

**THE HIGH COURT**

**[2010 No. 5845 P.]**

**BETWEEN**

**KATHERINE BOYLE**

**PLAINTIFF**

**AND**

**GOVERNOR OF ST. PATRICK'S INSTITUTION, IRISH PRISON SERVICE, MINISTER FOR JUSTICE AND LAW REFORM, IRELAND AND ATTORNEY GENERAL**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Barr delivered on the 31st day of July, 2015**

**Introduction**

1. The plaintiff is a secondary school teacher, employed by County Dublin Vocational Education Committee. In 2008, she was seconded to work as a teacher in St. Patrick's Institution, which is an institution for young offenders between the ages of 16 to 21 years.
2. During the summer of 2008, a new security screening area was introduced in St. Patrick's Institution, which comprised an x-ray machine for bags and other personal items and a walkthrough metal detector, similar to that seen commonly in airports throughout the world.
3. On 3rd September, 2008, an incident occurred at the security screening unit at the entrance to the prison, when the plaintiff had in her possession a mobile phone, which had been placed in her bra. This was a part of the prison complex where mobile phones were forbidden. The plaintiff's security clearance was suspended while an investigation was carried out into the incident.
4. On 9th September, 2008, an article appeared in the Irish Daily Star newspaper, which did not identify the plaintiff, but stated that a prison worker had been found in possession of a mobile phone. The article stated that she had produced the phone from her bra in the course of the security screening process. The plaintiff alleges that this article was deliberately leaked to the newspaper, so as to paint the Irish Prison Service and the new security system in a good light. The plaintiff claims that her constitutional right to privacy was thus infringed by some or all of the defendants. She alleges that as a result of this infringement, she was caused to suffer personal injury in the form of stress and anxiety, together with financial loss and damage.
5. A number of the defence witnesses had retired from their positions within the Irish Prison Service when the matter came to trial. In this judgment they will be referred to by the rank that they held at the time of the matters the subject matter of these proceedings.

**Background**

6. In 2007, there was considerable public disquiet about the fact that prisoners in Irish jails had access to mobile phones. It was known that some prisoners were directing criminal activities from their cells by using mobile phones to contact their associates, who were outside the prison. Matters came to a head when a prisoner in Portlaoise Prison phoned the Joe Duffy Show on RTÉ Radio from his prison cell.
7. The government of the day decided to clamp down on the availability of mobile phones within prisons. To this end, financial resources were made available to tackle the issue of security in the prisons. This was done in two ways. First, a separate unit known as the Operational Support Group (hereinafter "OSG") was established in April 2008 to take sole responsibility for security arrangements at the entrances to Irish prisons. They would also, when requested, carry out searches within the prisons. This was a separate entity from the prison staff in the individual institutions. The OSG staff had their own command structure. Officers on the ground were answerable to a Chief Officer, who was a member of the OSG and ultimately to the Governor of the OSG.
8. The second major change was that new security screening equipment was installed at the entrance to each prison. This comprised an x-ray machine for the examination of bags, clothing, and personal items such as watches and keys, and a walkthrough metal detector, similar to that used in airports. Depending on the facilities at the particular jail, the installation of this equipment necessitated on occasion construction works being carried out to build or adapt buildings to house the equipment. The OSG also comprised a canine unit, which used dogs to search for drugs being brought into the jail. The new security screening system was rolled out throughout 2008.
9. A key point of the new system was that from 2008 onwards every person entering a jail, whether they were prison staff, visitors, nurses, doctors or teachers would have to go through the new security screening process.
10. On 25th June, 2008, the Governor of the OSG, Governor John O'Sullivan, had a meeting with the head teachers from the various institutions. He explained the nature of the new security system. The head teachers were concerned that some of their staff would react badly to the new system, as they had been able to bring their mobile phones into the prison prior to that time. Governor O'Sullivan agreed to meet the teachers to explain the new system.
11. On 27th June, 2008, Governor O'Sullivan addressed a meeting of all the teachers working in the Dublin area. There were approximately 100/150 teachers present at the meeting. Governor O'Sullivan stated that he made it abundantly clear that when they returned after the summer break, a new security system would be in place. From that time onwards, all persons entering the prisons would have to surrender their mobile phones at the main gate. He stated that it would be a criminal offence to bring a mobile phone into the security screening part of the prison.

12. The plaintiff attended the meeting held on 27th June, 2008. There is considerable controversy as to what she said at the meeting. In her evidence, the plaintiff stated that she had stood up and asked a question about being contactable in case of medical emergencies. She mentioned that her mother and father were ill and that she needed to be contactable. Governor O'Sullivan said that a landline number would be made available. The plaintiff denied that in asking the question, she was questioning the new system. She denied that she said at the meeting, or to any teacher subsequently, that she would be bringing her phone into the prison.
13. A curious thing happened in the course of the hearing: a Ms Sonya Krzyzanowski, a teacher in Wheatfield Prison, had read an article in a newspaper about the opening days of the plaintiff's case. She recalled the meeting in June 2008. She recalled what the plaintiff had said at the meeting. She telephoned the Irish Prison Service and told them what she remembered of the meeting. She agreed to come to court to give evidence on behalf of the defendants.
14. In her evidence, Ms Krzyzanowski stated that she had been friendly with the plaintiff when she worked in Wheatfield Prison. She and the plaintiff had attended a celebration of one hundred years of flying in Westin Aerodrome. She had also gone to a comedy club with the plaintiff.
15. She recalled the meeting about the new security system, although she was not sure of the year in which it was held. She said that the plaintiff was very upset about the new rules being introduced. The plaintiff was stating that there was a problem receiving calls in the prison. She said that the plaintiff spoke a number of times at the meeting. Ms Krzyzanowski stated that the plaintiff had said that the new system was not fair as her mother was sick. She said that the plaintiff then said, *"I am going to bring it in anyway"*, referring to her mobile phone. Ms Krzyzanowski said that people at the meeting were shocked when the plaintiff made this remark in front of the Governor and head teachers.
16. Brenda Fitzpatrick has been the head teacher in Wheatfield Prison since 2007. She knew the plaintiff when she worked in Wheatfield Prison in 2002. She recalled the meeting that was held on 27th June, 2008. Governor O'Sullivan gave a presentation on the new security system. She recalled that people had questions as to how this would affect them. She recalled that the plaintiff was quite vocal in her opposition to the new system, in particular, not having access to her mobile phone. The plaintiff thought that this was unfair. Governor O'Sullivan said that having a mobile phone in prison would be a criminal offence. Ms Fitzpatrick had a clear recollection of the plaintiff saying *"I am going to bring it in anyway"*. Ms Fitzpatrick said that the other people at the meeting were very shocked and surprised by this statement. They looked at each other. She was not sure whether Governor O'Sullivan heard that comment.
17. In cross examination, the witness stated that she had read an article in the Irish Times online edition in relation to the opening of the plaintiff's case. She said that she received a call from Ms Krzyzanowski and they discussed the article about the plaintiff's case. They discussed their recollection of the meeting and decided to contact the Irish Prison Service *"on moral grounds."* Her understanding of the incident had been that the plaintiff came into the prison and the security screening had detected the mobile phone on her. In September 2008, the story went around the prisons like wildfire.
18. Evidence was also given in relation to the meeting by Ms Karen Cotter, who was an art teacher in Wheatfield Prison. She had worked with the plaintiff in that institution. She recalled the meeting in June 2008. They were told of the new security system. She recalled the plaintiff saying that she had brought a phone into the prison, that she had a mother who was unwell and that she would bring the phone into the prison. She was shocked and embarrassed that someone would stand up and say this at the meeting.
19. She stated that Ms Krzyzanowski had rung her and asked whether she recalled the end of year meeting. She told Ms Krzyzanowski what she remembered. Ms Krzyzanowski asked her if she would give evidence; she agreed to do so.
20. Ms Cotter stated that the plaintiff was two rows ahead of her in the meeting. The plaintiff's remarks were directed to the Governor. He had said that it was a criminal offence to bring a phone into the prison. The plaintiff said that she was going to bring her phone in anyhow. She was not sure whether the Governor had heard what she said. She did not believe that the comment was made in the heat of the moment.
21. Ms Julia Cadigan, worked as an art and pottery teacher in Wheatfield Prison. She did not know the plaintiff. She recalled the meeting in June 2008. She remembered the plaintiff standing up and saying *"I will be bringing my phone into the prison"*. The Governor said that it was a criminal offence. The plaintiff said *"Well I have a sick mother, I will be bringing my phone in"*. She thought that the plaintiff's statement was remarkable as she was defying what the Governor had said.
22. Ms Cadigan did not know the plaintiff; Karen Cotter had told her that the plaintiff had worked in Wheatfield Prison. She stated that they thought that this was insane behaviour on the part of the plaintiff. After the summer break, people talked about the girl who brought the phone into Mountjoy in her bra. She knew from gossip that a teacher was involved. She thought that this reflected badly on their profession. She said that she heard about the incident in one of the staff rooms, either in Wheatfield Prison or Cloverhill Prison. Someone said that the girl who spoke at the meeting had smuggled a phone in. She could have heard it from one of her students. She had a clear recollection of the plaintiff saying *"I am going to bring the phone in"*. She thought that this comment was quite disrespectful of the Governor. People threw their eyes up to heaven at this remark. She thought it was crazy behaviour. She stated that Ms Krzyzanowski had rung her as well. She was friendly with her. She had rung her a couple of weeks ago and asked the witness if she remembered the meeting in 2008. The witness said that she did remember the meeting. Ms Krzyzanowski said it was the meeting about the security, to which the witness said: *"Oh yeah, where the person got up and said about the phone."* Ms Krzyzanowski said *"That's it"*.
23. Governor O'Sullivan recalled that the plaintiff was quite aggressive at the meeting. She stood up three or four times and said that she needed her phone as her parents were ill and she needed to be contactable. She said that she had used the phone up to now and saw no reason why that could not continue. He said that he was taken aback by the plaintiff's aggressiveness. This was not like her. He had met the plaintiff before and she had always been very respectful. He thought that they had a good relationship before the meeting.
24. Governor O'Sullivan recalled that towards the end of the meeting, there had been a question from the back about what offence would be committed by bringing a prohibited article into the prison. Governor O'Sullivan said that he did not have a chance to answer this question, as the plaintiff got up and interjected; at that point, others objected to her asking more questions. She was interrupting other people speaking. Governor O'Sullivan stated that at the end of the meeting, she approached him and asked again about the use of mobile phones. She was dissatisfied with the new regime. She was accepting of the new regime up to a point, but made it clear that she was not happy with it. Governor O'Sullivan did not give any evidence that the plaintiff had stated that she intended to bring her phone into the prison.

25. Mr Duffy, the head teacher in St. Patrick's Institution, had also attended the meeting. He recalled that the plaintiff asked a question at the meeting, but he could not recall what she asked. He did not hear her say that she intended to bring her phone with her into the prison. He never heard her say that at any time.

26. I am satisfied that the plaintiff felt aggrieved that she would no longer be allowed to bring her mobile phone into the prison. This was of particular concern to her as her parents were not in good health; she wished to be contactable in case there was a medical emergency. I accept that the plaintiff became quite assertive during the meeting. I am satisfied that on the evidence of Ms Krzyzanowski, Ms Fitzpatrick, Ms Cotter and Ms Cadigan, the plaintiff said that she intended to bring the phone with her into the prison. However, I am satisfied that this comment was something said in the heat of the moment, rather than a firm statement of her intention concerning the bringing of her phone into the prison.

### **The Incident on 3rd September, 2008**

27. The plaintiff stated in evidence that she had been asked by a friend to show a lock-up garage premises in Phibsboro to a prospective tenant on 3rd September, 2008. She had her phone with her to give directions to the garage. She said that she had a bunch of keys in one hand and put her phone under the strap of her bra, so that she could shake hands with the prospective tenant.

28. Having shown the property, the plaintiff proceeded to the prison. In the car park, she saw the head teacher, Mr Tom Duffy. She wanted to speak to him about a forthcoming vacancy for the post of Deputy Principal in the Midlands Prison. She caught up with Mr Duffy and they proceeded into the prison together. They went in the front door, which is just to the right of the main doors to St. Patrick's Institution. When they pressed a bell to the right of the small door, they were buzzed in by the main gate officer. This brought the plaintiff and Mr Duffy into a small lobby. The gate officer was sitting at a hatch. Mr Duffy handed in his mobile phone. The plaintiff recalled asking the gate officer whether anyone had been down to get milk for the staff room. She said that they had a bit of banter at that point.

29. It is worth noting that there were a number of signs prohibiting the carrying of mobile phones into the prison. There had been a sign out at the main entrance to the prison which read "*Notice: the use of the following is PROHIBITED, mobile phones, recording equipment, photographic equipment*".

30. There were also signs within the lobby. There was a sign at the gate officer's hatch which showed a drawing of a mobile phone with a line through it with the words "*No mobile phones allowed*". There was a similar sign on the revolving door leading from the lobby to the security screening area.

31. The plaintiff and Mr Duffy proceeded through the revolving door into the security screening area. Mr Duffy went first. He placed some items into the tray for the x-ray machine. He then proceeded through the walkthrough metal detector.

32. The plaintiff then placed her bag into a tray. She walked through the metal detector and it beeped. The plaintiff went back and removed her jacket and placed it in the tray to go through the x-ray machine. She went through the metal detector a second time. It beeped again. The plaintiff went back and checked to see if she had anything in the front and back pockets of her trousers. She removed her watch and placed it in the tray.

33. She then proceeded through the metal detector for a third time. Again the machine beeped. The plaintiff returned and again checked her rear pockets. She then patted herself in the chest area. She discovered her phone. She put her hand into her bra area, and removed the phone. The plaintiff attempted to go back to the lobby through the revolving door. On being told that it was a one-way system, she gave the phone to Officer Mahony. Officer Mahony obtained keys from Officer Linda Nolan, who was standing in front of the walkthrough metal detector. Officer Mahony went back to the lobby area, handed in the plaintiff's phone and returned with a tag, which he gave to the plaintiff. The plaintiff then proceeded into the prison with Mr Duffy.

34. The plaintiff stated that at all times Officer Linda Nolan was leaning against the rear wall, which was in front of the metal detector. The plaintiff stated that she had no interaction with Officer Nolan; she just smiled at her.

35. Officer Nolan's account was quite different. She stated that at all times she was standing 3ft to 4ft in front of the walkthrough metal detector. When the machine beeped for the first time, she asked the plaintiff to go back and remove her jacket. Officer Nolan stated that there were three sections in the metal detector: head, middle and lower. The lights on the midsection had been triggered.

36. The plaintiff then went through for a second time. The detector again beeped indicating something in the midsection of her body. Officer Nolan stated that she asked the plaintiff to check herself in and around the chest area. The plaintiff went back and checked her front and rear pockets in her trousers. She held up her arm and said maybe it was her watch. The plaintiff then proceeded through the metal detector for a third time. When the machine beeped again, the plaintiff then went back and said "*It could be my bra strap*".

37. At this point Officer Nolan stated that she said that she was going to get the handheld metal detector, known as a "*wand*". She also stated that she told the plaintiff that, if necessary, she would do a pat down search. Officer Nolan stated that she moved to her left towards the area where the handheld metal detector was located. She stated that the plaintiff went back through the metal detector and checked herself in the chest area. She placed her hand into her bra area and produced a mobile phone. She stated that the plaintiff's hand movement seemed to be down into the cup section of her bra.

38. Officer Nolan stated that the plaintiff moved backwards as if to go back through the revolving door. Officer Mahony, who had been standing at the x-ray machine, had a brief conversation with the plaintiff. The plaintiff turned back and said "*I forgot it*". She then handed the phone to Officer Mahony. He obtained keys from Officer Nolan and went to give the phone to the gate officer. He returned and gave the plaintiff a tag for the phone. The plaintiff then proceeded into the prison.

39. Officer Nolan disputed the plaintiff's account in two key areas. First, she stated that she had had full interaction with the plaintiff. She had given directions to the plaintiff when she was going through the metal detector. Secondly, she stated that it was only when she indicated that she would have to get the handheld wand and do a pat down search, that the plaintiff produced the mobile phone from her bra. The plaintiff disputed that anything of that nature was said to her by Officer Nolan. The plaintiff had stated that Officer Nolan was at all times leaning against the back wall and that she had no interaction with the plaintiff.

40. Mr Tom Duffy stated that when he went through the metal detector, he waited to the left and the plaintiff followed after him. The machine beeped on the first occasion. The plaintiff returned through the machine and put some items into the tray. On the second occasion, she went back and put more items into the tray. On the third occasion that the machine beeped, the plaintiff went

back and handed in her phone.

41. Mr Duffy stated that Officer Nolan was standing in front of the metal detecting machine. He did not have a recollection of her interacting with the plaintiff. He did not recall Officer Nolan saying that she was going to get the handheld wand and was going to do a pat down search. He accepted that the handheld wand was located to Officer Nolan's left, in the area of two palm reading machines which were affixed to the wall.

42. Officer David Mahony stated that there was dialogue between the plaintiff and Officer Nolan, who was standing 3ft to 4ft from the metal detector. He stated that after the first activation of the metal detector, the plaintiff returned, took off her coat and placed it in the basket. After the second activation of the alarm, the plaintiff returned and put more objects into the tray. After the third activation, she returned and then produced her mobile phone. He did not see from where the phone came, as his line of vision was obstructed by the screen on top of the x-ray machine. He had a distinct memory of Officer Nolan saying "*Please walk towards me*" and also saying "*I am going to have to get the wand*". He stated that he did not have any conversation with the plaintiff until after she had produced the phone; all her conversation was with Officer Nolan.

43. It was put to Officer Nolan and Officer Mahony in cross examination that they had failed to adhere to the standard operating procedures which had been issued by Governor O'Sullivan. In particular, it was put to them that that they had not followed paras. 4 and 9 of the procedures that were to apply for the security screening of persons entering the prison. They are in the following terms:-

*"4. They are then required to walk through the metal detector. Should the metal detector activate 'bleep' the person will be asked to check his person and walk through again if necessary. In the event of a second activation, the person will be screened with a handheld wand and if necessary a pat down search will be conducted. In the event that a further search is required the person will then be asked to leave the screening area and proceed to the designated search room, where the searching procedures will be fully explained to them. All such searches will be carried out with due regard to decency, privacy and the dignity of the person being searched. The OSG Chief Officer/ACO must be present at all times in such cases (searching procedures will be clearly displayed and the gender balance will be maintained at all times).*

*9. Should a person being searched be found in possession of any prohibited article, they will be asked for an explanation and will not be allowed enter the prison under any circumstances until such time as the Governor is satisfied."*

44. Officer Nolan stated that on the day in question her superior officer, Chief Officer Buckley, was away on leave. Thus, there was nobody in the prison in her chain of command to whom she could report the matter. She stated that as the seizure had involved a teacher at the prison, this was a matter of acute embarrassment all round. She did not want to detain the plaintiff, as this would have been very embarrassing for her. In the circumstances, she had exercised her discretion to allow the plaintiff to proceed into the prison.

45. Officer Mahony said that on the day, Officer Nolan and he made a judgment call to let the plaintiff proceed into the prison. This may not have been approved of by higher officers in the OSG. Governor O'Sullivan gave evidence that when he learnt of the circumstances of the find, he was furious that his officers had not adhered to the standard operating procedures, which had been put in place. He was of the view that the phone should have been seized and placed in an evidence bag. The plaintiff should have been detained to await the arrival of the gardai. He was also critical of Officer Buckley for not arranging for another officer to be available in his place while he was away on leave.

46. The court was assisted in its deliberations by having access to a CCTV recording of the incident and a booklet of still photographs taken from the CCTV recording. I accept the evidence of Officer Nolan, Officer Mahony and Mr Duffy to the effect that Officer Nolan was standing in front of the walkthrough metal detector. Her head is clearly visible in the vicinity of the metal detector.

47. I accept the evidence of Officers Nolan and Mahony that there was interaction between Officer Nolan and the plaintiff while she was going through the metal detector. In relation to the allegation made by Officer Nolan that it was after she said that she would have to get the handheld wand that the plaintiff produced the phone from her bra, I prefer the evidence of Officers Nolan and Mahony in this regard. I accept their evidence that such a statement was made by Officer Nolan. Furthermore, the making of such a statement is supported by the CCTV recording, which clearly shows Officer Nolan moving to her left, which was in the direction of where the handheld wand was kept.

48. There was also some dispute as to whether the plaintiff removed the mobile phone from beneath her bra strap, or from the cup of her bra. The defendant submitted that the CCTV recording clearly showed the plaintiff putting her hand down into the cup of her bra. Having viewed the CCTV recording and having looked at the still photographs, it does appear that the plaintiff retrieved her phone from the cup of her bra. However, I do not think anything greatly turns on the fact that the phone was retrieved from the cup of her bra, rather than beneath her bra strap.

49. Officer Mahoney recorded the incident in the Day Book under the heading "*Security Screening Results.*" This was a very brief note of the incident, which simply stated that on 3rd September, 2008, Kathy Boyle, a teacher, had had an incident. In the column headed "*Security Check Failure*", it stated "*Mobile handed over after going through metal detector. Explained R & R (meaning Rules and Regulations)*". The entry was signed by Officer Mahony.

### **The Events on 4th September, 2008**

50. On the morning of 4th September, 2008, Officer Mahony reported the matter to Chief Officer Buckley. This was a verbal report. Chief Officer Buckley was not happy about the incident. They had had success in getting a phone, but had failed to adhere to proper procedures in allowing the plaintiff into the prison. Chief Officer Buckley sent for Officer Nolan, who gave her account of the incident. She was asked to provide a brief statement on a sheet of paper known as a "*half sheet*". He asked Officer Nolan if the plaintiff had given any excuse; Officer Nolan replied that she had simply stated that she forgot the phone.

51. Chief Officer Buckley issued orders, known as Chief's Orders, informing OSG staff that if no chief officer was available to them from the OSG, they could report the matter to a chief officer in Mountjoy jail. Chief Officer Buckley then informed his superiors, Assistant Governor Flynn of the OSG and the Governor of St. Patrick's Institution, Governor Quigley.

52. When Governor Quigley had finished his rounds, he, Assistant Governor Flynn and Chief Officer Buckley reviewed the CCTV recording. Later in the morning, a meeting was held between Governor Quigley, Chief Officer Buckley and the head teacher, Mr Duffy.

It was decided at the meeting that the plaintiff would be given a "slap on the wrist" and that that would be the end of the matter.

53. On 4th September, 2008, Officer Nolan forwarded the following statement known as a half sheet:-

*"On 3rd Sept at approximately 9.30am teacher Kathy Boyle presented to the security area for screening. On activating the metal detector three times in the mid body section and on being asked had she anything likely to activate the alarm and on indicating three times that she didn't – she then produced a mobile phone from her undergarment (bra). The phone was taken from her and left at the main gate.*

*Linda Nolan (Officer)"*

54. Governor Quigley had a conversation with Governor O'Sullivan later in the morning. He sent an email at 14:51hrs setting out the action that he proposed to take in the matter at a meeting with the plaintiff, which was scheduled for later in the afternoon:-

*"John,*

*As discussed with you earlier I have arranged to speak with this lady in the next few minutes. I explained this lady's situation. As this is a new procedure introduced and only in its infancy, we have to be prepared to allow a level of tolerance. It has highlighted a number of areas we need to address and she did upon realising where it was located hand it over to OSU staff. I think a valuable lesson has been learnt from both sides and that we now can move forward. I would not be in favour of any further penalties being imposed."*

55. A somewhat different approach was advocated by Governor O'Sullivan in an email which he had sent at 14:30hrs, but was not seen by Governor Quigley until after he had sent his email at 14:51hrs. The email from Governor O'Sullivan attached a letter from him which was in the following terms:-

*"Dear Governor,*

*I refer to the above incident and to our telephone conversation of this date in relation to same. I am now in receipt of a report from the officer on duty in the search area on the date in question.*

*The officer has reported that when Ms Boyle was passing through the walkthrough metal detector on 3/8/08 [sic] it activated. She then walked through the detector on two more occasions and each time there was a further activation.*

*When asked if she had anything on her person that could activate the detector, she replied that she did not. However, she then produced a mobile phone from her underwear (bra); the phone was confiscated.*

*It is difficult to understand the reasoning behind this woman's actions. Mobile phones are not allowed into the prisons under any circumstances and signage is clearly displayed at the entry point.*

*This matter must be investigated and until such time as the investigation is concluded Ms Boyle should not be allowed into St. Patrick's Institution.*

*All reports relating to this incident will be forwarded for your attention and investigation.*

*Yours sincerely*

*John O'Sullivan (Governor)"*

56. Also attached to the email were the half sheet submitted by Officer Nolan and a brief report from Chief Officer Buckley.

57. The meeting with the plaintiff took place at approximately 15:00hrs. It was attended by Governor Quigley, the plaintiff, Mr Duffy and Chief Officer Buckley. Mr Duffy stated in evidence that he was somewhat taken aback by the tone of the meeting. Governor Quigley instead of just issuing a stern reprimand, stated that the matter was serious and would have to be fully investigated. He directed that the plaintiff would have to be put on leave during the carrying out of the investigation. He directed Mr Duffy to accompany the plaintiff to the car park.

58. Governor Quigley stated that in advance of the meeting he had viewed the CCTV recording approximately six to ten times. He had communicated with Governor O'Sullivan, who was of the view that her security clearance should be revoked. Governor Quigley said that he went into the meeting not sure if he would revoke her security clearance. He asked the plaintiff for an explanation. She said that a friend had asked her to show an apartment, which was available for rent. She needed to be contactable. Governor Quigley stated that he was concerned by this remark. He said that he wanted to adopt a restorative approach to the matter. There needed to be remorse and an admission of guilt from the plaintiff. She had apologised for the breach of security, but did not admit any guilt on her part.

59. Governor Quigley said that he made his decision to suspend her security clearance on a number of grounds. First, she had been given a number of opportunities to hand in her phone, both in the lobby area and in the screening area. He felt that it would be uncomfortable for her to have a phone in the bra area, so she would have known that it was there. She had been through the metal detector three times and it was only when Officer Nolan moved to her left to where the hand wand was located, that the plaintiff produced the phone. Secondly, Governor Quigley had spoken to Mr Stephen O'Connor of County Dublin Vocational Education Committee, who had assured him that the plaintiff would still have her job as a teacher, even if her security clearance was revoked. Thirdly, there had been no admission of guilt forthcoming from the plaintiff. In these circumstances, he decided to suspend her security clearance.

60. Governor Quigley appointed Deputy Governor Declan Murphy to investigate the circumstances surrounding this incident. Later on 4th September, 2008, at 18:20hrs, Governor Quigley received an email from Ms Yvonne Walsh of the Operations Directorate in the following terms:-

*"I understand that a teacher has been intercepted carrying a mobile phone into St. Patrick's Institution. I would be grateful if you could provide me with a written report in relation to same."*

61. At 08:08hrs on the following morning, Governor Quigley sent an email to Governor O'Sullivan referring to the request by the Operations Directorate for a report and asking who would have informed them of the incident.

62. Governor O'Sullivan responded at 08:39hrs as follows:-

*"Sean,*

*In response to your email of this morning I am to clarify the situation as follows:-*

*(i) After you had spoken with the person in question I then advised the Deputy Director of Operations of the situation, explaining to him that the matter was in hand and that a report would follow.*

*(ii) In accordance with procedures, all such incidents must be fully investigated and a full report submitted outlining the circumstances and action taken.*

*(iii) Am I to understand that there were other incidents of this nature in St. Patrick's, which I am unaware of?"*

### **The Investigation and the Newspaper Article**

63. Deputy Governor Murphy had an interview with Officer Nolan on 8th September, 2008. The interview is significant and was in the following terms:-

*"Interview with Officer Linda Nolan at St. Patrick's Institution*

*Regarding the teacher with a mobile phone at the search area on Wednesday, 3rd September.*

*DM: What time was did (sic) this incident occur?*

*LN: At 09:30 approx*

*DM: What exactly happened?*

*LN: The teacher, Kathy, came into the search area and as she walked through the metal detector it alarmed giving a reading at chest level. I asked the teacher if she had anything, she replied no, I asked her to remove her coat, she did and came through the detector, it again alarmed and I asked her had she anything on her to set the machine off, she stated it must be my bra strap. She returned and removed her watch and walked through again, it alarmed again, I went to get the hand wand and then she produced the mobile phone from her bra and said she forgot it. The phone was taken and placed in the secure area, in the main gate, and she was admitted."*

64. On 9th September, 2008, the following article written by Mr Michael O'Toole appeared in the *Irish Daily Star*:-

*"'Phone in Bra' Jail Smuggler Busted*

*Prison worker is suspended.*

*A prison worker has been suspended after she was caught trying to smuggle an illegal mobile phone into a jail – hidden inside her bra.*

*Prison bosses seized the phone, began an immediate investigation and suspended the woman, who works in the Mountjoy complex.*

*That complex is home to Mountjoy itself, the Dochas Women's Jail, St. Patrick's Institution for Young Offenders and the Training Unit.*

*The woman was caught by new hi-tech x-ray equipment installed by the authorities in a bid to prevent contraband – such as mobile phones and drugs – being smuggled in.*

*A prison service spokesman last night told The Star:*

*'we can confirm that a member of staff was found to be carrying a mobile phone.*

*The matter is being investigated and the member of staff is suspended pending the outcome of the investigation.'*

*Sources say the worker triggered alarm bells on the x-ray machine on three separate occasions – but each time she resolutely denied having any contraband on her.*

*One insider said:-*

*'The machine kept indicating that she was carrying something on her. But each time she said she had nothing and was asked to go through the x-ray again.*

*The officers kept asking her every time she passed through the security system – but each time she said it must be her bra setting off the alarm.*

*When she was told a female officer would have to search her, she held her hands up and said there was a mobile hidden inside her bra.'*

*Sources said the latest discovery is a clear example of how well the new security system at the Mountjoy complex is working.*

*All visitors and workers must now go through the x-ray system before they are allowed into the jails.*

*But many officers are angry that they aren't allowed their own mobiles into the prisons with them – and say it means they are cut off from their families and loved ones for the duration of their 12-hours shift.*

*Mobile phones are becoming increasingly rare – and valuable – inside Irish jails because of the new security crackdown.*

*The Star revealed last month that inmates are now renting them for €20 a night from fellow prisoners.*

*The authorities ordered a crackdown on mobiles in the prison after gangster John Daly, who was later murdered after his release, rang RTE Radio's Live Line from his cell in Portlaoise Prison in May 2007."*

65. Mr Michael O'Toole gave evidence at the trial. The court ruled that he did not have to reveal the identity of the sources of his information. Mr O'Toole confirmed that he had had the information from his source or sources on 8th September 2009. He confirmed that the portion of the article that was put in inverted commas after the words "One insider said", represented verbatim information what had been furnished to him by his source.

66. In relation to the statement put out by the Press Office as quoted in the article, he said that such a statement merely confirmed that an investigation was ongoing and that findings would be made at the end of the investigation. It blocked off further questions on the matter and prevented the story gaining legs.

67. Before coming to the allegations made by the plaintiff in relation to this article, it is necessary to continue with the narrative concerning the investigation carried out by Deputy Governor Murphy. He asked the plaintiff to provide a statement in relation to the incident on 3rd September, 2008. She provided the following statement, which was signed by her at a meeting with Deputy Governor Murphy and Mr Duffy at the Halfway House public house on 11th September, 2008:-

*"Kathy Boyle*

*Report regarding Wednesday 3 September 2008*

*I went to work as a teacher in St. Patrick's on Wednesday morning, 3 September. Under normal circumstances I go directly from home to school. I usually have no reason to use my mobile phone and leave it at home or occasionally, in my car.*

*Wednesday 3 September was unusual in that I had a meeting in Phibsboro at 8:30am and I needed to be contactable to provide directions for the meeting. I use my mobile phone that morning to give directions and arrange my meeting. I can, if need be, verify this meeting and the calls made. I placed my mobile phone in my bra strap where I frequently carry my phone or money. The phone so I can hear it or the money so that it would not be stolen. I needed to ensure that I did not miss any calls in order to get my business completed quickly to be on time for work.*

*When I had completed my meeting I went to work arriving at 9:20am. As I walked from the car park to the first entrance gate, I met Mr Duffy who is my supervising teacher and my immediate boss, who was also on his way to work.*

*At this point the recording officer usually asks if you have a mobile phone. Because I don't normally carry a phone, I had not used the new phone lockers or the new tag system and this can be verified. Mr Duffy handed in his phone and got a tag. I greeted the officer and asked him if he had any milk. He said a colleague, Maria, had already got some from him. It is normal for the teachers to ask for milk for the staffroom. I then moved on to press the button and follow Mr Duffy through the revolving door.*

*I took off my raincoat and placed it and my school bag in a box for scanning. As I went through the security machine it beeped and I took off my watch and put it in the box. The machine beeped a second time. I went through my pockets. When the machine beeped again I started to pat myself down. At that point, I felt my mobile still inside my bra strap. I took it out and told the officer that I still had it as I turned to go back through the rotating door. The officer explained that it was a one way system and I handed the phone to the officer. He took it and gave me a tag and I went back through the machine. The machine no longer beeped and I was not searched. I then proceeded into the school.*

*I have been teaching in prisons since 1993 and I have always fully respected the security systems in place within the prison environment. My mobile phone is a personal phone, registered in my own name and address with my family and friends' numbers in it. This was a completely genuine oversight due to the unusual circumstances of Wednesday morning and the fact that I do not normally bring my phone to work.*

*Katherine Boyle."*

68. On 15th September, 2008, Deputy Governor Murphy issued the following report of his investigation:-

*"The Governor*

*Sir, I am to report that on completion of my investigation into the incident at the Search Area Main Gate on the morning of 3rd September, 2008, the following are the facts as discovered in the course of my investigation.*

- Teacher, Kathy Boyle, entered the search area at 09:23 on the morning in question, she approached the search staff and then as she passed the metal detector it sounded alarm.*
- Ms Boyle returned and removed her coat and returned through the metal detector it again alarmed. She again returned and removed her watch and patted her pockets checking for items.*
- On her third move through the metal detector it again sounded and she again checked her pockets and gave herself a*

pat down during which she found the mobile phone in her chest area.

- She immediately handed over the mobile phone and received a tag from the search staff for same.
- Ms Boyle complied with the search at all times and followed all directions given.
- Ms Boyle was allowed into the prison on completion of the search.
- This matter was not reported to the Governor of St. Patrick's Institution until 11:30 approx on 4th September.
- Ms Boyle had, at this stage, been admitted on three separate occasions to the institution and had conducted normal classes during this period.
- Ms Boyle cooperated at all times with the investigation.

Declan Murphy

Deputy Governor"

69. On that day, or on the following day, Governor Quigley issued the following memorandum and sent it to Governor O'Sullivan for his observations:-

"Mobile phone incident on 3/9/08

On 3rd September, 2008, at approximately 9:30am, a teacher Ms Kathy Boyle was involved in an incident in the search room, St. Patrick's Institution. The following is an account of what occurred and is supported by CCTV evidence:

- On the first occasion she passed through the detector, she activated the alarm suggesting there was some item on her person. She removed her jacket and it was passed through the x-ray machine for examination.
- The second occasion she passed through the detector, she again activated the alarm. She can be seen to search the lower half of her body and removed her watch.
- On the third occasion, she again activated the alarm on the detector machine. She again searched her lower half and then the upper half of her body where she detects a mobile phone held in her bra. She removed it and placed it with the officer who stored it in the gate office. She then successfully passed through the detector machine and went to the school to take up duty.
- Taking into consideration the entire incident and paying particular attention to natural justice and the onus of proof, I feel we have no choice but to allow her entry to the prison. Can we prove she was attempting to smuggle the phone. What will we do if it were an officer or other professional person. She has been teaching in the Prison Service since 1993 and has never been involved in any incidents of this nature.
- Whilst the phone was contained in a rather unusual location she cooperated with the search team and on each occasion examined herself when she activated the detector machine. It was she who handed over the phone it was not our staff who found it concealed on her person.
- After handing the phone over at 9:30am she was allowed entry into the prison. She was again allowed entry at 2:00pm on 3/9/08. She was also allowed entry at 9:30am and 2:30pm on 4/9/08.
- The system was effective insofar as she didn't bring a mobile phone into the prison.
- I cannot find any evidence which would support that she deliberately attempted to smuggle a mobile phone into the prison. She complied with the search at all times and followed all directions given.
- As this is a new system there is going to be a learning period. Mistakes can be made and people can forget that they have phones on their person. Ms Boyle is known as being someone who is inclined towards thoughtlessness.
- In the circumstances, I believe Ms Boyle should be allowed back on duty, but before a final decision is made I would appreciate your observations on this please.

Governor."

70. On 17th September, 2008, Governor O'Sullivan furnished his observations as follows:-

"Dear Governor

I am to acknowledge receipt of your email of 15th September, 2008, in relation to the above incident and to furnish my observations as follows:-

On 27th June, 2008, presentation was made to the teaching staff from all prisons in the auditorium at Mountjoy Prison outlining the security screening procedures to be introduced. Further to that a separate presentation was made in the Dochas Centre to all of the head teachers on 25th June, 2008. On both occasions, it was made abundantly clear that mobiles were not allowed beyond the point of entry to any prison. Signs to this effect are clearly displayed at the entry point to every prison and institution, including St. Patrick's.

The teaching staff at St. Patrick's returned from the summer break on Wednesday, 27th August, 2008. Records show that Ms Boyle entered the prison through the security screening area on Thursday, 26th August from 2pm to 12:15pm [sic], on 27th and 29th August, and on 1st and 2nd September. Therefore, she had been through the security screening procedures for five separate days before the date of the incident in question.



*Ms Boyle arrived at the security screening area at 9:30am on the morning of 3rd September, 2008. The video evidence is quite clear. This woman activated the metal detector on three separate occasions. Only when it was indicated to her that she would be subject to a scanning with a handheld wand did she produce the mobile phone from her undergarment. The fact is that Ms Boyle failed to declare her mobile phone, despite having been given every opportunity to do so. Therefore, she was clearly in breach of the security regulations and should not have been allowed enter the institution.*

*In accordance with procedure, the matter must be fully investigated by the Governor of the Prison. A report on the incident must be submitted to the Director of Prisons Operations outlining the circumstances and any other relevant information.*

*In reference to your query in relation to procedures that apply to prison officers or other professionals, I am to advise you as follows:*

- In line with protocol which is clearly outlined in the OSG standard operational procedures, any person (prison officers or other professionals) found in possession of contraband, which includes mobile phones, is prohibited from entering the prison and the gardaí should be notified immediately.*

*Taking into account the emphasis placed on the new security measures, along with the manner in which the mobile phone was concealed, this was a blatant security infringement and should be treated accordingly.*

*Yours sincerely*

*John O'Sullivan (Governor)"*

71. On 23rd September, 2008, Governor Quigley made his formal decision. He stated that the factors which led him to make the decision to remove the plaintiff's security clearance were: (i) his viewing of the CCTV; (ii) the information that Governor O'Sullivan had given him that he had made it clear to teachers that no mobile phones were to be brought into the prison; and (iii) the representation from Mr Stephen O'Connor that the plaintiff would not lose her job, but would be redeployed within the CDVEC.

72. Governor Quigley stated that he had seen the article on 10th September, 2008. He did not think that it portrayed the Irish Prison Service in a good light. There was no benefit to having one's dirty linen aired in public. He denied that it played any part in his decision-making.

73. Governor Quigley's formal decision was in the following terms:-

*"Re: Incident of mobile – Ms Kathy Boyle*

*Having completed the investigation and received reports from those involved. Taking into consideration Governor O'Sullivan's observations that:*

*'On 27th June, 2008, a presentation was made to the teaching staff from all prisons, in the auditorium at Mountjoy Prison outlining the security screening procedures to be introduced. Further to that a separate presentation was made in the Dochas Centre to all of the head teachers on 25th June, 2008. On both occasions, it was made abundantly clear that mobiles were not allowed beyond the point of entry to any prison. Signs to this effect are clearly displayed at the entry point to every prison and institution, including St. Patrick's.*

*The teaching staff at St. Patrick's returned from the summer break on Wednesday, 27th August, 2008. Records show that Ms Boyle entered the prison through the security screening area on Thursday, 26th August (from 2pm to 2:15pm), on 27th and 29th August, and on 1st and 2nd September. Therefore, she had been through the security screening procedures for five separate days before the date of the incident in question.*

*In line with protocol which is clearly outlined in the OSG standard operational procedures, any person (prison officers or other professionals) found in possession of contraband, which includes mobile phones, is prohibited from entering the prison and the gardaí should be notified immediately.'*

*In line with the protocol I am to recommend that Ms Kathy Boyle is to have her security access to St. Patrick's Institution withdrawn as and from this date. I have notified Mr Tom Duffy, Supervising Teacher of this decision and he will make the necessary arrangements to facilitate the return of personal items etc.*

*Sean Quigley*

*Governor"*

74. One can see that this formal decision mirrors to a large extent the observations which had been made by Governor O'Sullivan in his letter dated 17th September, 2008.

75. It is not necessary to look in any more detail at Governor Quigley's decision as the plaintiff's counsel stated on a number of occasions during the trial, that they were not seeking to quash Governor Quigley's decision. Nor is it necessary for the court to reach any determination as to whether this incident was just an unfortunate mistake on the part of the plaintiff, or was a deliberate attempt to smuggle her phone into the prison. The plaintiff's action is not about the decision that was reached in her case, but is in relation to the article which was published in the *Irish Daily Star*.

76. On 9th March, 2009, the plaintiff lodged an appeal through her trade union representative, Mr Glynn. That appeal was unsuccessful.

77. It is appropriate at this stage to look at the arguments made by the plaintiff in relation the article published on 9th September, 2008.

## **Matters Arising Out of Publication of the Article**

78. The plaintiff submitted that there had been a leak of confidential information concerning the plaintiff which had been done by servants or agents of the Irish Prison Service so as to portray that body in a favourable light.

79. The first question that arises is as to whether the information concerning what took place at the security screening area on 3rd September, 2008, was confidential information. The plaintiff relied on the decision in *Gray v. Minister for Justice, Equality and Law Reform* [2007] 2 IR 654. In that case, members of An Garda Síochána had disclosed to a journalist, information that a convicted sex offender, a relative of the plaintiffs, was residing with them in their home. The court had regard to the fact that this was confidential and sensitive information which was only available to members of An Garda Síochána. The court held that in disclosing such information, and in verifying the information when asked for confirmation by the journalist, the gardaí had breached the plaintiffs' constitutional right to privacy. As a result of the disclosure of this information, the plaintiffs had been exposed to acts of harassment and intimidation and had been forced to leave their home and relocate to another part of the country. They were awarded damages for the interference with their right to privacy.

80. The plaintiff also relied on the decision in *Hanahoe v. Hussey* [1998] 3 IR 69 where the gardaí were found to have leaked information to the media about the fact that a search warrant had issued to the gardaí to search the plaintiff's offices, such that there was what was described as a "media circus" outside the offices when the search warrant was being executed. The defendants were liable for the leaking of this information by the gardaí.

81. In response, the defendant submitted that the information contained in the article was not confidential information, the disclosure of which would entitle the plaintiff to sue for breach of privacy. They pointed out that this was not information which had come to the defendants in confidential circumstances. It was an event that had occurred in a part of the prison where there was a general right of access. They pointed out that the incident could have been witnessed by anyone coming behind the plaintiff who wanted access to the prison. This could have included visitors, contractors, prison staff or teachers. In this case, the events had been witnessed by another teacher, Mr Duffy. In addition, they submitted that the event was not private, since it had been recorded on CCTV, a fact which was known to the plaintiff. Here, there was no confidential information: there were only the observations by the defendants of the plaintiff's actions and it was submitted that this was not confidential information for legal purposes.

82. The defendant submitted that the information here was of a wholly different character to the sensitive and confidential information which was only available to the gardaí in the *Gray* case.

83. The defendants referred to the following extract from the judgment of Gilligan J. in *Sheedy v. Information Commissioner* [2004] 2 IR 533, at p. 547:-

*"I take the view that the correct test to apply to whether there is a breach of confidence is that as set out by Megarry J. in Coco v. A.N. Clark (Engineers) Ltd. [1969] R.P.C. 41 as follows at p. 47:-*

*'Three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an authorised use of that information to the detriment of the party communicating it.'*

*The respondent himself, in his decision, adopted a definition of confidence in the following terms:-*

*'A confidence is formed whenever one party (the confider) imparts to another (the confidant) private or secret matters on the express or implied understanding that the communication is for a restricted purpose.'"*

84. The decision of Gilligan J. in *Sheedy* was appealed to the Supreme Court. The Supreme Court allowed the appeal on grounds which are not relevant to the present proceedings.

85. The defendants also referred to the decision in *Theakston v. MGN Limited* [2002] EWHC 137, where the plaintiff was a television celebrity. He visited a brothel, and a prostitute subsequently tried to blackmail him. The *Sunday People* newspaper proposed to run a story on his activities. The plaintiff sought an injunction to prevent publication of the article. The court held that what went on in the brothel was not confidential. The fact that one of the parties may have wished for the activity to remain confidential, was not sufficient to give the matter the degree of confidentiality which would be protected by the courts.

86. The defendants also referred to the decision in *A. v. B.* [2005] EWHC 1651, where the court looked at the public interest in disclosing certain matters. In particular, they refer to para. 32 of the judgment of Eady J.:-

*"Another important consideration (which is also relevant to the present case, but not determinative) is that for public policy reasons there would be powerful arguments against concealing, with the assistance of the court, information about one's criminal activities. This could not be an inflexible rule, as there might be circumstances in which the court would think it right for spent convictions or past acquittals not to be revealed to the general public. One example might be where the defendant was blackmailing the claimant. Nevertheless, it would be hard to justify the concealment of information about (say) domestic violence or tax evasion simply because it has taken place behind closed doors. It could hardly be categorised as information in respect of which there would be a reasonable expectation of confidentiality. Nor would the law generally imply a duty of confidence. As it used to be said, 'there is no confidence in iniquity': see e.g. *Gartside v Outram* (1857) 26 L.J. Ch. 113."*

87. The defendant submitted that having regard to the location and nature of the incident, the plaintiff did not have a legally enforceable right to have what transpired in the security screening area treated as confidential.

88. I am satisfied that the defendant's arguments in this regard are well made. The plaintiff had entered a part of the prison, where other persons also had a right of access. The incident could have been witnessed by any third party who happened to be entering the prison at the same time as the plaintiff. Indeed, on this occasion, the incident was witnessed by another teacher, Mr Duffy. In addition, the plaintiff knew that the security screening area was covered by CCTV. The plaintiff may well have been acutely embarrassed by the incident and on that account may have wished that it would be kept confidential. However, such a desire on the part of one party does not suffice to make the occasion confidential in the legal sense. The fact that the OSG officers were bound by a duty of confidentiality under the terms of their contract of employment only meant that they were not permitted to reveal to third parties what went on in the security screening area. It did not mean that the Irish Prison Service could not publicise the incident, if it had wished to do so. They could have publicised the incident, subject to being liable in defamation if what they said was not true and accurate.

89. I am of the view that the event in this case did not have the characteristics of confidentiality as set down by Gilligan J. in *Sheedy v. Information Commissioner* (supra). There was no information which had the quality of confidence about it. No information was imparted in circumstances imputing an obligation of confidence. Accordingly, I hold that the plaintiff has not established that the information concerning the incident was confidential information, the disclosure which gives her a right to claim damages for breach of privacy.

90. In case I am wrong in holding that the information did not constitute confidential information, I will go on to deal with the plaintiff's other submissions. The plaintiff submitted that the article was deliberately leaked by the Irish Prison Service so as to paint that body in a favourable light. In particular, the plaintiff laid great stress on the portion of the article which stated:-

*"Sources said the latest discovery is a clear example of how well the new security system at the Mountjoy complex is working."*

91. The plaintiff noted that the article was written at a time when the Irish Prison Service was anxious to obtain good publicity for the new security system. For this reason, journalists were invited to a walkthrough demonstration of the new system in December 2008.

92. The plaintiff further submitted that the Irish Prison Service deliberately gave official confirmation of the story in the statement that was released by the Press Office. The plaintiff submitted that when one asks the question, who benefits from the article, the only answer is that the Irish Prison Service benefited from its publication.

93. Evidence was given on behalf of the defendants by Mr Brian Purcell, who was the Director General of the Irish Prison Service at the relevant time. He stated that where a member of the prison staff was found in possession of a phone, this was not a good news story for the Irish Prison Service. It was a source of acute embarrassment for them. He pointed out that in 2007 there had been 2,117 seizures of phones. A similar number had been seized in 2008. This meant that about 4,000 phones were seized in the two year period in 2007 – 2008. The Irish Prison Service had not tried to publicise these finds, which it could have done if it wanted publicity for the security system. He stated that the Irish Prison Service would not seek publicity at the expense of a member of staff in the prison. There was nothing in it for the Irish Prison Service to see a member of staff being portrayed in such a negative way.

94. In relation to the statement from the Press Office, Mr Purcell stated that when a query had been raised by a journalist, such as Mr O'Toole in this case, the option was either to issue a "no comment", or a bland statement to the effect that the matter was under investigation. If they stated "no comment", this could cause the journalist, or other journalists, to pursue the story further. They would think that because the prison authorities refused to comment, there must be more to the matter. Whereas, if they issued a bland statement and stated that the matter was under investigation, this had the effect of preventing the story growing legs.

95. In this case, the Press Officer, Mr Sullivan, had been authorised to give Mr O'Toole the following comment:-

*"We can confirm that a member of staff was found to be carrying a mobile phone. The matter is being investigated and the member of staff is suspended pending the outcome of the investigation."*

96. Mr Purcell stated that this statement had the desired effect, as the story was not pursued in subsequent editions of the newspaper, or by other journalists. Mr O'Toole, the journalist, had also stated that this was the effect of the statement which had been put out by the Press Office.

97. Evidence was also given by Mr William Connelly, who was the Director of Operations in 2008. He heard of the incident from the Deputy Director of Operations on 4th September, 2008. He was told that there had been an incident in St. Patrick's Institution where a teacher had been found in possession of a mobile phone and that the matter was being investigated. He had viewed the CCTV recording. His view was that this was not a normal mistake on the part of the teacher. She had a bag, a jacket and trousers with front and back pockets. She had plenty of areas in which to keep her phone, rather than put it in her bra. She had had the opportunity to surrender the phone when the machine beeped on the first and second times. He accepted that people do make mistakes and volunteer their phones. However, in this case, the plaintiff only produced the phone after the third activation of the walkthrough metal detector.

98. Mr Connelly stated that Mr Sean Sullivan, the Press Officer, came to him stating that there had been a query from a journalist in relation to the incident. Mr Connelly gave him the limited information that could be put out. The statement did not identify the plaintiff; nor did it state that she was a teacher, or that she worked in St. Patrick's Institution. He gave a broad outline of what had happened. Mr Sullivan would then develop that into an official response to be given to the journalist. Mr Sullivan would get the permission of the Director General before issuing the statement.

99. Mr Connelly did not think that the article portrayed the Irish Prison Service in a positive light. On previous occasions, when they had found phones in the prison, they did not publicise these finds. Mr Connelly stated that on the previous day, there had been a major search operation in the jail, which had produced a large number of prohibited items. They had not sought to publicise that search, which they could have done if they wanted to portray the Irish Prison Service in a positive light. Mr Connelly stated that teachers were part of the staff in the prison. The Irish Prison Service would not do them down by releasing information about them. He was of the opinion that the article was not good for the Irish Prison Service. He could not say who gave the information to the journalist. It could have been an outsider who heard of the incident. All prison officers signed the Officials Secrets Act 1963, which prohibits them talking about prison matters outside the jail. The teaching staff are not required to sign that Act.

100. Governor Quigley stated in his evidence that the article was not a good story from the point of view of the Irish Prison Service. It was never good to air one's dirty linen in public. He did not believe that Officer Nolan or Officer Mahony would have leaked the story, as they were part of the OSG, which was bound by strict rules of secrecy. In addition, they had departed from standard operating procedures in their handling of the incident. They had given the plaintiff the benefit of the doubt when, under the protocols, she should have been detained and the gardaí called. They had kept the incident quiet. Officer Mahony said that he had not told the gate officer of the circumstances of the discovery of the phone, when he handed in the mobile phone. It was not in their interests to make the incident public.

101. Governor O'Sullivan stated that he was unhappy with the way the incident was handled by Officers Nolan and Mahony. Like Governor Quigley, he was of the view that it was not in their interest to publicise the incident. Governor O'Sullivan had denied that he had spoken to the journalist, or had authorised anyone to do so. He did not think that the article portrayed the Irish Prison Service in a positive light. The term "a prison worker" could refer to anyone. The information was not confined to employees of the Irish Prison Service. The information could have come from anyone within the prison, or someone outside the prison who learnt of it.

102. Having regard to the evidence given by Mr Purcell, Mr Connolly, Governor Quigley and Governor O'Sullivan, I am satisfied that the details of the incident were not deliberately leaked by the Irish Prison Service so as to paint that organisation in a positive light. Each of the witnesses denied giving any information to Mr O'Toole, nor did they authorise anyone to do so. While the article did state that the incident showed that the new security system was working well, I accept the evidence of the defendants that, overall, the occurrence of the incident did not portray the prison staff in a positive light. I accept the evidence of the defence witnesses that they would not leak a story which was harmful to "one of their own". Furthermore, having regard to the large number of finds that had been made in 2007 and 2008, there was ample opportunity, if the prison authority so wished, to publicise these finds so as to portray the new security system in a positive light. However, the Irish Prison Service had not sought to publicise these finds.

103. I am satisfied that the Press Office statement, as quoted in the article, was designed to prevent the story gaining legs. It was made so as to shut down further queries by stating that the matter was under investigation. The Press Office statement achieved its aim in that the story was not followed up in subsequent editions of the newspaper. I am satisfied that the Irish Prison Service acted reasonably in releasing the limited press statement to Mr O'Toole.

104. Towards the end of the cross examination of Governor Quigley, a more subtle reason behind the deliberate leaking of the story by the Irish Prison Service was put forward. It was suggested that details of the incident had been leaked to the journalist so as to prevent Governor Quigley taking a lenient approach to the incident. The inference made was that the investigation was ongoing and as Governor O'Sullivan had taken a hard line approach to the matter, he or someone on his behalf had leaked the details of the incidents so that Governor Quigley's hand would be forced in the investigation. The theory was that once the details of the incident were made public, Governor Quigley could not adopt a lenient approach towards the plaintiff, as that would have undermined the entire system. They could not be seen to adopt a strict approach with visitors caught with mobile phones, if they had adopted a different approach to a member of staff in the same circumstances.

105. While it was true that Governor O'Sullivan was advocating that a hard line approach be taken to the plaintiff's incident, I do not accept that he went so far as to plant a story in the media, so as to prevent Governor Quigley from taking a lenient approach to the plaintiff's case. This allegation was not canvassed with Governor O'Sullivan in cross examination. However, there is simply no evidence to support this allegation. I reject the contention that Governor O'Sullivan or anyone on his behalf deliberately leaked the story so as to influence the course of the investigation which was underway in relation to the matter.

106. Finally, the plaintiff made an alternative submission to the effect that having regard to the content and timing of the story, the leak could only have come from a member of the prison staff. Counsel for the plaintiff pointed out that the article only referred to a "prison worker" and made clear that that person was not a prison officer; this, they argued, pointed to the fact that the source of the story was a prison officer. The plaintiff also pointed to the use of the word "contraband" in the article. It was submitted that this was a term used by prison staff. The defendants did not accept that this word was used exclusively by prison officers. They stated that it was a word used commonly throughout the prison service by both staff and civilians.

107. In terms of parsing and analysing the article, the defendants pointed out that in the article the source was quoted as having said that the plaintiff triggered the alarm bells on the x-ray machine on three occasions. The defendants submitted that any member of the prison staff would have known that it was only bags and personal items which went through the x-ray machine, whereas the plaintiff had activated the alarm on the walkthrough metal detector. It was submitted that a prison officer would have known this and would have used the correct terminology.

108. The plaintiff also pointed to the fact that in the article it was stated that each time she passed through the security system, she said that it must have been her bra which was setting off the alarm. In Officer Nolan's interview, it was stated that after the second activation of the alarm, she asked the plaintiff whether she had anything on her to set the alarm off, to which the plaintiff stated that it must be her bra strap.

109. Evidence was given by a number of witnesses to the effect that rumours and gossip spread like wildfire in a prison. In this regard, the plaintiff had told her friend, Deirdre Cunningham, what had happened. She told her this on the day of the incident. There was evidence that the staff room in St. Patrick's Institution is particularly small, such that any conversation would be overheard by other teachers. It was also pointed out that prisoners could have overheard teachers talking about the incident and they could have furnished the information to Mr O'Toole.

110. Mr Michael Wadden is employed as a teacher in Shelton Abbey Prison. He had worked with the plaintiff in Shanganagh Castle from 1993 to 2003. When that institution closed in 2003, he moved to Shelton Abbey and the plaintiff moved to St. Patrick's Institution. He recalled that he had heard a rumour that the plaintiff had been caught smuggling a phone into the prison. He heard this rumour before he read the article. It was due to his knowledge of the rumour that he was able to identify the plaintiff as the person referred to in the article.

111. The plaintiff also stated that after the article appeared, her niece rang her and said, "That's you, isn't it?" The defendant submitted that this showed that the plaintiff must have discussed the incident with members of her family before the publication of the article.

112. I find that the plaintiff has not established that the leak could only have come from a prison officer. The clear evidence is that there was a rumour circulating among teaching staff within days of the incident. Mr Wadden in Wicklow had heard the rumour before the article was published. I accept the evidence that within the prison system rumours spread like wildfire. When the plaintiff did not appear for her classes after 4th September, 2008, it is likely that other staff and students would have been curious as to the reason for her absence.

113. It was suggested in the course of the hearing that the leak to the press may have emanated from either Officer Nolan or Officer Mahony. Having regard to the fact that they had departed from standard operating procedures in relation to the incident, and having regard to the fact that their commanding officer, Governor O'Sullivan, was most displeased with the manner in which they had dealt with the incident, I find that it is unlikely that they would have had any interest in publicising the incident to Mr O'Toole.

114. In the circumstances, it cannot be said that the leak must have come from a prison officer. The source could have been a prison officer, but equally it could have come from a member of the teaching staff, or a third party who learnt of the rumour. The clear evidence has been that all prison officers must sign the Official Secrets Act 1963 when commencing their employment with the Irish Prison Service. Evidence was given by Officer Joyce Clarke, who is head of training in the Irish Prison Service, that on all training courses it is made clear to prison officers that they must not divulge to any third party any details regarding their work, or what happens within prisons. The only person who is authorised to speak to the press is the Press Officer.

115. It is possible that the information came from a prison officer, who learnt of the rumour in the days after the incident. However, I am satisfied that if a prison officer did furnish information to Mr O'Toole, he was not authorised to make such disclosure to the journalist. The question then arises as to whether the Irish Prison Service can be made vicariously liable for such unauthorised action on the part of the prison officer. The defendants submitted that the law requires that there must be a close connection between the work that the employee is employed to do and the tortious act of which complaint is made. They relied on the following statement of principle set down by Fennelly J. in *O'Keefe v. Hickey* [2009] 2 IR 302 at p. 378:-

*"[243] 62. Ultimately, I am satisfied that it is appropriate to adopt a test based on a close connection between the acts which the employee is engaged to perform and which fall truly within the scope of his employment and the tortious act of which complaint is made. That test, as the cases have shown, has enabled liability to be imposed on the solicitor's clerk defrauding the client (Lloyd v. Grace Smith & Co [2012] 1 A.C. 716); the employee stealing the fur stole left in for cleaning (Morris v C.W. Martin & Sons Ltd [1966] 1 Q.B. 716) and the security officer facilitating thefts from the premises he was guarding (Johnson & Johnson (IRE) v. C.P. Security [1985] I.R. 362). In each of these cases, the action of the servant was the very antithesis of what he was supposed to be doing. But that action was closely connected with the employment. In Delahunty v. South Eastern Health Board [2003] 4 I.R. 361, O'Higgins J., rightly in my view, held that there was no such close connection. The employee of the orphanage had abused a visitor, not an inmate.*

*[244] 63. The close-connection test is both well established by authority and practical in its content. It is essentially focussed on the facts of the situation. It does not, in principle, exclude vicarious liability for criminal acts or for acts which are intrinsically of a type which would not be authorised by the employer. The law regards it as fair and just to impose liability on the employer rather than to let the loss fall on the injured party. To do otherwise would be to impose the loss on the entirely innocent party who has engaged the employer to perform the service. The employer is, of course, also innocent, but he has, at least, engaged the dishonest servant and has disappointed the expectations of the person to whom he has undertaken to provide the service. There is no reason, in principle, to exclude sexual abuse from this type of liability. That is very far, as I would emphasise, from saying that liability should be automatically imposed. The decision of O'Higgins J. provides an excellent example of practical and balanced application of the test. All will depend on a careful and balanced analysis of the facts of the particular case. In Bazley v. Curry [1999] 194 DLR (4th) 45, the employees of the care home were required to provide intimate physical care for the residents. The sexual abuse was held to be closely connected."*

116. The defendants also referred to the case of *Reilly v. Devereux* [2009] 3 IR 660, and in particular to the following portion of the judgment of Kearns J. at p. 670 – 671:-

*"[28] However, I cannot accept that the nature of the employment relationship between the plaintiff and the defendants in this case was such as would support a finding of vicarious liability. While undoubtedly the first defendant exercised a supervisory and disciplinary role where the plaintiff was concerned, he was not in the same position as a school teacher or boarding house warden in relation to a child. Nor was the nature of the employment one which would have encouraged close personal contact where some inherent risks might be said to exist as, for example, might arise if the first defendant had been a swimming instructor in close physical contact with young recruits. There was no intimacy implicit in the relationship between the plaintiff and the first defendant nor was there any quasi-parental role or responsibility for personal nurturing which was found to exist in the cases where vicarious liability was established. To hold otherwise would be to extend to the Defence Forces a virtual new species of liability where the defendants would be liable for virtually every act or omission of an employee.*

*[29] Such an approach was firmly out ruled by this court in O'Keefe v. Hickey [2008] IESC 72, [2009] 2 I.R. 302.*

*[30] As Hardiman J. stated at p. 343:-*

*'[126] In my view, both justice and the basic requirements of an ordered society require that the imposition of strict liability on a no fault basis be done (if at all) only on the clearest and most readily understandable basis. I do not regard the Canadian cases cited as providing such a basis: quite the opposite, as the two conflicting decisions cited demonstrate, in my view. I do not believe that the expanded basis of vicarious liability represents the law in this jurisdiction, or can be made to do so except by legislation. The consequences of doing this, social as well as economic, would be immense;'*

*[31] Hardiman J. went on to note the 'chilling effect' of any extension of the doctrine of vicarious liability whereby the State would become liable for criminal activities of those in their employment in circumstances where there was no fault attaching to the State. To do so would be not only to make the taxpayer liable for the criminal acts of employees of State bodies, but it would also affect that body's actions in ways which would require to be considered as a matter of policy before such an extension of the law could be allowed."*

117. In her judgment in *Lynch v. Binnacle Limited T/A Cavan Co-Op Mart* [2011] IESC 8, at para. 26, Denham J. quoted with approval the traditional test for vicarious liability, the Salmond test, which was set out as follows in Salmond's *"The Law of Torts"* (1st ed., 1907), at p. 83:-

*"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.*

*But a master ... is liable even for the acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them."*

118. I am satisfied that in this case, there was no connection between the work a prison officer was employed to do within the prison, and the leaking of information to a journalist as to what occurred in the security screening area. If a prison officer did leak such information, he or she was acting in a way that was completely outside the scope of their employment. In fact, they would have been acting in a way which was the very opposite to what they had been told in training and contrary to the duties that they held pursuant to their contract of employment, which required that they sign up to the Official Secrets Act 1963. In these circumstances, I am satisfied that if a prison officer did leak the information to Mr O'Toole, the prison officer was acting on a frolic of his own and the defendants, as his employer, are not vicariously liable for such actions on the part of the prison officer.

119. At the close of the evidence in this case, the defendant submitted that the plaintiff's action should be dismissed on account of an alleged lack of candour on the part of the plaintiff. The defendant pointed to a large number of areas where they alleged that the plaintiff had not told the full truth. They submitted that the court should dismiss the plaintiff's action against the defendants pursuant to s. 26 of the Civil Liability and Courts Act 2004.

120. Section 26 of the Civil Liability and Courts Act 2004, provides as follows:-

*"(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that –*

*(a) is false or misleading, in any material respect, and*

*(b) he or she knows to be false or misleading,*

*the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.*

*(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that –*

*(a) is false or misleading in any material respect, and*

*(b) that he or she knew to be false or misleading when swearing the affidavit,*

*dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.*

*(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.*

*(4) This section applies to personal injuries actions –*

*(a) brought on or after the commencement of this section, and*

*(b) pending on the date of such commencement."*

121. The defendants referred to the following matters, which they stated showed that the plaintiff had given evidence that was false and misleading in a material respect and which she knew to be false or misleading. The court was told that the plaintiff was first informed of the use of the hand wand when she saw the defence. This was not true: it had been referred to in a letter from Dermott Ahern, T.D., which had been sent to Áine Brady, T.D., who had made representations on behalf of the plaintiff. The court was told that the plaintiff had not seen the CCTV recording until 2014; this was not true: Mr Glynn, the union representative, had seen it in 2009. The court was told that the plaintiff let herself into the main gate of the prison; this was not true. The plaintiff said that there definitely was not a bell at the front gate, but there is one to the right of the entrance door. The plaintiff told her counsel that she just moved towards the metal detector and it alarmed; whereas she had moved through the metal detector so as to activate the alarm. The court was told that Deputy Governor Murphy had suggested the meeting in the Halfway House pub, whereas Mr Duffy and Deputy Governor Murphy contradicted this assertion. The court was told that the security screening area was quite big, whereas Officer Seabrook stated that he had measured the room as being 28ft in length, and that from the metal detector to the exit door was 10ft. The court was told that Officer Mahony had an uninterrupted view of the plaintiff taking a phone from her bra; this was not correct: his view was obscured by the screen on the top of the x-ray machine. The court was told that the back door to the security screening area had been opened and that two other officers were inside the screening room; this was challenged when the plaintiff agreed that the door was operated by an officer in a separate cabin. It was submitted in evidence that there were only four people in the room: the plaintiff, Mr Duffy, and Officers Nolan and Mahony. The court was told that Officer Nolan had been lounging against the back wall; whereas the CCTV shows Officer Nolan moving around in the vicinity of the metal detector. The court was told that the plaintiff was not told of the decision made by Governor Quigley on 23rd September, 2008, until later, while in her evidence she stated that she got a copy of it in mid-October. This was not correct: Mr Duffy said that he gave the plaintiff the information fairly quickly after 23rd September, 2008. The court was told that the plaintiff was not told on 4th September, 2008, that her security clearance had been removed. Mr Duffy said that she was so informed on that occasion.

122. The defendant submitted that the plaintiff had said that she had put the phone in her bra strap, as she wanted to shake hands with the prospective tenant and her keys were in the other hand. This explanation was new. Other explanations were that she wanted to be contactable while driving and that it was her habit to keep the phone there. The defendant submitted that she did not say this to the court. The CCTV clearly showed the phone in the cup of her bra. The defendant submitted that in cross examination it was put to Governor Quigley that it did not matter if the phone was in the strap, or the cup of her bra. The defendant submitted that this was an important issue. If it was uncomfortable in the strap area of the bra, it would be all the more uncomfortable in the cup of the bra, thus making it harder to forget that it was there.

123. In relation to the meeting on 27th June, 2008, the plaintiff said that she asked a question about being contactable and was satisfied with this. She gave the impression that this was a polite putting of the question. This was not borne out by the four teachers who gave evidence in relation to the meeting. The defendant submitted that due to these inconsistencies and contradictions in the evidence of the plaintiff, the court should dismiss her claim pursuant to s. 26 of the 2004 Act.

124. While the defendants have pointed to a number of areas where the evidence of the plaintiff was contradicted by evidence led on behalf of the defendants, it seems to me that this falls short of the type dishonesty that would warrant the dismissal of a plaintiff's case pursuant to s. 26 of the 2004 Act. The mere fact that the evidence of a plaintiff may not be accepted as accurate by the court, does not mean that the plaintiff has deliberately told lies to the court. In the circumstances, I refuse to dismiss the plaintiff's case pursuant to s. 26 of the Civil Liability and Courts Act 2004.

## **Conclusions**

125. The plaintiff was involved in an incident in the security screening area of the prison on 3rd September, 2008, when she was found to be carrying a mobile phone in her bra. Naturally, the plaintiff was embarrassed by the incident. Somebody leaked the details of the incident to the journalist working for the *Irish Daily Star* newspaper. The plaintiff maintains that the defendants breached her

right to privacy in disclosing this information to the journalist.

126. For the reasons set out in this judgment, I am not satisfied that the information which was supplied to the journalist constituted confidential information, the disclosure of which would give rise to a claim in damages. Even if I am wrong in this, for the reasons set out in the judgment, I am satisfied that none of the defendants deliberately leaked or authorised the leak of this information to the journalist.

127. Nor am I satisfied that the leak could only have come from a prison officer. The evidence before the court established that a number of teachers knew of the incident prior to publication of the article. There had been rumours concerning the incident which were heard by members of the teaching staff at another jail, prior to the article being published. The leak could have come from a prison officer, or from a member of the teaching staff in St. Patrick's Institution, or from a third party, such as a prisoner, who overheard conversations relating to the incident.

128. Even if I am wrong in that, and it should transpire that the information was leaked by a prison officer, I am satisfied that this was outside the scope of his authority and was not closely connected to the work that he was employed to do within the prison. In the circumstances, this was not something for which the defendants could be held vicariously liable.

129. Accordingly, I dismiss the plaintiff's action against the defendants.