Mobile Phone Evidence in the Trial of Joe O'Reilly

Frank Crean B.L.

On 21st July 2007, Joe O'Reilly was convicted of the murder of his wife Rachel O'Reilly. Mr. O'Reilly has lodged an appeal against his conviction. It is believed that the grounds of appeal include contentions that first, the trial judge should not have permitted mobile phone records and location data relating to the day of Mrs. O'Reilly's murder to go before the jury. Second, that there was no evidence before the court that O2 was a licensed operator within the meaning of the Postal and Telecommunications Services Act 1983, as amended ("the Act") (*Irish Times*, November 1, 2007).

Location data components in mobile phones enable phone companies to know the whereabouts of a powered-on handset. Such location data was adduced as evidence to track the movements of Mr. O'Reilly and of various witnesses in the trial.

Proof of Mobile Phone Records

Section 98 of the Act provides that it is an offence for a person employed by a "licensed operator" to disclose "any information concerning the use made of telecommunication services provided for any other person" save in defined circumstances. This encompasses mobile phone records and location data. In the O'Reilly case, the prosecution relied on the exemption contained in s. 13(2B) of the Act, whereby such information can be supplied on foot of a signed written request by a member of the Garda Síochána not below the rank of Chief Superintendent.

A *voire dire* (trial within a trial) was conducted to test the admissibility of these records as evidence in the trial. Counsel for Mr. O'Reilly argued that the prosecution had not proved the mobile phone records were admissible as no evidence was adduced that O2 was a licensed operator within the meaning of the Act. It was submitted therefore that compliance with the relevant provisions of the Act was incomplete. Counsel for the prosecution argued that the Act regulated the operation of licensed operators; unlicensed operators are not governed by the Act. The trial judge ruled that the phone records and location data were admissible as evidence in the trial.

Status of Mobile Phone Records as Evidence

Mobile phone records are admissible in court as evidence in accordance with s. 5(1) of the Criminal Evidence Act 1992. This exception to the rule against hearsay applies where the evidence is produced by a device which processes information supplied to it and where the device itself gathers the data. Before a judge can decide whether evidence of this type is admissible, it is necessary to call appropriate evidence to describe the function and operation of the device generating the evidence (*R v. Cochrane* [1993]).

Proportionate Invasion of Right to Privacy

Though the use of a person's mobile phone records constitutes an invasion of their right to privacy, their use as evidence in a criminal trial accords with the common good and is thus permissible (*The People (D.P.P.) v. Colm Murphy* [2005]).

Mobile phone networks need to identify the location of every handset in order to connect calls and relay messages between handsets. This fact has been exploited to yield evidence of the location of various individuals in the trials of Ian Huntley, Colm Murphy and Joe O'Reilly. It is likely that such data will be increasingly relevant in criminal investigations in the future.

O'Rourke Reid Website Launch

O'Rourke Reid would like to announce the launch of our new website. We begin 2008 with a brand new online presence. Please browse at your leisure throughout the site where you will find information about the services we offer, our Team and our latest newsletter. If you have any feedback, you can contact us online at www.orourkereid.com

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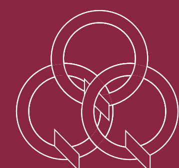

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HSE Patient Charges

Recently the Health Service Executive (HSE) reported that it has yet to receive payment of almost €400 million in patient charges since 2005. According to the HSE, some of these outstanding debts can be attributed to the length of time it takes to collect fees from road traffic incidents since the formation of the Personal Injuries Assessment Board (PIAB).

The HSE said that as awards are now paid directly to the claimant, hospitals must wait to receive their payments. Previously any court awards were paid through a legal representative who then settled the hospital's costs before the claimant received their award.

Private Security Authority

The Private Security Authority was established by the Government in 2004. Since then "bouncers" and private security firms must be licensed. It is an offence to employ an unlicensed security contractor.

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M50 Campaigner To Foot Legal Bill

Robert Haniver,
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Recently the Supreme Court overturned an earlier High Court award of legal costs to Mr. Dominic Dunne who lost his challenge to legislation enabling the completion of the M50 motorway.

Mr. Dunne took the case against the Minister for the Environment and Dún Laoghaire-Rathdown County Council. Mr. Dunne lost his case in the High Court but was nonetheless awarded legal costs.

In civil matters legal costs are normally awarded to the successful party, unless the Court orders otherwise. This means that the losing side must bear the winning side's legal costs, regardless of which party brought the action.

However, the High Court retains discretion regarding the awarding of costs. In this case, the High Court exercised its discretion and made an award of costs against the winning side. The High Court awarded the costs on the basis that the plaintiff was a private individual who was pursuing issues of "general public importance" and not for reasons associated with his own "private personal advantage".

The Court's scope for exercising its discretion regarding the award of costs has not been defined by law. However, this High Court ruling appeared to set down criteria under which the Court would exercise its discretion and depart from the normal rule of costs.

The High Court viewed this case as having all the hallmarks of a "public law challenge" and agreed with Mr. Dunne's argument that the Court should exercise its discretion when the following principles apply:

1. **The Plaintiff was acting in the public interest and was not pursuing the matter for personal gain; and**
2. **The issues raised by the proceedings were of "sufficient general public importance".**

The High Court went as far as to say that in "public law litigation", the Court's discretion to award costs to the losing party is not dependent on how the factual or legal issues of the case were decided. This appeared to state that cases involving issues of public importance would be exempt from the normal rules of costs.

The High Court also appeared to give weight to the individual's successful involvement in previous and separate proceedings when deciding to exercise its discretion on costs.

On appeal, the Supreme Court in a judgement of the Chief Justice found that the High Court had overstepped the mark in holding that in "public law litigation", the High Court was not obliged to look at other circumstances (such as who the successful party to the action was) when exercising its discretion to depart from the general rule of costs.

Furthermore, the **Supreme Court** held that there are no specific criteria to be met before the Court will exercise its discretion. In the judgment, the Chief Justice held that although an individual acting in the public interest and not pursuing a personal agenda are factors to be taken into account before exercising their discretion, the Court should consider all other circumstances including who won the case.

It was held that when a Court is assessing whether an issue raised is "of special and general public importance", it must assess both the public implications of the issue and the actual legal points raised in the case.

The Supreme Court found that the High Court's decision to take into account Mr. Dunne's previous track record in relation to litigation when deciding the issue of legal costs was misconceived. However the Chief Justice accepted that in other circumstances, prior and separate litigation could have relevance when deciding which party is awarded costs.

Conclusion

Following this Supreme Court appeal, the general rule remains that the successful party in a civil action will be awarded costs, unless the Court decides that the circumstances of a particular case and the interests of justice, warrant the exercise of its discretion to award costs to the unsuccessful party, or not to make any award of costs.

Increasing Significance of Equality Legislation in Employment Law

Graham Duggan,
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Defendant Litigation

EU equality directives are having a wide ranging effect on how we commence, manage and terminate employee relations. This article focuses on the impact of a recent case before the Equality Tribunal which highlights how costly a discriminatory dismissal can be for an employer.

There are a number of ways an employee can claim to have been unfairly dismissed from their job and proceedings on foot of such a dismissal are usually heard by the Employment Appeals Tribunal (the EAT). However, if the employee is claiming for dismissal on the basis of discrimination, a claim can be brought to the Equality Tribunal. The Equality Tribunal can award compensation for the dismissal (loss of earnings) but more importantly additional compensation for the anxiety and stress caused by the discrimination. **A discriminatory dismissal is one where the employee is alleging that he was dismissed by reason of one of the grounds set out in the Employment Equality Acts**, the most litigated and most contentious being a medical condition, illness or disability.

The recent case centred around the allegation of a dismissal on the grounds of discrimination because of a health condition. It involved a baggage handler who commenced employment in 1993 and was promoted to ramp supervisor in 2001. In January 2004 the employee had an accident involving his elbow which caused him to be absent from work. One month into this absence period, the employee was asked by his employer to attend the company doctor.

During this medical review, the employee mentioned that he had previously been diagnosed with heart disease which involved a number of medical procedures being carried out prior to him commencing employment with the company in 1993. The company doctor, with the employee's consent, contacted the employee's consultant cardiologist. After reviewing the situation and the work duties of the employee (the extent of which were disputed), the company doctor decided that the employee was not fit to return to work. In March 2005 the employee was advised that his employment would be terminated in June of that year.

As a result of the decision to terminate his employment, the employee took a claim for dismissal on the grounds of disability against the employer to the Equality Tribunal, which was successful. A major point of contention was whether the company doctor, as an occupational physician, was in a better position to evaluate the heart condition as opposed to the Plaintiff's own consultant cardiologist. The employee was awarded €125,000, which was a significant award in terms of an equality claim, but more importantly €60,000 of the award was for stress suffered because of the discrimination.

In making its decision, the Equality Tribunal reviewed Section 16 of the Employment Equality Acts 1998-2004 which provides that while an employer is not required to retain an individual in a position if the individual is not fully competent and available to undertake the duties attached to the position, the employer must, if a person who has a disability and is fully competent and capable provide "reasonable accommodation".

Essentially this means that **an employer must carry out a review to ascertain what can reasonably be done to meet the requirements of a competent and capable person who suffers from a disability in order to allow them to continue to do the job**. The employer in this case undertook no such review of the employee's condition and this was the reason for the finding of a dismissal by reason of discrimination.

Conclusion

Equality law has a wide ranging impact in all facets of society today but more particularly in the workplace. **Ignorance of the law or an unwillingness to facilitate an employee who has a disability may lead to a finding of discrimination and a sizeable compensation payment against a company**. Compliance with equality legislation is not something to be considered but to be implemented: employers who ignore this do so at their own peril.

Corporate Manslaughter and Corporate Homicide Act 2008

Helen H Whelan,
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The Corporate Manslaughter and Corporate Homicide Act will come into force on 6th April 2008 in the UK. An organisation will be guilty of this offence if the way in which its activities are organised or managed causes a person's death and amount to a gross breach of the duty of care owed by the organisation to the deceased. How the activities were managed or organised by senior management is a major contributing factor of the gross breach. In other words the management failure must have caused the victim's death.

"Senior Management" means those persons who play a significant role in the management of the whole or a substantial part of the organisation's activities. This covers both those in the direct chain of management and those in strategic or regulatory compliance roles.

The definition of "organisation" is sufficiently broadly defined to include foreign registered companies (e.g. Irish companies) carrying on business in the UK.

The resulting sanction is an unlimited fine although the court will also be empowered to impose an order requiring management to take steps to remedy the management failure and a publicity order on a convicted organisation.

The duty of care imposed would include the duty owed by an employer to his employees to provide a safe system of work and by an occupier of buildings and land to people in or on property. It would also include the duty owed by transport companies to their passengers.

Workplace Accidents

The Occupational Injury Benefit figures released for 2007 show that the number of workplace accidents has increased. The number of valid claims rose by 11% from 12,416 in 2006 to 13,803 in 2007.

This newsletter is for information purposes only. For legal advice on any of the matters raised please get in touch with your usual contact in O'Rourke Reid.

PIAB - Legal Costs for Vulnerable Claimants

David Ryan,
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On 26th October 2007, the Personal Injuries Assessment Board (PIAB) announced that it was extending the regulations regarding claimants recovering legal costs associated with a PIAB assessment. The relaxation of their position in respect of this issue is confined to "vulnerable claimants", who due to their individual and exceptional circumstances restrict their access and usage of the PIAB process.

At present, the PIAB Act provides legal costs for claimants who lack full legal capacity, e.g. a minor or person of unsound mind. It appears that the recent changes in PIAB's policy are intended to extend this provision by deeming certain classes of claimants "vulnerable". Unfortunately, PIAB does not define nor give any indication as to who may be classed as "vulnerable", except to say that they will adopt a case by case approach.

It seems that this policy change is primarily aimed at persons with literacy difficulties. Would a claimant be "vulnerable" if he lacks the legal knowledge and experience required to know how to process a claim? It is unlikely that PIAB would stretch their interpretation this far but without transparent guidelines and procedures, each individual claimant can query their position in respect of recouping legal costs.

Regrettably it is not easily apparent what procedures PIAB will use when determining this issue. For instance, will PIAB's assessment be based solely on medical reports or a simple evaluation of declarations from the Solicitor acting for the claimant. In addition, will the respondent possess an automatic right to know what status PIAB gives the claimant and if so, should he be informed prior to consenting to an assessment? Certainly the respondent's insurers and their Solicitors should hope that this is the position.

One further issue of note for respondents and their insurers concerns how and at what level PIAB will approve legal costs for such claimants. Details concerning these procedures have yet to be released. Until then, it would appear that respondents and/or their insurers will have to query this in advance of consenting to a PIAB assessment of damages.

This change in policy by PIAB is warranted and one which may be advantageous for both claimants and respondents. However this change will result in a higher cost outlay for respondents and/or insurers who consent to a PIAB assessment. Such short term expense may have long term benefits if the provision regularly and consistently dissuades the onset of litigation. As such, it is incumbent on representatives for both the claimant and the respondent to enquire of PIAB as to whether the assessment of the claim will include provision for legal costs. Regarding the long term consequences of this provision, only the passage of time will reveal the effects.

Landmark Ruling in Asbestos Claim

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On 17th October 2007 the House of Lords ruled that the asbestos related condition pleural plaques does not result in an actionable injury. This decision prevents potential claimants from bringing claims against employers.

Pleural plaques are scarring of the lung tissue which rarely cause any symptoms. They are only detectible on x-rays or a CT scan and do not in themselves progress into an asbestos related disease. People with pleural plaques usually only suffer stress related to an increased fear of the risk of developing a fatal disease.

Litigants have been claiming for the past 20 years for developing pleural plaques. Courts accepted that pleural plaques were an injury which caused anxiety.

Recently insurers decided to test whether pleural plaques were an actionable injury. In 2005 the English High Court rejected this challenge and upheld the right to compensation. The Court of Appeal reversed the decision finding that pleural plaques could not give rise to an actionable injury. The Claimants appealed the decision and the case proceeded to the House of Lords.

In making their decision the House of Lords found that pleural plaques are not visible or disfiguring. None of the Appellants suffered from any disability, impairment or a physical condition. The inhalation of the fibres and the formation of the plaques involved did not cause physical pain or discomfort. Pleural plaques did not give rise to any asbestos related disease. On this basis the presence of pleural plaques did not constitute an actionable injury in tort. In addition, suffering from pleural plaques did not amount to damage when aggregated with the risk of future disease or anxiety.

The judgment means that no compensation is payable in pleural plaques claims. The Association of British Insurers said the ruling "brings clarity for the claimants and insurers". The TUC expressed strong disapproval of the ruling.

Johnston v NEI International Combustion Ltd: Rothwell v Chemical & Insulatiing Co Ltd & Ors: Toppings v Benchtown Ltd: Grieves v F T Everard & Sons & Ors-17th October 2007

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