THE HIGH COURT

JUDICIAL REVIEW

[2017 No.9713 P]

[2024] IEHC 653

BETWEEN

DANIEL PHELAN

APPLICANT

AND

IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Ms. Justice Mary Rose Gearty delivered on the 8th of October, 2024

1. Introduction

1.1 The Plaintiff seeks a declaration that the statutory offence of threatening another person with a syringe is unconstitutional as it creates an offence without a corresponding element of *mens rea* on the part of the accused. The Defendants argue that the provision must be read as incorporating a corresponding mental element, and they nominate recklessness, in which case the section aligns with the constitutional right to a fair trial and the case law defining *mens rea* in the context of Irish criminal law.

1.2 The section can, and should, be interpreted as incorporating a mental element of subjective fault. A statutory provision should be interpreted as being consistent with the Constitution if that interpretation is one that is reasonably open to the court. Interpreting the section in this way does not force the plain language of the section, is consistent with other sections in the same Act and aligns with Irish authorities on the issue of *mens rea*. The case law emphasises the constitutional imperative to include a consciously guilty mind as an essential element in any definition of serious crime. Any provision which creates criminal liability in the case of a morally blameless person is incompatible with our constitutional guarantees to uphold and vindicate the right to liberty and the dignity of the individual.

2. Threatening another with a Syringe

2.1 The relevant provision is s.6(1) of the Non-fatal Offences Against the Person Act of 1997 and is one of the "syringe offences" created to address public concern about incidents in which wrongdoers exploited fears of potentially fatal infection though the use of syringes or blood as weapons while committing an assault or robbery. The external factors of most such offences consist of two parts, the *actus reus,* or act of the accused, and the reaction of the victim. In respect of the *mens rea,* the offence may be committed where there is intention or "*where there is a likelihood*" that the victim will fear infection. The phrase in italics is the phrase in issue.

2.2 The relevant subsections of s.6 read as follows:

"6(1) A person who—

(a) injures another by piercing the skin of that other with a syringe, or (b) threatens to so injure another with a syringe, with the intention of or where there is a likelihood of causing that other to believe that he or she may become infected with disease as a result of the injury caused or threatened shall be guilty of an offence."

(2) Creates offences of pouring or spraying blood, or fluid resembling blood.

(3) Creates an offence of attempting to commit offences under ss. (1) or (2).

"(5) (a) a person who intentionally injures another by piercing the skin of that other with a contaminated syringe shall be guilty of an offence."

The penalty is set out in s.6(4) and, if convicted on indictment, the Plaintiff may be sentenced to a maximum term of 10 years imprisonment.

2.3 The Plaintiff argues that there is a constitutional requirement that the accused have *mens rea*, or a guilty mind, in respect of both the act and its consequences. He submits that this is not provided for in s.6(1)(b), where the requirement of *mens rea*, if any, includes an objective state of affairs rather than a subjective state of mind, namely, that the accused act "*with the intention of or where there is a likelihood of causing that other to believe that he or she may become infected with disease as a result of the injury caused or threatened"* (Emphasis added).

2.4 This is a section which has received relatively little attention since its enactment, perhaps because it provided, in truth, a complicated alternative

to more familiar offences. The 1997 Act replaced the common law offences of assault, with some amendments which are not relevant in this context. Prosecutions in respect of s.6 syringe offences were relatively rare as the 1997 Act assault offences, or robbery offences, were usually sufficient for the circumstances, with fewer formal proofs and more familiar language.

2.5 This Plaintiff was charged with an offence under s.6(1)(b) of the 1997 Act, in circumstances where it is alleged that he produced a syringe at Waterford Hospital and told a security guard there that he was going to stick it into him. On arrest, a syringe was found on his person. The Plaintiff made no admissions at interview. Two security guards have provided witness statements describing these events and saying that they did not know what was in the syringe although both describe some kind of liquid squirting out.

3. Statutory Interpretation: Presumption of Constitutionality and Context

3.1 Every statute enjoys the presumption of constitutionality. One of the earliest expressions of this principle was that of Hanna J. in *Pigs Marketing Board v. Donnelly (Dublin) Limited* [1939] I.R. 413 at 417, where he held:

"*… it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established*."

3.2 In *McDonald v. Bord na gCon* [1965] I.R. 217, at 239, Walsh J. described the same presumption, often referred to as the "double construction" rule:

"*One practical effect of this presumption is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction. It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant*."

3.3 Walsh J. elaborated further on this principle in *East Donegal Co-Operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 at 341 stating that any such construction:

"*…cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas… a statutory provision which is clear and unambiguous cannot be given an opposite meaning*."

3.4 These principles, long followed, establish that the interpretation of a provision as being constitutionally valid must be reasonably open on the language of the section and that an unambiguous section cannot be, effectively, replaced by a different provision.

3.5 This exercise must also be guided by the relevant principles of statutory interpretation. In one of the most recent cases discussing statutory

interpretation in the context of criminal provisions, *DPP v. McAreavey*, [2024] IESC 23, Collins J. summarised the law thus:

"*Statutory construction is a unitary exercise that, in all cases, has the same objective, namely the ascertainment of the intention of the legislature from the text adopted by it (which is the starting point and primary focus), read in its proper context*: Heather Hill Management Company CLG v. An Bord Pleanála *[2022] IESC 43, [2022] 2 ILRM 313, as well as* A, B and C (a minor) v. Minister for Foreign Affairs *[2023] IESC 10, [2023] 1 ILRM 335."*

3.6 These recent cases emphasise both language and context. The history of the legislation, the relevant case law, and the wider picture in that area of law are significant aids to ascertaining the meaning or effect of a particular provision, although the starting point is the meaning of the words used.

3.7 The broad context in which this provision sits is that of criminal legislation. The House of Lords decision in the case of *Sweet v. Parsley* [1970] A.C. 132 was referred to by both sides in this case. This is authority for the proposition that if a legislative provision is silent as to *mens rea*, there is a presumption at common law that the courts must read the necessary words into the relevant section. There, Lord Reid commented that Parliament never intended to make criminals of persons who were in no way blameworthy and concluded that the courts must require *mens rea*.

3.8 The principle set out in *Sweet v. Parsle*y is one which is aligns with the Irish position that words requiring *mens rea*, if required, should be added if this

can be done without doing violence to the language of the provision. The principle is, however, applied in a different, constitutional context here.

3.9 Both parties also referred to the Article 26 reference, *The Employment Equality Bill, 1996* [1997] 2 I.R. 321. There, the Supreme Court struck down provisions which imposed a criminal penalty on those vicariously liable for discrimination in an employment context, in other words, where the person thus made criminally liable was not personally at fault.

3.10 Hamilton C.J., delivering the judgment of the Court, said at pp. 373–374:

"*What is sought to be done by this provision is that an employer, devoid of any guilty intent, is liable to be found guilty on indictment of an offence carrying a fine of £15,000 or a prison sentence of two years, or both such fine and imprisonment, and to be tainted with guilt for offences which are far from being regulatory in character but are likely to attract a substantial measure of opprobrium. The social policy of making the Act more effective does not … justify the introduction of so radical a change to our criminal law. The change appears to the Court to be quite disproportionate to the mischief with which the section seeks to deal*."

3.11 The Supreme Court declared the relevant provision unconstitutional as it rendered an employer liable to trial and severe criminal sanction where she was not blameworthy and such a provision was, as a consequence, contrary to Article 38.1 of the Constitution which enshrines the right to a trial in due course of law and contrary to Article 40.1 of the Constitution which provides that all people shall be held equal before the law.

3.12 In *C.C. v. Ireland* [2006] 4 I.R. 1; [2006] 2 I.L.R.M. 161, the Irish Supreme Court considered s.1(1) of the 1935 Criminal Law (Amendment) Act. This was a provision which criminalised having unlawful carnal knowledge of a girl under the age of 15 years. It was possible to commit the offence even if the accused mistakenly, and reasonably, thought the girl was 15 or older.

3.13 In a trenchant judgment on behalf of the Court, Hardiman J. viewed attempts to criminalise the conduct of the mentally innocent, no matter what the policy objective of such provisions, as assaults on the dignity and sense of self-worth of the individual, using the wording of Madam Justice Bertha Wilson in the Canadian case of *Hess and Nguyen v. The Queen* [1990] 2 S.C.R. 906, which involved a similar provision. Wilson J. had also noted the Canadian Courts' profound commitment to the principle that the innocent should not be punished, which predated the adoption of the Canadian Charter of Rights and Freedoms in 1982.

3.14 Hardiman J. noted the resonance such language has in Irish courts given the primacy of the Constitution in both jurisdictions, as opposed to the supremacy of parliament. Our reliance on constitutional guarantees leads to a discussion of such principles by reference to fundamental rights, as opposed to a discussion confined to statutory interpretation. He concluded that a provision which does not require *mens rea* in this context "*constitutes a failure by the State in its laws to respect, defend and vindicate the right to liberty*

and good name of the person so treated, contrary to the State's obligations under Article 40 of the Constitution."

3.15 The Court referred to proposed formulations of the offence of unlawful carnal knowledge which would "*pass constitutional muster*", but refused to formulate such a provision as this was the function of the legislature.

3.16 In a case involving ambiguity, a court must not only try to interpret a provision so that it is consistent with the Constitution, but also must obey the rules of statutory interpretation, including the presumption at common law that some mental element should be inferred, if the *mens rea* is not plainly described. As Mr. O'Malley said, in his comments on the *C.C.* case in Sexual Offences, 2nd Ed, paragraph 5.08, quoting from Nord, "*The Mental Element in Crime*" (1960) 37 Univ. Detroit L.J. 671: "*the mental is fundamental*".

3.17 The Irish courts cannot ignore unambiguous language which creates an offence in which no *mens rea* is required, as the Supreme Court held was the case in *C.C.* The history of that provision was relevant in interpreting its effect. Not only was there no word suggesting that *mens rea* was required, but the provision had always been understood, and treated, as one which did not require *mens rea* for policy reasons, namely, discouraging sexual intercourse by males with young girls. In this context, the absence of *mens rea* refers not only to offences of absolute liability and strict liability, but also to offences that can be committed carelessly or negligently.

3.18 The Parliament of the United Kingdom may, by using unambiguous language, impose criminal liability on persons without providing for a *mens rea* element to the offence, but the Oireachtas cannot do likewise without exposing the provision to constitutional challenge.

3.19 Hardiman J identified the distinction in *C.C.*, in the course of his consideration of the *Sweet v. Parsley* line of jurisprudence:

"*The English decisions, of course, were addressing matters of construction and not of compatibility with a Constitution. But they, like this court in the Employment Equality Bill case … speak powerfully to the central importance of a requirement for mental guilt before conviction of a serious criminal offence, and the central position of that value in a civilised system of justice*."

3.20 The Court in *C.C.* also commented on the regime proposed by the Employment Equality Bill, noting that although "*it imposed criminal liability for an act of which the employer neither knew nor approved, [s. 15(3) of the Bill] did provide for what might be regarded as a due diligence defence*." This did not save the section from constitutional invalidity.

3.21 Hardiman J. contrasted the Bill with the 1935 Act, noting that there was no such provision in the 1935 Act but declining to comment on whether this might have saved the provision in that very different context. He also commented on the consequences of a conviction for unlawful carnal knowledge, including social opprobrium, agreeing with Wilson J. that the

severity of the punishment or the prospect of leniency should not be the yardstick by which one decided if a provision was constitutionally valid.

3.22 The Court did not expressly consider the distinction between *mens rea* as to *actus reus* and *mens rea* as to circumstances. Denham J., dissenting, took the view that the presumption that *mens rea* must be present was sufficiently well established as to overwhelm even the legislative history of the provision and was prepared to read in such a requirement. The majority, agreed with Hardiman J. The history of similar provisions, in which explicit exemptions were set out regarding mistakes as to age and the fact that this had not been done in this instance, led the majority to the inescapable conclusion that this was what the Oireachtas had intended and it was incompatible with the personal rights guaranteed by the Constitution.

3.23 The judgment ends with a comparison between the acts of driving and of consensual sexual intercourse which may now be re-evaluated, considering the case of *DPP v. O'Shea* [2017] IESC 41. Hardiman J. noted that both activities were, *prima facie*, lawful in justifying the premise that neither can become an offence without *mens rea* but O'Malley J. took a different view. There was no discussion in *C.C.* of the point that sexual intercourse with a child is difficult to compare with intercourse between consenting adults. While this did not arise in *O'Shea,* the question of *mens rea* in serious driving offences came up for detailed consideration and is discussed further below.

4. *Mens Rea*: Subjective and Objective Recklessness

4.1 Before considering the constitutional validity of s.6, it is important to note the history of the concept of subjective recklessness in Irish law. The origin of the term "*mens rea*" is the Latin maxim: *actus non facit reum nisi mens sit rea*. This maxim translates as "the act cannot be guilty unless the mind is guilty". This is a strong and simple statement of a concept which, as noted above, has been consistently adopted in Ireland and, albeit with some notable divergences, endorsed across the criminal law world, including in most common law jurisdictions.

4.2 In Ireland, the emphasis on a subjective approach to criminal liability is particularly strong and, unlike most other common law jurisdictions, it is also applied, to the exclusion of any objective test, in the defences of provocation and self-defence in homicide.

4.3 Briefly summarised, in Ireland the traditional understanding of *mens rea* for serious offences is that the concept comprises intention and recklessness, and the word "recklessness" means subjective recklessness. In other words, there has been a consistent interpretation of the word in Irish law to mean a conscious disregarding of a substantial and unjustifiable risk. Objective recklessness refers to conduct which a reasonable observer, knowing the relevant facts, would have considered to be taking an unjustified risk. If objective recklessness is required, it is not necessary for the actor herself to

be aware of the risk of harm, or for her to appreciate its seriousness, even if she was aware of it.

4.4 Law students encountering the phenomenon were traditionally encouraged to consider (in England) whether the man on the Clapham Omnibus would have been aware of the risk he ran. This was updated, for Irish audiences, to the man on the 46A and perhaps will someday include a woman on the Luas Red Line as an even more diverse example to illustrate the same point.

4.5 In *Noel and Marie Murray v. The Director of Public Prosecutions* 1970 I.R. 360, the Murrays were accused of capital murder and, for the first time, our courts considered the *mens rea* required by the section which provides that a life sentence be imposed on one who commits capital murder. The 1964 Criminal Justice Act defined murder, including specific wording describing the requisite intention for murder. S.3 of the Act creates the offence of capital murder, namely the murder of specific categories of victim. Here, the victim was a member of An Garda Síochána. There was no word imparting *mens rea* in s.3, however. Put otherwise, while intention was the *mens rea* for the homicidal act, there was no express term setting out what knowledge was required, if any, of the status of the victim in capital murder.

4.6 All five judges of the Supreme Court held that *mens rea* was required in respect of both elements of the offence: the killing must be intentional, as set out in s.4, but there must also be *mens rea* in respect of the status of the victim. All agreed that it was not necessary to prove knowledge on the part

of the killer as to the victim's status as a member of An Garda Síochána, but that it was sufficient if she was reckless as to that fact.

4.7 The majority held that the term "reckless" refers to subjective recklessness, meaning that the accused must advert to the possibility that her victim is a garda, or belongs to a category of victim which aggravates the offence, from murder to capital murder, thereby attracting a mandatory life sentence. It may be that all five judges intended this as a unanimous endorsement of the principle of subjective recklessness but there are internal inconsistencies in some of the judgments. The overwhelming tenor of the judgments was to insist that recklessness should involve the conscious taking of an unjustified risk. Most commentators agree that this formulation can be described as subjective recklessness.

4.8 In one passage at page 386, outlining his view, Walsh J. said:

"*It is well established that unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime the court cannot find a person guilty of an offence against the criminal law unless he has a guilty mind*."

4.9 Professor McAleese later argued, in an article entitled "Just What is Recklessness?" (1981) DULJ 29, that recklessness as to conduct should not be treated differently from recklessness as to circumstances. Both the *actus reus* of a crime and the circumstances or result required before it become an offence, must be facts of which the actor is aware or risks to which she has adverted. The potential result must have at least crossed her mind; there is

no logical reason to distinguish between *actus reus* and the circumstances or result. In McAleese's words, to conclude otherwise "*offends both common sense and the obvious need to have basic principles and basic terminology mean the same thing throughout the gamut of the criminal law*."

4.10 McAleese also commented on the reasoning of the five judges and, despite some criticisms of discrepancies within and between judgments, her article concluded that their broad insistence on subjectivity "*is in accord with the preponderance of legal thought on the ambit of recklessness; it establishes the highest degree of clarity and certainty; it simply makes profound legal and common sense; and it contains the ambit of criminal liability within justifiable limits*".

4.11 The Supreme Court confirmed the primacy of the subjective test in 2004. In *the People (D.P.P.) v. Cagney; The People (D.P.P.) v. McGrath* [2008] 2 I.R. 111, that Court considered the offence of endangerment contrary to s. 13 of the Non-Fatal Offences Against the Person Act 1997. Here, the appellants were convicted of endangerment but with no instruction to the jury as to what the test was in respect of *mens rea* in terms of the assessment of the risk to others. While the word *conscious* was used by the trial judge in this context, there was no express advice to the jury to consider the risk from the point of view of the accused. This risk had to be a substantial risk of death, and the accused must have been conscious of that risk, the Supreme Court held.

4.12 The main *ratio decidendi* was that the Director should refrain from preferring endangerment charges in a case where the long-established offence of

manslaughter by assault had been charged in respect of the same facts. The importance of the judgment in this context is that, again, the Supreme Court made a firm stand on the issue of *mens rea* and the importance of conscious fault as a basis for criminal liability.

4.13 In Cagney, at paragraphs 89-90, Geoghegan J. stated:

"Where "recklessness" is a constituent of a criminal offence in Ireland, the leading authority on its meaning is The People v. Murray *[1977] I.R. 360. The judgments of Henchy, Walsh and Griffin JJ. make it clear that the required mens rea for the purposes of recklessness as to consequences is subjective and not objective. In particular Henchy J. endorsed the American Law Institute definition in the Model Penal Code. … It seems clear therefore that for the purpose of a count under s. 13 based on recklessness as was the case here the accused would have had to consciously disregard a risk not of just causing harm but of causing serious injury or death*." This approach was again endorsed, and this passage from the judgement Geoghegan J. cited, by the Supreme Court in *Clifford* [2013] IESC 43.

4.14 The issue of *mens rea* arose again in the case of *The People (D.P.P.) v O'Shea*, [2017 IESC] 41. This is the case which was foreshadowed in the hypothetical posited by Hardiman J. in *C.C.* In *O'Shea*, the Supreme Court held that the offence of careless driving, which attracted significant penalties, required proof of *mens rea*. The relevant species of *mens rea* were not confined to intention and recklessness however, according to O'Malley J., who delivered the judgment of the Court on this aspect of the case.

4.15 O'Malley J. noted that the necessity to read words importing *mens rea* into a statute "*arises from the presumption that the Oireachtas did not intend to punish a blameless individual*." At paragraph 23, she refers to the exceptional nature of the manslaughter offence in respect of *mens rea*, noting: "*As pointed out by Charleton, McDermott & Bolger in Criminal Law (Butterworths, Dublin, 1999), manslaughter was, classically, the only example in Irish criminal law where an accused could be found guilty of a serious criminal offence without the necessity of proof that he or she was aware that his or her conduct might bring about the external element of a crime.*" She endorses this reasoning, concluding that "*the offence in question occupies a defined position in a range of driving offences*" and that there is no requirement that intention or recklessness be established to prove careless driving, despite the significant potential penalties.

4.16 Other passages in this judgment can be contrasted, usefully, with the concerns sought to be addressed by the assault offences created by s.6(1). At paragraph 44: "*The concept of intention has always had a very limited role in cases of bad driving. This, presumably, is because of the ubiquity of the car in modern society, the danger to members of the public caused by bad driving and the fact that accidents are rarely intentional on anyone's part. A crash that causes physical injury will generally not constitute an assault*."

4.17 Consider these comments in light of the societal fears sought to be assuaged by s.6 and the new syringe offences. In the context of driving offences, an offence including negligence as the element of fault had long been available

to address an activity that is so commonplace that a lesser form of *mens rea* is justified where the consequences may be so grave: mere carelessness can cause death but the social benefits of driving are clear and most adults drive. In other words, this context explains why the driver is held to a higher standard and may even be punished where she was not aware of the risk her driving posed to others, but where a reasonable driver would have been aware of that risk. We require drivers to pass a test and to carry a licence. No such societal benefits attach to the activity of carrying a syringe and there is nothing commonplace about the act.

4.18 As noted by Prendergast in his article on Gross Negligence Manslaughter, DULJ 2014, 37(1), 267-275, there is a difference between absolute and strict liability. There is a further difference between either category and liability for criminally negligent or objectively reckless conduct, which conduct carries some element of fault, albeit less than that required for other serious criminal offences. As noted, the car is potentially lethal and, therefore, there is an onus on the driver to reach an objective standard of behaviour.

4.19 Only a limited number of people have access to syringes and in most circumstances when a citizen wields one filled with what appears to be blood, that fact alone will create fear in another. This scenario differs from the case of a driver who is inattentive but who causes significant physical injury, or even death. The discussion in *C.C.* of the rationale for such laws referred to the admirably clear policy objectives set out by McLachlann J. in

her dissenting judgment in *Hess and Nguyen v The Queen*. She made it clear that she considered a policy objective of reducing the instance of sex with underage girls by the relatively simple expedient of requiring adults to make reasonable enquiries as to their age when considering having sexual intercourse with a female partner was not an onerous imposition to place on men. Any equality objection to this proposal could be answered by ensuring that the relevant provision is gender neutral, ignoring the statistically insignificant number of female offenders in this regard.

4.20 Hardiman J., considering this policy objective stated by McLachlann J., admired its clarity and logic but completely rejected the proposition on the basis that it was a *"[u]tilitarian defence of absolute liability*" and could be used to justify any policy that might achieve the desired effect, the end justifying the means. He also suggested that it was not based on any evidence that the objective had succeeded, noting reliance on the common use of the word "jailbait" to denote public awareness of what the law prohibited, and why.

4.21 While it may seem difficult to conceive of circumstances in which an actor could wield a syringe that appears to be filled with blood without being aware that this will affect his immediate neighbours to the extent that they fear infection, this hypothetical is reminiscent of the case of *Elliot v. C [1983]* 1 WLR 939 which led to a revision of the law regarding recklessness in England and which is discussed below.

5. The House of Lords: *Caldwell* to *R. v G.*

5.1 Ray Ryan and Des Ryan provide a comprehensive review of the position regarding recklessness in England and Wales, leading up to the English case of *R. v G.*, in an article called *Recklessness, subjectivity and the Criminal Law*, Irish Law Times 2004, 22, 90-95. In brief, while the Irish courts have been consistent in defining recklessness as subjective recklessness, the authors of this article document notable divergences from this view in England and Wales, only for the courts in that jurisdiction to revert to the traditional view that, in all serious criminal offences, an accused must have been aware of the potential for harm if he is to be convicted.

5.2 The *R v. Caldwell* [1982] AC 341 decision was followed in *Elliott v C. (a minor), [1983] 1 W.L.R. 939*, referred to above, where a 14-year-old with reduced mental capacity was convicted of arson. The evidence established that she did not appreciate the risk of damage to property that she ran, when setting fire to white spirits in a shed. At least one judge was explicitly critical of *Caldwell* but considered himself bound by it.

5.3 The issue was revisited in *R. v. G.*, [2003] 3W.L.R. 1060, prompting the article by Messrs Ryan and Ryan. In *G.*, the House of Lords finally overturned *Caldwell*. Lord Bingham of Cornhill, at page 1080, was trenchant in his criticism of the case as "*offend[ing] the principle that conviction should depend on proving the state of mind of the individual defendant to be culpable*".

5.4 The language used by Lord Bingham echoes that in the judgment of Hardiman J. as he outlined the Constitutional imperatives in this jurisdiction, which imperatives provide an even more effective remedy in this jurisdiction in the vindication of the rights to a fair trial, to liberty and one's good name: the most powerful way to reinforce these important rights and uphold this basic principle of liability.

6. Interpreting s.6(1) consistently with the History of Recklessness

6.1 Looking only at the wording of s. 6 and its social context, at first blush, this provision might have been an attempt by the Oireachtas to introduce an offence which criminalises behaviour which is objectively reckless. If this was the only interpretation of the section possible, then anyone who brandishes a syringe, or threatens to do so, whether the actor is aware of the effect this conduct might have on others or not, would thereby be committing a serious criminal offence if there was an objective likelihood that another person would believe he will become infected as a result of the action or threatened action. In other words, if a reasonable woman would have realised that it was likely that this conduct would cause such a belief.

6.2 The problem with the Plaintiff's argument is that the section does not use any express term denoting objectivity. This is a very real problem when one considers the long-understood definition of *mens rea*, as set out above, and the Irish approach to the definition of recklessness, including that taken by

the Supreme Court in *Murray*, in the Equality Act case and in *C.C.* These cases confirm that our courts have insisted that in any provision creating a serious criminal offence, save in the context of the Road Traffic Acts or manslaughter offences, there must be a requirement that the prosecution prove that the accused had *mens rea*, usually translated as "a guilty mind" and encompassing all manner of mental state from intentional conduct to recklessness but always, in this context, a term denoting conscious fault.

6.3 In every relevant Irish case, it is emphasised that the mental element of recklessness must be one that is subjective to the accused and that there is no place in our criminal law for the concept of strict or absolute liability. Criminal liability for negligent acts or omissions has been confined to regulatory offences as set out, for instance, in *Maguire v Shannon Regional Fisheries Board [1994] 3 I.R. 580*, and historic exceptions such as manslaughter, whereby an accused may be criminally liable even if she has not adverted to the risk that her conduct poses.

6.4 Given the approach of the Supreme Court since the case of *Murray*, it is difficult to see how the legislature could abandon this emphasis on conscious risk-taking by using the ambiguous phrase *"where there is a likelihood that* [an event may occur]". In any such sentence, the likelihood may be an objective one, something that can be proved mathematically or, more probably in human affairs, an event that a reasonable woman would

consider likely. The likelihood may be subjectively assessed, however, in that it may be an event which is likely *in the view of the actor*.

6.5 If the actor cannot identify or foresee any risk of harm by her conduct, then, given the authorities discussed above, it may be unconstitutional to penalise her for conduct beyond what we usually refer to as regulatory offences and outside the defined exceptions of manslaughter and road traffic offences. But s.6 lends itself to an alternative, constitutional interpretation: that there is a likelihood of a particular result, and the actor has adverted to this but has gone on to take the risk nonetheless. It is worth noting that the authorities in this jurisdiction, unlike those in the United Kingdom, have not yet had a case to compare with the facts of *Caldwell* where, against the background of an existing grudge, an unjustifiable risk was undertaken at a time when the actor was voluntarily intoxicated rendering him unable to identify or appreciate the risk in question.

6.6 Considering the facts of this case: if the same physical actions were carried out by a person with the mental capacity of a 14-year old, who deliberately waved a syringe at another but with no appreciation of the fear she was causing, it would be unfair to find her guilty of this serious criminal offence.

6.7 Where is the fault element in engaging in conduct which risks injury to another if one does not perceive the risk? Such an actor may lack intelligence or imagination, to use the formulation of Lord Bingham, but neither of those failings should expose him to conviction of serious crime or the risk of

punishment: *R. v. G.* [2003] 3 W.L.R. 1060 at 1079. The situation may be different if the actor has become voluntarily intoxicated but s.6 does not seek to distinguish between the intoxicated actor and the blameless actor who has not appreciated the risk for other reasons.

6.8 The ambiguity of the phrase "*where there is a likelihood*" is illustrated by the differing views taken by academic commentators and by the dismissal of the argument, albeit not fully fleshed out, by the Court of Appeal in *DPP v. O'Brien* [2016] IECA 164. Before considering *O'Brien*, it is helpful to consider the rest of the Act, particularly provisions in which recklessness is explicitly required as the *mens rea.*

7. *Mens Rea* terms in the Non-fatal Offences against the Person Act 1997

7.1 This Act encompassed a number of different reforms and introduced several new concepts, including the syringe offence under consideration. The Act was a codification, to a large extent, of the law on non-fatal offences against the person. The law of self-defence was restated, albeit only in respect of non-fatal assaults and not in respect of homicides, assault offences were redefined, and specific offences e.g. poisoning, coercion, harassment and false imprisonment, were created, restated or redefined.

7.2 The assault offences can be committed either intentionally or recklessly. The Plaintiff argues that the words *'or where there is a likelihood of causing that other to believe that he or she may become infected'* denote something other than

intention *or* recklessness and must suggest an objective standard. He makes the point that recklessness is expressed in s.2, amongst other provisions of the same Act, as an alternative *mens rea* to intention. Had the legislature wanted to make this the relevant *mens rea*, it would have drafted the provision accordingly. Whilst intention is clearly referable to the state of mind of the accused person, the reference to a *'likelihood of causing that other to believe'* is, the Plaintiff submits, referrable to an objective test which is unrelated to the state of mind of the accused person.

7.3 Sections 12, 13 and 15 the offences of poisoning, endangerment and false imprisonment can only be committed where the actor intends or is reckless as to her actions. Sections 16 and 17 deal with abduction of children and neither section uses words which impart *mens rea* and there is no comparable phrase to assist with the interpretation of section 6.

7.4 In s.5, the offence of threatening to kill or cause serious harm can only be committed intentionally. The following section is the one under consideration and here we see, for the only time in the Act, the *mens rea* required is where the relevant act is done "*with the intention of or where there is a likelihood of causing that other to believe that he or she may become infected*…"

7.5 This anomaly of language, in the midst of other sections which specifically require intention or recklessness, suggests that the Oireachtas may have intended to provide for a different *mens rea* in this section. However, there are numerous ways of expressly requiring that objective recklessness is

sufficient and one of these is to make that explicit in the section. The Plaintiff's argument that the test is objective would be stronger if the Oireachtas had not used a more traditional phrase, commonly used to denote objective recklessness, in a later section in the same Act.

7.6 Section 7 of the 1997 Act creates the offence of possession of a syringe with the intent to cause harm. Section 8 creates the offences of placing or abandoning a syringe in such a manner that it is likely to injure another and does injure another or is likely to injure, cause a threat to or frighten another shall be guilty of an offence. The offence includes no words imparting *mens rea* at this stage, but the later subsections contain, by implication, some indication of what was intended. The wording is different to s.6 though, which lends itself to the suggestion that the fact that placing a syringe in that manner is likely to injure another must be a fact to which the actor has adverted. This has not been argued before me and it is unnecessary to express any view on the section.

7.7 Section 8(2) creates the offence of intentionally placing a contaminated syringe in such a manner that it injures another, with a penalty of imprisonment for life. Subsection (3) provides that subsection (1) does not apply to a person placing a syringe in any place whilst administering or assisting in lawful medical, dental or veterinary procedures. This ensures that relevant professionals do not unintentionally commit the offence.

7.8 In subsection (4), it is provided that where it is alleged a syringe is placed in a place being a private dwelling at which the accused normally resides, it shall be a defence for the accused to show that he or she did not intentionally place the syringe in such a manner that it injured or was likely to injure or cause a threat to or frighten another, as the case may be. In other words, the person who puts a syringe down in their own home, whether objectively or subjectively reckless about this, is not committing an offence once it was not intentionally placed to cause harm.

7.9 Here, we see again a reference to events being "*likely*". In s.8, however, the reference is to something being done in a manner likely to cause a result, rather than there being "a likelihood" that the result would occur so there is no need express a view on these subsections.

7.10 All of the sections in question relate to offences committed with syringes or needles, blood or fluid resembling blood. It is certainly arguable that the legislature intended to rule out a defence for those who are acting without conscious thought, due to self-induced intoxication. The problem is that unless this is expressly set out, the attempt to create an offence which can be committed without a blameworthy mind is too wide and captures those who may not be aware of the risk they are taking but for other, blameless reasons. No such express objective level of *mens rea* is set out and, as regards s.6, at least, the double construction rule and the historic approach to interpretation of criminal statutes dictate that the offence be read as one

which requires *mens rea*. In Ireland, this means intention or recklessness and the latter, as usual in serious offences, means subjective recklessness. This view is reinforced by the wording chosen in s.10, to which I now turn.

7.11 Section 10 creates the offences of harassment and stalking which carry 10-year penalties, identical to the maximum penalty for most s.6 offences, including that under consideration. These subsections specifically refer to objective recklessness using a formulation of words which is very familiar to lawyers, and which is used regularly to denote this species of *mens rea*. The relevant acts in s.10 ("acts" is always in the plural in this section) must be done intentionally or recklessly on the part of the accused but the resulting interference, distress or fear in the victim need not be something of which the accused was aware. It is provided, expressly, that the test is whether a reasonable person would realise the effect that the acts would have on the other party.

7.12 The subsections read:

"10.—(1) A person shall be guilty of the offence of harassment where—

(a) the person, without lawful authority or reasonable excuse, persistently, by his or her acts, intentionally or recklessly, at the time when the acts occur

or when the other becomes aware of them—

(i) seriously interferes with another's peace and privacy, or

(ii) causes alarm, distress or harm to the other, and

(b) the person's acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other, at the time when the acts occurred or when the other becomes aware of them.

(2) A person shall be guilty of the offence of stalking where—

(a) the person, without lawful authority or reasonable excuse, by his or her acts, intentionally or recklessly causes another, at the time when the acts occur or when the other becomes aware of them—

(i) to fear that violence will be used against him or her or another person connected to him or her, or

(ii) serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities, and

(b) the person's acts are such that a reasonable person would realise that the acts would cause the other, at the time when the acts occur or when the other becomes aware of them, to fear that violence will be used against him or her or another person connected to him or her, or serious alarm or distress that has a substantial adverse impact on his or her usual day-to-day activities."

7.13 The offences of publishing or broadcasting certain material under s.10A contain no words imparting *mens rea*, instead, a specific defence is provided if the actor can "*prove that at the time of the alleged offence the person was not aware, and neither suspected nor had reason to suspect*" that the information was identifying information or that publishing the information was in

contravention of an order. In other words, an offender must have a guilty mind and those who can show that they were not aware of relevant circumstances or had no reason to suspect they were committing an offence will not be guilty of an offence.

7.14 Section 6(1) uses the formulation "*where there is a likelihood of causing that other to believe*". Having traversed the various sections, some of which expressly provide for *mens rea*, some of which do not, two of which refer to events being likely, and two of which contain express provision for objective recklessness, and one a defence which amounts to the same thing, there is no consistent approach in the Act which can point to the necessary interpretation sought by the Plaintiff.

7.15 Perhaps most significantly, in the subsections creating the offences of harassment and stalking, the words used are those traditionally associated with objective recklessness and most often referred to simply as the "reasonable man" test. Once the test refers to risks of which the reasonable person would be conscious, the *mens rea* required is objective and not subjective and the prosecution need not prove what, if anything, was in the mind of the accused. This very specific phrase having been used in s.10, it is difficult to sustain an argument that the provision in s.6 was intended to break with the tradition of the Irish courts, and those in other common law jurisdictions, by providing for a criminal offence which could be committed unwittingly or without a blameworthy or guilty mind.

8. English Language Construction

8.1 As a matter of English language, s.6 is not one that must be read as requiring objective recklessness as the relevant *mens rea.* The passive voice is used, "*where there is a likelihood of causing…*", which does lend itself to an objective interpretation. The person who assesses the likelihood is not named and one can argue that this is an objective test in that the reasonable person must think there is a likelihood of something happening or that it is phrased so as to suggest that the likelihood should be an objective fact. However, this is not what the Plaintiff must prove, he must prove that this is, unambiguously, the only interpretation reasonably open to the Court.

8.2 This section can be interpreted in a way that is compatible with the Constitution. The phrase, "*where there is a likelihood of causing…*" can mean not only objectively likely but subjectively likely. There is no indication that the person who identifies the likelihood that a particular belief will be caused by a given act is a hypothetical, reasonable person. It is equally likely to be the actor, the person who brandishes the syringe. If the latter, the actor must be aware of the likelihood that her acts will cause a certain effect. Had the Oireachtas wanted to move away from the traditional test of subjective fault, they should have used more definite language. This construction is one that is required by the common law as there is no word imparting *mens rea* in this part of the provision and, therefore, the section should be read so as to include the requirement of *mens rea*, if that can be done.

8.3 Subjective recklessness requires the conscious disregarding of a significant risk and, returning to s.6, the situation described is one which fits that definition. Where a person brandishes a syringe which appears to have liquid in it at another, there is a significant risk that the other person will fear infection, in most contexts. The history of the definition of recklessness and of criminal legislation in Ireland strongly supports the interpretation that requires that person to be conscious of the significant risk she is taking, and to disregard it before she can be convicted of this offence.

8.4 Not only can s.6(1)(b) require subjective recklessness as the *mens rea*, as a matter of English language construction, but the terms of s.10 specifying a traditional, objective test suggest that the Oireachtas could have chosen to phrase the section in that way had it intended to change the law in this significant way. This means that the subjective interpretation is one that is consistent with plain language, with the history of the concept of *mens rea* in Ireland, with the other sections of the Act and, most importantly, it is also consistent with the Constitution.

9. Court of Appeal in O'Brien

9.1 Both Plaintiff and Defendant referred to *DPP v. O'Brien* [2016] IECA 164, in which Mr. O'Brien had stolen a Bounty bar while in possession of a syringe. He thrust the syringe at two men who followed him out demanding that he return the chocolate. He threatened to kill them and chased one of them,

still holding the syringe and verbally abusing the man. He claimed that he was holding a biro, not a syringe, but was convicted under s.6(1)(b). His appeal against conviction included the argument that there had been no evidence that the appellant's victims perceived a risk of infection with disease, both had said they feared being stabbed. The case, therefore, dealt with one aspect of s.6, but not with the *mens rea* required of the accused.

9.2 The decision of the Court is set out by Edwards J. in paragraphs 30 - 32:

30. It was submitted by counsel for the respondent that … the actus reus consists of threatening to injure another by piercing the skin of that other with a syringe, and the mens rea consists of so doing in one of two circumstances. The first circumstance that can constitute sufficient mens rea is where the threat is proffered with the positive intention of causing the recipient of the threat to believe that he or she may become infected with disease as a result of the injury threatened. The second is where the threat is proffered in effect recklessly, i.e., in circumstances where there is a likelihood of causing the recipient of the threat to believe that he or she may become infected with disease as a result of the injury threatened.

31. It was contended by counsel for the respondent that to secure a conviction for an offence contrary to s.6(1)(b) of the Act of 1997, it is not in fact necessary for the prosecution to prove that the victim actually perceived a risk of infection with disease. 32 … [T]he respondent's analysis is correct…

9.3 While the issues before the Court in *O'Brien* were different, in that the Court was considering the point of view of an alleged victim and addressing the

state of knowledge required of him, not that of the accused, it is instructive to note that the Court's rehearsal of counsel's argument, mentioned in passing, states the *mens rea* required, namely, intention or: *where the threat is proffered in effect recklessly, i.e., in circumstances where there is a likelihood of causing the recipient of the threat to believe that he or she may become infected.*

9.4 While the issue of whether or not the accused had to subjectively anticipate or advert to a risk was never directly addressed by either side in *O'Brien*, hence the Court did not have the benefit of any argument in that regard, what the above passage demonstrates is that an experienced criminal law Judge, and his colleagues on the Court of Appeal, appeared to read the section as one which required a fault element, namely, subjective recklessness and saw no violence to the language in so doing. While that Court did not address the issue in any detail, what this Court is required to consider is whether the section unambiguously states that there is no subjective test required or whether it is forcing the language of the section to do what was done by the Supreme Court in *Cagney and McGrath* in the constitutional context and endorsed in *Sweet v. Parsley* in the common law tradition, and to read the relevant *mens rea* into the section.

9.5 The finding of the Court of Appeal, that the respondent in *O'Brien* was correct, related only to the submission that there was no need to prove specific fear of infection on the part of the victim. The Court did not consider the issue of *mens rea* other than in the paragraphs set out above and the case

cannot be relied upon as an authority to the effect that the relevant *mens rea* is subjective recklessness. However, it does mitigate against finding that the section cannot be read in a way which is consistent with the Constitution. Plainly, all judges involved in the case read the section in that way.

9.6 Edwards J. noted (paragraph 33) that the jury: "*even if they were not satisfied beyond reasonable doubt to draw the inference that the appellant positively had such an intention, there was also sufficient evidence to have allowed a jury, properly charged, to have concluded beyond reasonable doubt that the appellant behaved as he did in circumstances where there was a likelihood of causing [the victim] to believe that he might become infected with disease if stabbed with the syringe…*"

9.7 While this sentence does not suggest that any person must take the view that there was such a likelihood, laws must operate in the real world. Any such provision, to be effective in a criminal trial, must permit the jury to understand how they are to determine whether or not something is likely. The only choices here are the reasonable woman or the accused person, the actor. The wording of this section can accommodate both.

10. <u>Conclusions</u>

10.1 The Plaintiff seeks a specific, literal interpretation of s.6(1) but does not point to any authority which requires this. Having relied on its statutory context, the only sections of the 1997 Act highlighted by the Plaintiff specify two species of mens rea but other sections in the same Act do not require

mens rea, expressly, or they refer to an objective standard. The historic interpretation of comparable provisions runs counter to the Plaintiff's case.

10.2 Nor does a literal interpretation address the issue in this case conclusively. For whatever reasons, the legislature in this case abandoned terms such as reasonableness or recklessness and, without using any such word, referred only to the likelihood of specific effects in the mind of the victim. The probability or risk of an event may be an objective fact, but it may also be highly subjective. Few events in human affairs are capable of being described using mathematically ascertainable probabilities and most involve some element of human judgment as to when an event is likely, or not likely, to occur. If human judgement is required, then the next question must be: which human is making the judgment call? Is it the accused person or is it a useful everyman, usually referred to in law as the reasonable man? If the latter, then it does not matter what the accused thought, she may be guilty even if she could not appreciate the risk of harm.

10.3 The most recent cases considering statutory interpretation suggest that, while a literal interpretation is often sufficient, and is the first issue for analysis, a provision must be seen in context and the presumption of constitutionality may also affect the construction of a provision which might otherwise appear to bear a single, more obvious, meaning.

10.4 A literal interpretation is not sufficient in this case as it tells us little about how an observer would decide whether there is a likelihood of the relevant

event occurring. Is the likelihood one which must be apparent to a reasonable man, or must it be apparent to the accused? If the former, then the offence can be committed without the accused having ever addressed his mind to the likelihood of causing fear. If the latter, then the *mens rea* is subjective, in line with all the authorities and with the origins of the phrase set out above: there can be no guilty act without a guilty mind.

10.5 To paraphrase Murray J. in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC 43, the legislative context in this case does not displace a literal construction, but aligns with one valid construction of the section and it is not the interpretation for which the Plaintiff contends. Unlike the provisions under consideration in *Heather Hill,* the wording in this section allows a valid, alternative interpretation which should be preferred to that put forward by the Plaintiff. The resulting interpretation is consistent with the Constitution and also aligns with the common law authorities on *mens rea* and the historic definition of that phrase in Irish law, insofar as it is used in the context of most serious criminal offences.

11. *Ex Tempore* Ruling on Costs, 14th November, 2024

11.1 Under s.169(1) of the Legal Services Regulation Act 2015, a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the Court orders otherwise. As set out by Murray J. in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183, the entirely successful party has a *prima facie* entitlement to be awarded the costs of the action.

11.2 In determining whether to depart from this rule, the Court has had regard to the nature and circumstances of the case, the conduct of the parties, including whether it was reasonable for a party to raise, pursue or contest one or more issues, and the manner in which the parties conducted their cases: s.169(1) (a), (b) and (c) of the Legal Services Regulation Act 2015.

11.3 This issue raised here is whether it was reasonable to litigate the main argument. It was submitted that the language of s.6 of the Non-Fatal Offences Against the Person Act 1997 was unusual. In my substantive judgment I used the word anomaly to describe the phrase chosen, namely whether there was a likelihood of a particular event. The issue was not clear cut insofar as there was no direct authority determining the issue. While the Respondent relied on passages in *DPP v. O'Brien* [2016] IECA 146, these comments were *obiter dicta* and there was no detailed consideration of the issue in that case.

11.4 The Respondents urge that, while there was no direct authority, *O'Brien* indirectly addressed the point and this supported the proposition that the provision was constitutional, and indeed there was a wealth of authority suggesting that the words of the section must be read as requiring a *mens rea* of subjective recklessness. From *The People v. Murray* [1977] I.R. 360, to later statutes, including the 1997 statute itself, the case revolved around an anomaly of language which was no more than ambiguous. The phrase was not happily chosen and could lead to a possible interpretation that an objective standard was intended, but all the relevant caselaw suggested otherwise. For those reasons, I will not award any costs to the Plaintiff.

11.5 But this is not the end of the issue. I am asked to consider whether this case was in the public interest. That, in itself, is not persuasive insofar as all matters litigated concerning constitutional interpretation might be described as being in the public interest. The Plaintiff relies, in particular, on *Collins v. The Minister for Finance* [2014] IEHC 79, which applicant recovered 75% of her costs. The novelty of the issue in that case is not comparable to this one, however.

11.6 I gratefully adopt the approach of Simons J. in *Corcoran & Anor v. Commissioner of An Garda Síochána and Anor* [2021] IEHC 11. There, he describes the balancing exercise involved in reconciling the objective of ensuring that litigants are not deterred from pursuing litigation which

serves a public interest with the aim of not encouraging unmeritorious litigation, noting:

"In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights."

11.7 The issue raised here was clearly one of general importance. Litigants who might not be in a position to challenge the effects of a penal statute should not be deterred from bringing similar challenges.

11.8 The case has clarified an obscure point of law. While not a strong case, in that much of the law pointed to a decision against the position for which the Plaintiff argued, the issue raised having been resolved will bring clarity in respect of concerns relevant to personal rights. In that context, despite the relative weakness of the case, I am inclined to make no order as to costs. While not persuaded that the Plaintiff should obtain any portion of his costs, due to the relative obscurity of the issue in this important area of law and the importance that cases which bring clarity to the law be pursued, I am not going to require him to contribute to the Respondent's costs.