This paper attempts to provide a basic road-map for counsel appearing for the defence in District Court criminal proceedings. It aims to provide a handy skeleton for quick reference amidst the often unpredictable maelstrom of summary proceedings.

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Introduction:
The facility of advice, assistance and encouragement from other members is unique to, and the lifeblood of, the Law Library. Usually, the answer to a specific query can be easily addressed by a quick text message or phone call.

As James Dwyer BL and Tony McGillicuddy BL noted in their Bar Council CPD paper of November 2007:

“Collegiality at the bar is a resource that you should avail of.
Your colleagues are required to assist you.”

You each have a directory of your colleagues’ telephone numbers at your fingertips. Use them!

In conjunction with this, it is obviously not a bad idea to have a look at the books. The following textbooks are of particular assistance:

James Woods, District Court Practice and Procedure in Criminal Cases (Limerick, 2010).
Coonan & O’Toole, Criminal Procedure in the District Court (Round Hall, 2011).

Derek Dunne, Judicial Review of Criminal Proceedings (Round Hall, 2011).
Declan McGrath, Evidence (Thomson Round Hall, 2005).

Lynn O’Sullivan, Criminal Legislation in Ireland (Bloomsbury Professional, 2011).
Katie Dawson, Road Traffic Law Handbook (Bloomsbury Professional, 2010).
Abrahamson, Dwyer & Fitzpatrick, Discovery and Disclosure (Thomson Round Hall, 2007).\(^1\)

\(^1\) Chapter 27 addresses specifically the law in relation to disclosure in summary criminal proceedings.
PRIOR TO PROCEEDINGS

i. Getting Instructions:
Roy Keane had a thing or two to say about preparation\(^2\), but the reality of practice in the District Court is that, particularly for remand appearances\(^3\), the completeness and timing of your instructions may be far from ideal.

The level instructions will vary from the very detailed brief, which might resemble a book of evidence including typed memoranda of consultations and summaries of CCTV footage, to the scant text message: “Client is John Ward. Bridewell 46. Get Legal Aid!”

In the event of minimal instructions, it may be of assistance to prepare a checklist of information to be sought or a form (such as that set out at the appendix). The more information you can glean, the less likely wrinkles in your initial instructions will be highlighted as obvious creases during proceedings.

As much basic information as possible ought to be politely insisted upon from your instructing solicitor:

1. What charges are before the Court?
2. What are the charges listed for?
3. What are the names of the prosecuting garda(í), what stations are they from? (see list of garda shoulder badge letters which correspond to particular garda stations at the appendix).
4. Has disclosure been ordered/received?
5. Has an application for Free Legal Aid been made? Is an application for FLA appropriate?

ii. Discussions with the State:
The prosecuting garda or presenting sergeant should be in a position to provide you with further information:

1. (Subtly) Confirm that the charges before the Court tally with your instructions?
2. Does the accused have any previous convictions?
3. Does the accused have any relevant suspended sentences?

A Prison Officer or Custody Garda may be able to assist you with the following information if your client is in custody:

4. Is the accused in custody on some or all of the charges before the Court?
5. Is the accused in custody with consent to bail?
6. Where is he being held? – Is he on remand at Cloverhill Prison or St Patrick’s Institution? If he is serving a sentence, what is his prospective release date?

Making enquiries with certain District Court clerks or the public counters at either the CCJ or the Bridewell can provide a further fruitful source of useful information.

\(^2\) “Fail to prepare, prepare to fail” Roy Keane in an interview with the *Irish Times* on 23 May 2002. A remarkably similar maxim: “failing to prepare is preparing to fail”, was well worn about a decade earlier by the famous Canadian ice-hockey player, Wayne Gretzky.

\(^3\) ie procedural or interlocutory stages in the progression of a District Court case.
iii. Initial Consultation with Client:
If the case is listed for the first time, and you are appearing for the accused - assuming your solicitor has not yet taken detailed instructions from your client and you do not have the benefit of disclosure – the following information should be sought, with one eye on the note that you will later “return” to your instructing solicitor’s office:

1. Client’s date of birth; telephone number(s); address; and PPS number.
2. His family, work and educational circumstances.
3. Any addiction or health issues.
4. His total income and outgoings in rent, maintenance etc.
5. Whilst firmly reminding your client of the burden and standard of proof and the prosecution’s disclosure obligations⁴, ascertain his general attitude to the charges.

iv. To robe or not to robe?
The general rule, following a practice direction of a former President of the District Court is that counsel must appear robed in the District Court, provided that there is a legal practitioners’ or robing room in the particular courthouse.

Counsel are not required to robe during vacation sittings, and should not robe in the children’s court. The following table may be of further assistance:

<table>
<thead>
<tr>
<th>District Court</th>
<th>Robe during terms</th>
</tr>
</thead>
<tbody>
<tr>
<td>CCJ 2, 3 (charge sheet procedure custody cases)</td>
<td>Yes</td>
</tr>
<tr>
<td>CCJ 1, 4 (charge sheet procedure bail cases)</td>
<td>Yes</td>
</tr>
<tr>
<td>CCJ 8 (drunk driving)</td>
<td>Yes</td>
</tr>
<tr>
<td>CCJ 17, 18 (summary trials)</td>
<td>Yes</td>
</tr>
<tr>
<td>Bridewell 44, 46 (summons procedure)</td>
<td>Yes</td>
</tr>
<tr>
<td>Bridewell 45 (Drug Treatment Court)</td>
<td>Yes</td>
</tr>
<tr>
<td>Four Courts 8 (revenue, social welfare, litter etc).</td>
<td>Yes</td>
</tr>
<tr>
<td>Smithfield 55, 56 (Children’s Court)</td>
<td>No</td>
</tr>
<tr>
<td>Cloverhill Court</td>
<td>Yes</td>
</tr>
<tr>
<td>Tallaght Court</td>
<td>No</td>
</tr>
<tr>
<td>Dún Laoghaire Court</td>
<td>No</td>
</tr>
</tbody>
</table>

⁴ Part 9 of the DPP’s Guidelines contains a detailed statement of the DPP’s obligation to make disclosure: see www.dppireland.ie
<table>
<thead>
<tr>
<th>Court</th>
<th>Appearance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Swords Court</td>
<td>No</td>
</tr>
<tr>
<td>Balbriggan Court</td>
<td>No</td>
</tr>
<tr>
<td>Blanchardstown Court</td>
<td>Yes</td>
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<tr>
<td>Naas Court</td>
<td>Yes</td>
</tr>
<tr>
<td>Kilcock Court</td>
<td>No</td>
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<tr>
<td>Athy Court</td>
<td>Yes</td>
</tr>
<tr>
<td>Navan Court</td>
<td>Yes</td>
</tr>
</tbody>
</table>

v. Appearing unattended by a solicitor:
Following Hedigan J.’s judgment in *Heinullian v Governor of Cloverhill Prison* (High Court, 20 May 2010) it is clear that counsel, instructed by her solicitor, has a right of appearance before the District Court, unattended by a solicitor:

“Provided that Counsel is instructed by a firm of solicitors, he or she does not have to be attended in the District Court and has a right of audience in the District Court by virtue of their call to the bar by the Chief Justice of Ireland.”

Further solid foundation for the right to appear unattended can be found at Order 6 rule 1 of the District Court Rules, 1997:

“The following persons shall be entitled to appear and address the court and conduct proceedings –
(a) any party to the proceedings; or
(b) a solicitor for such party; or
(c) a counsel instructed by the solicitor, for such party; or...”

Recent changes to the Code of Conduct of the Bar Council of Ireland put counsel’s right of appearance unattended in the District Court beyond doubt:

“In general, barristers shall be attended in court by their instructing solicitors or their clerks or assistants, but subject to the following exceptions:

(a) When moving an application for an adjournment or a consent order;
(b) When appearing in the District Court, or on District Court Appeals, on the instructions of a solicitor

Barristers so appearing shall furnish a written memorandum of the proceedings to their solicitors.”

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5 *Heinullian v Governor of Cloverhill Prison* (High Court, 20 May 2010), at [6].
1. **Appearing for a remand/adjournment:**
For remand appearances it is helpful from the off to keep what you expect/hope to write on your return at the forefront of your mind.

i. **First Appearance:**
If the prosecution is before the Court by way of summons the matter may be adjourned for disclosure and indication of plea.

If the prosecution is before the Court by way of the charge sheet procedure, it is a requirement that the prosecution adduce evidence of arrest charge and caution [“EACC”] and the accused’s reply. The accused may then be remanded either in custody or on bail for indication of plea pending disclosure.

If the accused is to be remanded in custody such can be for a maximum of 8 days (ie one week, inclusive of both dates); subsequent remands in custody can be for 15 days where there is no consent by the accused or for 30 days with the consent of accused.

ii. **Application for a certificate for Free Legal Aid:**
Counsel should move an application for a certificate for Free Legal Aid:
1. if such an application is appropriate, and
2. the accused instructs such an application.

The criteria for the granting of a certificate are set out in section 2 (1) of the 1962 Act:

“If it appears to the District Court –
(a) that the means of a person charged before it with an offence are insufficient to enable him to obtain legal aid, and
(b) that by reason of the gravity of the charge or of exceptional circumstances it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence before it, ...”

The first step of the test is usually fulfilled by the completion of a signed declaration as to means by the accused. This is often referred to as the “statement of means.” The practice of requiring a statement of means to be “vouched” by

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6 This can be done by way of certificate pursuant to section 6 of the Criminal Justice (Miscellaneous Provisions) Act 1997.
7 In circumstances where an accused is appearing before the District Court for the first time on garda station bail he cannot normally be remanded in custody, unless there is an application to revoke bail.
8 Section 24(1) of the Criminal Procedure Act, 1967, as substituted by s.4 of the Criminal Justice (Miscellaneous Provisions) Act, 1997.
9 See s.24 of the Criminal Procedure Act, 1967 as amended.
10 Criminal Justice (Legal Aid) Act 1962.
11 Counsel ought to exercise caution in relation to submitting the statement of means to the District Court, having clearly explained to the accused that it is a criminal offence to provide any fraudulent or misleading information therein.
production of a social welfare receipt (or other similar hearsay evidence) has been approved following the judgment of the Supreme Court in Joyce. Please find a blank statement of means at the appendix.

iii. Application for Disclosure:
The accused and his legal representatives, as a function of constitutionally guaranteed fair procedures, have a right to relevant disclosure as to the central material elements of the prosecution case.

The right to disclosure in the context of summary proceedings is not all encompassing but rather is interpreted in a common sense manner along the lines of the judgments in Gary Doyle. The particular items sought by way of disclosure are often listed by counsel moving the application. Whether or not nominated items of disclosure are noted by the District Judge, a letter seeking specific disclosure ought to be sent to the superintendent of the relevant garda station by the solicitor for the accused.

The judgment in O’Driscoll establishes that an order for disclosure may also be made prior to an accused’s election – where a right to opt for a trial by jury for certain offences exists, for instance in T&F proceedings [Criminal Justice (Theft and Fraud Offences) Act, 2001].

The following non-exhaustive list of documents might be sought by way of disclosure in summary proceedings:

- Précis (or summary) of the evidence;
- Statements made by prosecution witnesses (obviously, only if such statements are already in existence);
- Other statements taken in the course of the investigation;
- Any statement made by the accused or memo of interview taken;
- Video of interview of the accused;
- CCTV footage;
- A custody record pertaining to the incarceration of the accused in a garda station;
- A certificate from the forensic laboratory (common in drugs cases);

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13 Ibid at [3]: “The first named respondent did not decide that issue then, but adjourned it because it was his practice to require a vouched statement of means.” & at [11]: “The first named respondent was properly careful to ensure that the applicant’s means were insufficient to allow him to retain his own legal assistance. Legal aid in an appropriate case is now recognised as essential in a civilised society but it also imposes substantial burdens on the State and it is entirely appropriate that the means of an applicant for legal aid should be established and verified.”
17 This must be ordered by the court under s.56 of the Criminal Justice Act 2007.
18 A person is entitled to it as of right pursuant to regulation 24 of the Criminal Justice Act 1984 (Treatment of Persons in Garda Custody) Regulations 1987.
A certificate indicating the presence of alcohol or drugs in the accused blood, urine or breath (common in drunken driving cases).

iv. Service of the book of evidence:
The following may be a useful checklist:
- Has the book of evidence [“BoE”] been served on the accused? (Keep this copy for legal representatives to examine - Solicitor may make a photocopy for the accused to read if he so wishes).
- Does the DPP consent to sending forward to the current or next sittings of the Circuit Court?
- Has an alibi warning been administered and explained?
- Application for new Circuit Court bail? (on the same terms as District Court bail? - what were the terms of DC bail?)
- Application for a Circuit Court certificate for Free Legal Aid for a named solicitor + one counsel? (An updated statement of means may be required).
- Is an application for a certificate for FLA for second counsel appropriate? (if the application fails at this juncture, a de novo right to apply lies in the Circuit Court).
- Application for a “section 56 order”[19] for videotapes of interview(s)?

v. Bail application/execution of a bench warrant:
If the accused is before the Court for the execution of a bench warrant, counsel should ascertain
i. If the execution of the bench warrant has been organised “by arrangement” between the accused (usually through his legal representatives) and the gardaí;
ii. Whether the accused may have any good reason for having failed to appear in answer to his bail;
iii. The nature of the substantive charges before the District Court
iv. Whether there are garda objections to bail, and in particular whether there are any section 2[20] objections;
v. Whether there is a section 13[21] failure to appear charge before the Court.

Enquire as to the garda attitude to bail. It is usually the case that there is consent to bail in the District Court, and often the case that garda objections can be met with agreed conditions.

Such conditions might include:
- Residing at a particular address;
- Signing on conditions (Counsel should take a careful note of the required frequency, specified days/times to sign on, nominated garda station).
- Curfew;
- Restriction of movement orders;
- Surrender passport (and undertake not to apply for any travel documents);

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[20] s.2 Bail Act 1997
To stay away from alleged injured party [“IP”];
- Independent surety or cash in lieu of a surety;
- A cash lodgement as part of accused’s own bond.

Counsel should ensure that the accused does not leave court before signing his bail bond.

A bail hearing may proceed in the event of:

i. An objection pursuant to section 2 Bail Act 1997 (only appropriate once the District Judge [DJ] is satisfied that the substantive charge constitutes a “serious offence” and the refusal of bail is “reasonably considered necessary” – section 2 is set out below at the appendix); or

ii. An O’Callaghan objection (fear of flight, interference with witnesses etc).

Prior to a District Court bail hearing counsel should:

- Establish what conditions of bail the accused is willing to abide by.
- Establish what sums of money might be available to the accused for a cash lodgement in his own bond.
- Find out whether any person might be in a position to stand as an independent surety for the accused – Counsel should ensure to note the contact details of any prospective independent surety.
- Ask the prosecution for the basis for any garda objections.
- Ask the prosecution for a detailed history of any bench warrants the accused may have previously taken.
- Find out the number and nature of previous convictions;
- If there are section 2 objections, written notice should be provided to the legal representatives of the accused in advance.

The anatomy of a District Court bail hearing is as follows:

- Garda gives evidence of objections. (Hearsay evidence should only be admitted sparingly when there is a good reason when viva voce evidence cannot be adduced: People (DPP) v Tristan McLoughlin [2010] I IR 590.
- Counsel cross-examines the objecting garda.
- The Defence can call evidence (it is not usual that the accused is called in the DC).
- Counsel makes submissions suggesting conditions that might alleviate any well established prosecution objections.

The amount of the bail bond should be set at a level attainable to the accused:

Broderick v DPP [2006] 2 ILRM 351.

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22 People (AG) v. O’Callaghan [1966] IR 501
vi. **Remand for other purposes:**

Counsel should be aware that she may be asked to appear for “a remand” in circumstances where the matter is not listed for the first time:

- DPP’s directions for consent to summary trial/trial on indictment;
- Consideration of jurisdiction by District Judge.

Or following a “plea” (sentencing hearing) on an earlier court date:

- For a probation service report/restorative justice report/production of receipt for payment of compensation/production of receipt for charitable payment/psychiatric report/results of urinanalysis etc

Remember that a case may be **adjourned**, and an accused may be **remanded** on bail/in custody.
2. **Appearing for a sentencing hearing:**
When a matter is listed for “indication of plea” or for “plea or date for hearing” upon the instructions of an accused either a **guilty plea** is entered and the sentencing hearing will proceed there and then, or a **not guilty plea** is entered and the accused is remanded “for hearing” of his summary trial.

There is a list of suggested aggravating and mitigating factors published by the Law Reform Commission. 24 (This list can be found at the appendix of this paper). Counsel ought to make herself aware of the penalties attaching to the offences before the Court.

i. **Consultation with client prior to “plea”:**
Counsel ought to take up to date instructions from the accused prior to the sentencing hearing. A checklist might include:

- Any mitigating circumstances surrounding the commission of or motivation for the offence(s);
- Family, educational and employment history;
- Addiction and health issues;
- Courses, rehabilitation/therapeutic treatment being undertaken;
- Any reports or testimonials available;
- Willingness to undertake community service/restorative justice;
- Willingness to engage with the Drug Treatment Court;
- Ability to pay fines/compensation/make donation;
- Future aspirations/employment prospects.

ii. **Discussion with garda/state solicitor prior to a sentencing hearing.**
- If you don’t already know, find out the number and nature of the accused’s previous convictions and ensure that there are no relevant suspended sentences.

- Confirm that the prosecuting garda(i) will accept particular facts in cross-examination. This will be of assistance to your client in mitigation.

- Counsel might seek for certain (more minor) charges to be withdrawn in exchange for the defendant’s guilty plea. The District Judge is then likely to make an order striking these charges out.

- If appropriate, on the instructions of your client, counsel might seek for aspects of the prosecution’s version of facts to be omitted by the garda witness giving an outline of the prosecution case. 25

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25 There is nothing improper in counsel agreeing facts with the prosecution. This is specifically provided in the code of conduct at Rule 10.26.
iii. Anatomy of a sentencing hearing:

Prosecution case:
- The prosecuting garda(i) gives an outline of facts.
- Counsel cross-examines garda(i) as to mitigating factors.

Defence case:
- A plea in mitigation is pitched. It is advisable to use the well worn but effective Offence/Offender/Future/List of mitigating factors formula.

(In certain circumstances, the following steps may also be taken by counsel):
- Testimonials/letters can be submitted.
- A witness can be called (relative/social worker) if she can give compelling further mitigation.
- Reference can be made to sentencing authorities. (See appendix).
- Sentencing options might be respectfully suggested to the District Judge.

Judgment of District Court:
- The District Judge usually sentences the defendant there and then;
- Alternatively, the District Court may remand the defendant further for payment of compensation/engagement with the restorative justice programme/the preparation of a probation service report.
- Counsel should remember to ask for recognisances for an appeal to be set following the finalisation of the matter.

iv. Applications for approval of an independent surety:
Pursuant to section 7 of the Bail Act 1997, independent sureties for District Court appeals are required to be approved by the District Court. Counsel moving such an application should endure that the person hoping to be approved meets the following checklist of prerequisites for an independent surety:

- Has no previous convictions;
- Is not presently standing as an independent surety for any other person;
- Has a bank book or a detailed and up to date bank statement in court;
- Has a passport or equivalent proof of identity in court;
- Knows that the sum of money frozen in her account/lodged with the District Court will be lost in the event of the appellant not appearing to prosecute his appeal or not abiding by all of his bail conditions;
- Has a close relationship with the appellant/knows the appellant well.

v. Some sentencing authorities:

People (DPP) v. McCormack [2000] IR 356, 359:

“Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused.”
McCarthy v Brady DJ [2007] IEHC 261:
A persuasive authority that the length of the suspension of a sentence should not exceed the currency of the sentence of imprisonment itself, unless there are stated special reasons. (eg. A six-month sentence of imprisonment ought not to be suspended for a period longer than six months, unless there is a special stated reason for so using).

R v. Mah Wing (Eng CA, 1983):
A term of imprisonment must not be increased merely because being suspended; cited with approval by CCA in People (DPP) v. Loving [2006] IECCA 28:

"When a court passes a suspended sentence, its first duty is to consider what would be the appropriate immediate custodial sentence, pass that and then go on to consider whether there are grounds for suspending it. What a court must not do is pass a longer custodial sentence than it would otherwise do, because it is suspended."

People (DPP) v. Jennings (CCA 15 Feb 1999 per O'Flaherty J.):

“This young man has had a troubled background and he has not taken his hope in the past. But there comes a time in everyone's life, and it is a principle of sentencing as well, where the court detects that it may be make or break time. If he is given this, his last chance perhaps, he will hopefully take it and rehabilitate himself, get employment and become a useful member of the community.”
3. Appearing at a summary trial/hearing:

i. Prior to the summary trial:
Prior to appearing for a defendant in a contested case counsel should remember that the advice of more senior colleagues is a resource to which you are entitled. Do not be reticent about seeking help.

There are three steps to examining disclosure in preparation for a hearing.

1. Counsel should first look at the prosecution case and consider whether there is a prima facie case to answer;
2. Analyse what evidence might be excluded;
3. Take instructions from the accused as to any evidence that might amount to a defence.

(Remember that if your client is convicted you will be required to make a plea in mitigation in the usual manner – be prepared for this).

Once you are in court, speak to the prosecution solicitor or prosecuting sergeant/garda and establish the following:
- How many witnesses do the prosecution intend to call? Who do they intend to call?
- If you have not already seen them, ask for an opportunity to examine the garda notebook entries and the custody record. You are also entitled to view the contemporaneous notes during a hearing before they are referred to by sworn witnesses.
- Seek the exclusion of all other prosecution witnesses whilst each other witness is giving evidence.

ii. The hearing:

The prosecution case:
- The prosecution witnesses give evidence. (Counsel should ensure that this is done in strict accordance with the rules of evidence. An objection should be taken to a witness attempting to adduce evidence which offends any of the rules).
- Succinct leading questions should be put in cross-examination. Compound questions should be avoided.26
- Remember that Irish law requires that – if your client intends going into evidence – you must put your client’s instructions to the prosecution witnesses. They are very unlikely to agree with all aspects of his story. A useful device is to preface/finish such questions putting your case thus: “I understand you don’t agree with this... / ...but you don’t agree with that?”.

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26 See the excellent advice of Iain Morley QC at chapter 13 of his book, The Devil’s Advocate.
The direction stage:
- It may be that there is no case to answer on the facts of the prosecution case. Counsel should consider whether there are grounds for a *R v Galbraith* [1981] submission for dismissal if:
  - i. There is no evidence that the crime alleged has been committed by the defendant; or,
  - ii. The evidence against the defendant is of a “tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.”
- Before embarking on the application, counsel should ensure that the prosecution have acknowledged that their case has been made, i.e. ask “is that the prosecution case?” – the prosecution are generally not entitled to re-open their case at the direction stage: *Bates v DJ Brady* [2003] IEHC 20.
- If counsel has applications for a direction on a number of different grounds, it is both usual and useful that these are enumerated at the outset and then treated in turn.
- If the defence do not intend going into evidence, an application for dismissal of the charges can be made at the *beyond all reasonable doubt* standard immediately subsequent to an unsuccessful *Galbraith* application for dismissal.

The defence case:
In the event of an application for a “direction” to dismiss the case not being successful, your client must decide whether or not he wishes to give evidence. (If your client is in doubt, advise him to weigh up whether or not he considers giving evidence and being cross-examined might improve or disimprove the outcome of the case from his perspective).

Other witnesses may also give evidence for the defence. This might be disclosed to the prosecution in advance as a matter of courtesy, however there is no obligation to do this and it is not advisable to reveal the substance of the evidence they are likely to give.

Counsel should obviously not ask leading questions, and should be well aware of the answers that will be given by witnesses for the defence, prior to asking any questions.

It is undesirable that defence witnesses give evidence which has not been put to witnesses for the prosecution. If this happens, and objection is taken by either the prosecution or the District Judge, counsel can suggest recalling a prosecution witness for the purpose of putting the particular matter to them.

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Closing Submissions:
Closing submissions are made in a similar manner to applications at the direction stage, albeit at this stage of proceedings the standard is guilt beyond all reasonable doubt (rather than Galbraith/no case to answer standard).

A familiarity with relevant caselaw is an extremely useful asset in making submissions at summary trials. The following list of judgments are worthy of some study:
iii. Useful Caselaw for Summary Trials:

**Hearsay:**
*Subramaniam [1956] 1 W.L.R. 965:*
An out-of-court statement is not admissible to prove the truth of its contents.

**Right to silence:**
*People (DPP) v Finnerty [1999] 4 IR 364:*
“No comment” answers to questions at interview are not admissible.\(^{28}\)

**Constitutionality:**
*People (DPP) v Kenny [1990] I.L.R.M. 569:*
Unconstitutionally obtained evidence and any evidence flowing from a breach of a constitutional right is not admissible. Such cannot be admitted by a District Judge on a discretionary basis.

**Identification:**
*People (DPP) v Cooney [1998] 1 I.L.R.M. 321:*
General prohibition on dock identification (unless evidence based on recognition/there is a chain of evidence following an arrest at the scene of incident).

*People (DPP) v Casey [1963] I.R. 33:*
Gives a clear exposition on the dangers of eye witness identification.

*People (DPP) v Mekonnen [2011] IECCA 74:*
Gives a very useful synopsis of Irish authorities on the unreliability of identification evidence generally; the dangers of informal identification; and the desirability of identification by a formal identification parade wherever possible.

**Public Order Offences:**
*Jason Mulligan v DPP [2008] IEHC 334:*
(This was a case stated in relation to a section 24 “POA”\(^{29}\) direction to provide a name and address.) It follows *Galligan & Daly*\(^{30}\) and is an authority that if an accused is being prosecuted for a failure to comply with a garda direction, the accused must first be warned that such a failure to comply is a criminal offence.

*Paul Clifford v DPP [2008] IEHC 322:*
Section 6\(^{31}\) of the 1994 POA\(^{32}\) requires an intent or (subjective\(^{33}\)) recklessness that a breach of the peace will result from “threatening, abusive, or insulting behaviour”. In

---

\(^{28}\) This does not apply if adverse inference provisions of CJA 2007 & OASA are invoked. However, in practice this issue arises almost exclusively in higher courts.

\(^{29}\) Criminal Justice (Public Order) Act, 1994.

\(^{30}\) DPP (Gda Denis Sheehan) v Galligan & Daly (HC, 2 Nov 1995).

\(^{31}\) In section 6 Criminal Justice (Public Order) Act, 1994 summary trials, it is often the case that the height of the prosecution evidence is that an accused told someone to “fuck off” (or equivalent). In this regard *Cohen v California*\(^{31}\) (US Supreme Court) and *Denzel Cassius Harvey*\(^{31}\): (Court of Appeal Criminal Division) provide interesting commentaries.


\(^{33}\) People (DPP) v. Cagney [2004] IECCA 10.
Clifford at para. [7] Charleton J. considers that “a breach of the peace is conduct that goes beyond boisterousness”.

**DPP (Joe Lowney) v Florin Rostas (HC, 31 Jan 12, per M White J.):**
In a prosecution for intimidating/obstructive begging contrary to s.2 of the “POA 2011”, it is a necessary proof that the prosecution adduce evidence of a demand for a licence, permit or authorisation, pursuant to section 1 of the POA Act 2011.

**Theft Offences:**
*Valentine v DPP* [2007] IEHC 267:
The prosecution must prove that the stolen property in question was owned by a particular other person/legal person.

*Maura O’Kelly v DPP* (HC, 20 Feb 1997, per O’Donovan J.):
An accused cannot be convicted of handling stolen goods “otherwise than in the course of stealing” if the evidence points to the possibility that the accused may have actually stolen the item(s) in question.

**Possession:**
*People (DPP) v Ian Ebbs* [2011] IECCA 5:
The actus reus of possession must include knowing possession in the sense that the accused knew he possessed something (in his car boot, pocket etc). This does not extend to knowledge of the substance of the particular item (ie if he knew he had a bag, he is deemed to have fulfilled the actus reus of possession whether or not he knew it contained drugs).

**Arrest/search:**
*Christy v Leachinsky* [1946] 1 K.B. 124:
This is an authority that for a lawful arrest, the appropriate formalities must be observed.

*Dunne v Clinton* [1930] I.R. 366:
The idea that there is no half way house between liberty and arrest. A restraint on liberty, even of an implicit sort, amounts to an arrest.

*DPP v Rooney* [1993] I.L.R.M. 61:
Is an authority that to ground a lawful search a garda must:
   i. give evidence of forming the requisite suspicion; and
   ii. tell the accused of the nature and description of the statutory power which is being invoked to search him.

The case concerned a search of a suspect pursuant to Section 19 of the Dublin Police Act 1842. The garda stopped a man on Talbot Street and asked him if he had money in his pocket. He replied in the negative. The garda stuck his hand in the man’s pocket and found what was alleged to have been a forged £20 note.

*DPP v Brian Farrell* [2009] IEHC 368:
Proof of reasonable suspicion that an accused may possess drugs is required to ground a lawful s.23 “MDA”\textsuperscript{14} search. This is an authority that the reasonable suspicion must be personal to the accused. Evidence that an area is known for misuse of drugs is not sufficient to meet the requirement.

\textit{People (DPP) v McFadden [2003]} IECCA:
The reason for a search must be explained to an accused. (This case concerned a search in custody at a garda station. The CCA held that Mr McFadden should have been told of the reason why he was being searched; and the reason why the contents of his wallet were being examined): per Keane CJ: “...the fundamental requirement of our law that a police officer that is carrying out a search of a person without his consent informs that person for the legal justification for so interfering with his constitutional rights...”

\textit{DPP (Stratford) v Fagan [1994]} 2 ILRM 349:
The Supreme Court held that gardaí have a common law power to stop motor vehicles, as part of their investigatory role. This ratio applies narrowly to stopping motor vehicles to ask questions. There is no common law power to stop and search vehicles.

\textbf{Search Warrants:}
\textit{People (DPP) v Mallon [2011]} IECCA 29:
Examines the threshold for technical deficiencies that will invalidate a search warrant. O’Donnell J, gives a very useful summary of earlier judgments.

\textbf{Misuse of Drugs Act:}
\textit{Kelly v DJ Dempsey [2010]} IEHC 336:
An authority that for offences created pursuant to statute – in this case s.15 MDA (supply of drugs) – the regulations creating the offence must be adduced in evidence. A DJ purporting to take judicial notice of the existence of such regulations is acting ultra vires.

\textbf{Opinion Evidence:}
\textit{AG (Ruddy) v Kenny (1960)} 94 ILTR 185:

“...a witness may testify only to the existence of facts which he has observed with one or more of his own five senses. It is for the tribunal of fact – judge or jury as the case may be – to draw inferences of fact, form opinions and come to conclusions.”

There is a prohibition on witnesses giving evidence as to opinion evidence as to facts in issue, or opinion as to the ultimate issue.

(eg. In a s.6 POA hearing, a witness for the prosecution may boldly give evidence that an accused was “acting in a threatening and abusive manner”, without actually giving any material evidence to ground such an opinion. This evidence is therefore inadmissible. Without further admissible evidence, an application for a Galbraith dismissal would be appropriate).

\textsuperscript{14} Misuse of Drugs Act, 1977 (as amended).
AFTER PROCEEDINGS

i. Consultation with client:
After any type of District Court proceedings counsel should take care to:
   1. Explain the result and the next step of proceedings to the client.
   2. Take a note of his (up to date) telephone number & address.
   3. Give client a note of date, time and venue for next court appearance.

ii. Note of proceedings/“return”:
This is perhaps the most important aspect of your appearance from your instructing solicitor’s perspective. Attention to detail is very important so that the advocate appearing on the next court date is fully informed as to all aspects of the matter before the Court.

According to 5.15 of the code of conduct a “written memorandum of proceedings” should be “furnished forthwith” to your instructing solicitor. Instructing solicitors expect them back on the same day (some to a militant extent).

The format is a matter of personal style. Whether it be in the format of a letter or a memorandum, counsel’s note of proceedings ought to contain the following details:

- Name of client;
- Court location, date and time;
- Name(s) of prosecuting garda(i);
- Charges before the Court;
- Legal Aid number;
- Court orders;
- A succinct summary of proceedings;
- Next court location/date/time and the purpose/listing for next appearance.

Including the client’s contact details; personal circumstances; and previous conviction history can also be very useful.

It is often said that Judges, accused persons and solicitors notice and are impressed by counsel who pay attention to details.

iii. Split Fee Legal Aid:
It is most important that fee notes, no matter how small, are sent to each solicitor at the end of each month. If you don’t send notes for fees regularly you are much less likely to be paid regularly.

The Bar Council have previously advised that reminder notes should be sent to instructing solicitors after a three month delay in payment of fees.

The split fee rates are as follows:

- remand: €25.20
iv. BL certificates for Free Legal Aid in the District Court:
Following the judgment in Carmody\textsuperscript{35} an ad hoc scheme was set up for the payment of counsel for appearances on Free Legal Aid.

The proper procedure is that a written application is made by your instructing solicitor. Such applications can and should only be made in sufficiently long/complicated prosecutions.

Counsel assigned must appear on all court dates. The fee covers all such appearances. Counsel assigned on a District Court BL certificate are currently remunerated at half the Free Legal Aid fee for an arraignment in the Circuit Court.

The relevant explanatory memorandum and forms are at the appendix.

\textsuperscript{35} Paschal Carmody v DPP [2010] IEHC 7.
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BL District Court Form

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<td>Garda(i):</td>
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<td>Sheets/Case n.:</td>
<td>Judge:</td>
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<td>Registrar:</td>
<td>Legal Aid No.(s):</td>
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Next date:

Dob. Tel. Add.

Consultation:

Previous Convictions:

Proceedings:

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Result:
(1) Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.

(2) In exercising its jurisdiction under subsection (1), a court shall take into account and may, where necessary, receive evidence or submissions concerning—

(a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,

(b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,

(c) the nature and strength of the evidence in support of the charge,

(d) any conviction of the accused person for an offence committed while he or she was on bail,

(e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court,

(f) any other offence in respect of which the accused person is charged and is awaiting trial, and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the Misuse of Drugs Act, 1977.

(3) In determining whether the refusal of an application for bail is reasonably considered necessary to prevent the commission of a serious offence by a person, it shall not be necessary for a court to be satisfied that the commission of a specific offence by that person is apprehended.
STATEMENT OF MEANS
OF AN APPLICANT FOR FREE LEGAL AID IN A CRIMINAL CASE
As an applicant for free legal aid, you are hereby required in pursuance of section 9 of the Criminal Justice (Legal Aid) Act, 1962, to furnish on this form particulars relevant for determining whether your means are insufficient to enable you to obtain legal aid.

You must enter true and correct particulars against each numbered heading. If the answer is "None" or "No", this must be written in.

1. Name of Applicant:

2. Full Postal Address:

3. State whether single, married, widow/er:

4. Occupation:

5. Average weekly income from all sources, including overtime €

6. If you pay rent, please state weekly amount €

7. If you own your own house, please state amount of (a) Ground Rent (annual) € (b) Rates € (c) Monthly Mortgage Repayments (if any) €

8. What persons do you support? State ages of school-going children:

9. What money have you, or is likely to be available to you that could be used for obtaining legal aid at your own expense?

10. What other assets have you that could be used for obtaining legal aid at your own expense?

11. If you are under twenty-one, are your parents or guardian able and willing to provide legal aid for you or to assist you in providing yourself with legal aid? YES -or- NO

DECLARATION*
I declare that to the best of my knowledge and belief that the above particulars are true.

Date: __________________________ Signature: __________________________ Applicant

*WARNING: If any person in furnishing this statement knowingly makes any false statement or false representation he is liable, on summary conviction, to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding six months or to both the fine and the imprisonment.
LRC Report on Sentencing, July 1996:

CHAPTER 3: AGGRAVATING AND MITIGATING FACTORS

3.1
In the previous chapter, reference was made to the factors set out in the Consultation Paper which may aggravate or mitigate offence seriousness in the deserts calculation.

3.2
These factors were:

**Aggravating factors:**

1. Whether the offence was planned or premeditated;

2. Whether the offender committed the offence as a member of a group organised for crime;

3. Whether the offence formed part of a campaign of offences;

4. Whether the offender exploited the position of a weak or defenceless victim or exploited the knowledge that the victim's access to justice might have been impeded;

5. Whether the offender exploited a position of confidence or trust, including offences committed by law enforcement officers;

6. Whether the offender threatened to use or actually used violence, or used, threatened to use, or carried, a weapon;

7. Whether the offender caused, threatened to cause, or risked the death or serious injury of another person, or used or threatened to use excessive cruelty;

8. Whether the offender caused or risked substantial economic loss to the victim of the offence;

9. Whether the offence was committed for pleasure or excitement;

10. Whether the offender played a leading role in the commission of the offence, or induced others to participate in the commission of the offence;

11. Whether the offence was committed on a law enforcement officer;

12. Any other circumstances which:
(a) increase the harm caused or risked by the offender, or
(b) increase the culpability of the offender for the offence.
Mitigating factors:

1. Whether the offence was committed under circumstances of duress not amounting to a defence to criminal liability;

2. Whether the offender was provoked;

3. Whether the offence was committed on impulse, or the offender showed no sustained motivation to break the law;

4. Whether the offender, through age or ill-health or otherwise, was of reduced mental capacity when committing the offence;

5. Whether the offence was occasioned as a result of strong temptation;

6. Whether the offender was motivated by strong compassion or human sympathy;

7. Whether the offender played only a minor role in the commission of the offence;

8. Whether no serious injury resulted nor was intended;

9. Whether the offender made voluntary attempts to prevent the effects of the offence;

10. Whether there exist excusing circumstances which, although not amounting to a defence to criminal liability, tend to extenuate the offender's culpability, such as ignorance of the law, mistake of fact, or necessity.

11. Any other circumstances which:
(a) reduce the harm caused or risked by the offender, or
(b) reduce the culpability of the offender for the offence.
Drug Treatment Court Eligibility criteria.*

*(As published by the Courts Services).

The court is open to receive participants who meet the following criteria;

- be 18 years old or older;
- have pleaded guilty or been found guilty in court of a non-violent criminal offence;
- be liable to be sentenced to a term of imprisonment if convicted;
- be dependent on the use of prohibited drugs and/or prescribed drugs;
- have an address within the catchment area –
  - Any Place North of the River Liffey in County Dublin or
  - Resident in Dublin 2, 4, 6 or 8 and currently receiving treatment or entitled to receive treatment in the HSE’s Castle Street Treatment Centre.

Participants should be remanded to Court 45, Chancery Street, Dublin 7 any Wednesday at 2pm.

The Court sits every Wednesday, except during August.
District Court Area of ......................................

Legal Aid Certificate No. ..............................................

District No. ..............................................................

Case No. ..............................................................

Application having been made by or on behalf of

..............................................................................................................................

who is charged before this Court with

..............................................................................................................................for a Legal
Aid (District Court) (Counsel) Certificate, and it appearing to the Court that

(a) the means of the person before it are insufficient to enable him/her to obtain legal representation by counsel, and

(b) the solicitor has established that the gravity of the charge and complexity of the case, as well as any other exceptional circumstances make it essential in the interest of justice that he or she should have the assistance of counsel in the preparation and conduct of his or her defence of the case before it,

the Court hereby directs the assignment of counsel in addition to the solicitor already assigned pursuant to the Legal Aid (District Court) Certificate.

Dated this ................ day of ................................................., 20...........

Judge of the District Court assigned to the said District

36 Insert Number of Legal Aid (District Court) Certificate granted under Section 2 of the Criminal Justice (Legal Aid) Act 1962
L.A. 1(B)
CRIMINAL LEGAL AID
NON-STATUTORY DISTRICT COURT (COUNSEL) SCHEME

CLAIM FOR FEES - BARRISTER ONLY (DISTRICT COURT OR AN APPEAL TO THE
CIRCUIT COURT)

PART 1

1. Name and Legal Aid Certificate Number of person (please use block capitals) in
respect of whom Legal Aid (District Court) (Counsel) certificate was granted.

<table>
<thead>
<tr>
<th>Surname</th>
<th>Forename</th>
<th>L.A. Cert. No, 37</th>
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2. Name and location of Court which granted legal aid certificate:

..........................................................................................................

Date granted: ____/___/20___

District Court Case Number:

3. Name of Solicitor assigned pursuant to the Legal Aid (District Court) Certificate.

..........................................................................................................

4. State in general terms, the charge(s) in respect of which legal aid was assigned.

..........................................................................................................

5. Barrister’s Fee Claimed: € __________

(NB The fee payable is a single fee per case)

Date(s) of appearances: ...........................................................................

I declare that:

(i) the particulars given by me in this form are correct,
(ii) that I have not received, nor will I accept any payment towards the cost of this case
from, or on behalf of, the defendant(s), (iii) that I have not made any claim for payment to
which I am not entitled,
(iv) that I am liable for V.A.T.,

37 Insert Number of Legal Aid Certificate granted under Section 2 of the Criminal Justice (Legal Aid)
Act 1962
(v) that in a case to which Regulation 7(4) applies, the Court certified for the granting of more than one certificate, and
(vi) I further declare that I was on the Criminal Legal Aid panel when assigned to this case.

Signed: ........................................ (Barrister assigned) Payee No.:

........................................

Name in capitals: ................................................................. Date:

____/____/20___

Address of Barrister:

.................................................................

........................................

THIS CLAIM FOR FEES MUST BE ACCOMPANIED BY THE LEGAL AID (DISTRICT COURT) (COUNSEL) CERTIFICATE

Part 2

(to be completed by the District Court Clerk, or Court Registrar, as the case may be, of the Court in which the case was heard)

I certify that the information given in reply at Nos. 1 - 4 of Part 1 (over) of this form is correct, that the Court directed the assignment of counsel and that the barrister who has signed Part 1 of this form was the counsel instructed and attended the Court sitting(s) on each of the dates listed for which a single fee is claimed at No. 5 of Part 1 of this form.

I certify that no application was made, in the opinion of the Court, for the barrister’s convenience.

I further certify that the following is the reason(s) given by the Court for deeming that more than one certificate has been granted (Regulation 7(4)):

.................................................................................................................................

.................................................................................................................................

Signed: ..........................................Office held: ........................................ Date:

____/____/20___.

Part 3

(for use in the Department of Justice and Law Reform)

Name

Amount €
Approved for payment in the sum of: €

Signature of approving officer: .............................................. Date: ___/___/20___.

Entered by: .............................................................. Date: ___/___/20___.

Checked by: .............................................................. Date: ___/___/20___.

NOTES

Where one Court grants the certificate(s) for free legal aid in respect of which a claim is made on this form and the case(s) is/are heard in a different Court, the barrister concerned should lodge the claim with the Officer of the Court which heard the case(s).

A claim form should be completed in respect of each certificate for free legal aid granted, except:

- Where two or more certificates are granted to a person and the cases in relation to which they are granted are heard together or in immediate succession and, in the absence of a direction otherwise by the Court, one certificate is deemed, in accordance with the provisions of Regulation 7(4), to have been granted, one claim only should be completed;

- Where certificates for free legal aid have been granted on behalf of two or more persons whose cases have been heard together, one claim form only should be completed in respect of such certificates.

This form, when completed, should be forwarded to:
The Accountant, Criminal Legal Aid Payments Section, Department of Justice and Law Reform, Financial Shared Services, Deerpark Road, Killarney, County Kerry.
THE DISTRICT COURT  
AN CHÚIRT DÚICHE

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS  
(GARDA JAMES DWYER)  
PROSECUTOR

V

BRIAN STORAN  
DEFENDANT

SUBMISSIONS ON BEHALF OF THE DEFENDANT

Background:
The defendant stands charged before Dublin District Court number 3 pursuant to charge sheet number 112233 that:

“On the 29/04/2013 at Church Street Dublin 7 a public place, in said District Court area of Dublin Metropolitan District, did use or engage in threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been occasioned.

Contrary to section 6 of the Criminal Justice (Public Order) Act, 1994”.

The prosecution case has closed and the hearing stands adjourned before Judge Bowman to Dublin District Court 17 on 29th May 2013 at 10.30am.

The Evidence of Garda James Dwyer:
Garda Dwyer gave evidence that he was on beat patrol on Church Street at 4.10pm on 29th April 2013. He approached and challenged another unknown male and proceeded to carry out a search on this man. The accused seemed agitated.

When Garda Dwyer concluded this search he was joined by another garda colleague. They turned their attention to the defendant. Whilst Garda Dwyer and his colleague interacted with the defendant he became increasingly agitated. Garda Dwyer told the Court that the defendant asked him to stop the search of the first male, saying “the state of you in your poxie Doc Martins and all”. He said that the defendant was shouting at this stage. Garda Dwyer then asked the defendant to leave the scene. The defendant continued to shout at him but did not leave. Garda Dwyer said that he made repeated requests of the defendant to desist in his behaviour but the defendant continued to argue with the garda. Garda Dwyer gave evidence from his
contemporaneous notes that the defendant said: “What is it guard? Watzit?”; “Go away out of it, the mouldy head on you guard”; and “see y’after the poxie steel-toe-docs up on you”.

Garda Dwyer then gave evidence that the defendant told him to “fuck off”.

Evidence was given that the defendant remained agitated and did not comply with the garda direction to leave the area. He was then arrested for an offence contrary to section 8 of the Criminal Justice (Public Order) Act, 1994 [hereafter: “the Act”]. Under cross-examination Garda Dwyer accepted that it was the utterance of “fuck off” rather than the other more mild insults that caused him to arrest the defendant.

Application for a direction of “no case to answer”:
The core of the defence application for a direction is the contention that the use of the words “fuck off” by a member of the public to a member of An Garda Síochána does not per se amount to, or give rise to an inference of, a conscious contemplation to provoke or occasion a breach of the peace.

Section 6 Public Order:
For a conviction pursuant to section 6 of the Act, the prosecution must prove the following constituent elements of the offence:

i. A person in a public place;
ii. uses threatening, abusive or insulting words, or engages in threatening, abusive or insulting behaviour;
iii. with an intent to provoke a breach of the peace, or being [subjectively] reckless that a breach of the peace might be occasioned.

Breach of the Peace:
In Paul Clifford v. DPP, Mr Justice Peter Charleton expresses what constitutes a breach of the peace:

“A breach of the peace implies conduct which goes beyond boisterousness. Instead, the offence involves a situation which imminently threatens a person, through the conduct of those involved in the breach of the peace, but not necessarily directly, of being harmed through an assault, an affray, a riot, an unlawful assembly or any other serious disturbance...

“Fuck Off”:

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38 Criminal Justice (Public Order) Act, 1994
6.—(1) “It shall be an offence for any person in a public place to use or engage in any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace may be occasioned.”
40 [2008] IEHC 322.
41 ibid at paragraph 7.
There is no doubt that the defendant’s use of these words in his dealings with the prosecuting garda was inappropriate, unnecessary and regrettable. It may be that the defendant’s continued insistence to tell the garda to fuck off, after Garda Dwyer requested him to desist, might constitute “offensive conduct” as contemplated contrary to section 5 of the Act.\(^{42}\)

However, it is submitted that the “agitated” defendant’s use of these words does not amount to an intention to provoke a breach of the peace, or a subjective recklessness that a breach of the peace might be occasioned. It is perhaps a regrettable but unavoidable truth that iterations of the word “fuck” - as noun, adjective, verb or adverb - litters casual conversations across modern Ireland.

In *Cohen v California*\(^{43}\) The United States Supreme Court overturned a conviction for “maliciously and wilfully disturb[ing] the peace or quiet of any neighbourhood or person ... by ... offensive conduct”\(^{44}\); Mr Cohen, who did not support American involvement in the Vietnam war, had worn a jacket emblazoned with the words “Fuck the draft” into a Los Angeles County Courthouse.

In allowing the appeal the Court relied on the *ratio* of one of its earlier judgments\(^{45}\), that:

> “[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures - and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.”\(^{46}\)

The Supreme Court held that “the single four-letter expletive” could not be made a criminal offence in line with constitutional guarantees for Free Speech\(^{47}\).

> “For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric.”\(^{48}\)

**Denzel Harvey v DPP:**\(^{49}\)

The factual basis of the English Court of Appeal’s judgment in *Denzel Harvey* is very similar to the facts of the instant prosecution:

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\(^{42}\) section 5(3) Criminal Justice (Public Order) Act, 1994: ‘...“offensive conduct” means any unreasonable behaviour which, having regard to all the circumstances, is likely to cause serious offence or serious annoyance to any person who is, or might reasonably be expected to be, aware of such behaviour’.

\(^{43}\) 403 US 15.

\(^{44}\) The Los Angeles Municipal Court conviction contrary to the Californian Penal Code § 415 had been affirmed by the Court of Appeal of California.

\(^{45}\) *Baumgartner v. United States*, 322 US 665, 673-674 (1944) *per* Frankfurter J.

\(^{46}\) *Cohen v California*, 403 US 15 at paragraph 26.

\(^{47}\) First & Fourteenth amendments of the Constitution of the United States.

\(^{48}\) *ibid* at paragraph 25.

\(^{49}\) [2011] EWHC Crim B1, 17 November 2011 *per* Bean J.
English police were informed that a group of young people might have been in possession of cannabis. The police officers decided to search three men outside a block of flats. Mr Harvey objected and said, "Fuck this man, I ain't been smoking nothing". The policeman told him that if he continued to swear he would be arrested for an offence under section 5 of the English Public Order Act 1986 (hereafter “the English Act”). The police officer searched the appellant but found no drugs, whereupon the appellant said, "Told you, you won't find fuck all". The officer again warned him about swearing and proceeded to search the other two men. A group of young people had gathered around them. The officer then used his radio to carry out a name search to see if any of the group was wanted by the police. He asked the appellant if he had a middle name and the appellant replied, "No, I've already fucking told you so".

Section 5 of the English Act\(^50\) requires proof of the following elements for the offence to be made out:

1. use of threatening, abusive or insulting words or behaviour; or disorderly behaviour; or displaying any threatening, abusive or insulting representation;
2. within the hearing or sight of a person likely to be caused alarm or distress.

The threshold for criminality under section 5 of the English Act is clearly lower than that under section 6 of the Act.

Section 5 of the English Act merely requires proof that a person within earshot might be likely to be caused alarm or distress; whilst section 6 of the Act requires proof of mens rea of intention to provoke a breach of the peace or subjective recklessness that such might be occasioned.

The Court of Appeal in Harvey\(^51\) found that:

"...there was no evidence in this case on which they could have concluded that either of the police officers had been caused or was likely to have been caused harassment, alarm or distress as a result of the use of those words..."\(^52\)

"... it is wrong to infer in the absence of evidence from any of them that a group of young people who were in the vicinity would obviously have experienced alarm or distress at hearing these rather commonplace swear words used..."\(^53\)

The Arrest & Section 8 Direction:

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\(^{50}\) Section 5, Public Order Act, 1986:
(a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
(b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

\(^{51}\) Denzel Harvey v. DPP [2011] EWHC Crim B1, 17 November 2011 per Bean J

\(^{52}\) ibid at page 5.

\(^{53}\) ibid at page 5.
For a section 8 direction under the Act a suspicion with reasonable cause that a relevant offence is being committed is required. Both the charge sheet and the evidence of Garda Dwyer indicate that he felt he had reasonable cause to suspect that the defendant was committing a section 6 breach of the peace offence. For the reasons outlined above, the Court is invited to conclude that the section 8 direction was not validly grounded.

Conclusion:
The defence submission that there is no case to answer is grounded in the second limb of *Galbraith*\(^{55}\): there is insufficient evidence before the Court that the defendant’s use of the words “fuck off”, to a member of An Garda Síochána during a search, prove that he had the requisite *mens rea* to cause a breach of the peace.

Manda Tory–Lecture BL
29\(^{th}\) April 2013.

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\(^{54}\) Criminal Justice (Public Order) Act, 1994, section 8
(1) Where a member of the Garda Síochána finds a person in a public place and suspects, with reasonable cause, that such person -
(a) is or has been acting in a manner contrary to the provisions of section 4, 5, 6, 7 or 9, or
(b) without lawful authority or reasonable excuse, is acting in a manner which consists of loitering in a public place in circumstances, which may include the company of other persons, that give rise to a reasonable apprehension for the safety of persons or the safety of property or for the maintenance of the public peace, the member may direct the person so suspected to do either or both of the following, that is to say:
(i) desist from acting in such a manner, and
(ii) leave immediately the vicinity of the place concerned in a peaceable or orderly manner.

(2) It shall be an offence for any person, without lawful authority or reasonable excuse, to fail to comply with a direction given by a member of the Garda Síochána under this section.

BETWEEN

DIRECTOR OF PUBLIC
PROSECUTIONS (GARDA
JAMES DWYER)

PROSECUTOR

V

BRIAN STORAN

DEFENDANT

SUBMISSIONS ON BEHALF
OF THE DEFENDANT

Stuart McKenna Ó Dulaing Sol.s,
Solicitors for the Defendant,
Parkgate Street,
Dublin 8.
Mr George Dowling Sol.,
Stuart Ó Dúnlaing McKenna Sol.s,
Parkgate Street,
Dublin 8.

Monday, 29th April 2013.

Re.  DPP (Gda James Dwyer) v. Brian Storan
District Court Appeal No. A.2013/1234 4321/2013
Circuit Court 16.

George,

I confirm that I appeared for Mr Storan in the above matter before Judge Bowman this morning. Mr Dean Kelly Sol. appeared for the DPP.

Proceedings:
A certificate for Free Legal Aid is granted and Ms Stuart assigned. RCB to CCJ Circuit Court 16 on Thursday, 30th May 2013 at 12pm for hearing. (Estimated at 2 hours).

I spoke with Mr Storan after proceedings. He instructs that he neither wishes to put the prosecution on proof of ownership of the items which are the subject of the handling charges; nor does he want to contest the legality of his detention.

District Court Orders:
s.17 T&F (handling stolen bicycle): 4 month sentence suspended for 24 months;
s.17 [x2] T&F: TIC.

I appreciate your instructions,

____________________
Lionel Hutz.
### Memorandum of Appearance

<table>
<thead>
<tr>
<th>Client:</th>
<th>Brian Storan</th>
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<tbody>
<tr>
<td>Solicitor:</td>
<td>George Dowling</td>
</tr>
<tr>
<td>Charge(s):</td>
<td>ss 3, 15 MDA</td>
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<td>Case No.(s):</td>
<td>-</td>
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<tr>
<td>Your/our ref.:</td>
<td>-</td>
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<tr>
<td>Court:</td>
<td>CCJ 17</td>
</tr>
<tr>
<td>Date/Time:</td>
<td>Mon, 29 Apr 2013, 10.30am</td>
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<td>Garda(s):</td>
<td>James Dwyer</td>
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<td>Judge:</td>
<td>Michael Bowman</td>
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<td>12/12345 (DS)</td>
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**Court Orders:**
- s.15 MDA: dismissal;
- s.3 MDA: 2 months suspended for 9 months.

**Proceedings:**
- Registrar: Brendan Grehan.
- I speak to Mr Storan in custody. He confirms that he wishes to contest the section 15 supply charge but does not want to challenge his possession of the crack cocaine. I also speak with his mother.
- A guilty plea is entered to section 3 MDA.
- Garda Dwyer gives evidence in respect of the section 15 charge and is cross-examined.
- Mr Storan gives evidence and is cross-examined.
- Closing submissions are made citing People (DPP) v Cronin, (2003, CCA per Hardiman J.): “it is not only where the probabilities are equal that the accused must be afforded the benefit of the doubt”.
  
  “There is no doubt, on the basis of the two cases just cited, that it is an inadequate statement of the law to say that the inference most favourable to the accused is to be drawn only where there are two or more conclusions which, with equal plausibility, can be drawn from a particular set of facts. The accused is entitled to have the inference most favourable to him drawn unless it has been excluded by the prosecution beyond reasonable doubt. This is unaffected by the fact that the jury may consider the more favourable inference much the less likely of those available. It is, of course, true that where there are two conclusions of equal plausibility, the accused is entitled to have the one most favourable to him drawn, but that is not the whole story: he continues to have this entitlement, even if the favourable inference is relatively unlikely, unless it has been excluded beyond reasonable doubt.”.
- Judge Bowman makes an order to dismiss the section 15 MDA charge.
- A plea in mitigation is entered in respect of the section 3 conviction.
- Judge Bowman indicates a 2 month sentence suspended for 12 months. I make submissions in respect of the length of the suspended sentence: McCarthy v DJ Brady (2007, HC).
- Judge Bowman reduces the length of the suspension: 2 months imprisonment suspended for 9 months.
- Recognisances are fixed in his own bond of €200.
- Mr Storan is very pleased with the result which does not affect his prospective June 14th release date. He does not wish to pursue an appeal.
Memorandum of Appearance

Client: Brian Storan
Solicitor: George Dowling
Charge(s): s.15 MDA [x2]
Case No.(s): 2013/123456
Your/our ref.: BMS 001/001 | SOD 103

Court: CCJ 1
Date/Time: Tues, 29 Apr 2013, 10.30am
Garda(s): James Dwyer | Sundrive Road
Judge: Michael Bowman
Legal Aid No.: 2013/12345 (GD)

Court Orders: RCB to CCJ 18 on Tues, 7 May 2013 at 10.30am for mention to fix:
Tuesday, 21 May 2013 at 10.30am for hearing, peremptory against Pros.

Mr Storan, b. 9 Nov 1988, resides at 333, Parkgate Street, Dublin 8.

Proceedings:
- Clerk: Deirdre.
- Garda Dwyer moves an application to vacate the May 7th hearing date (estimated at a full day).
  Notice of the application was received by your office on April 24th. Garda Dwyer tells the Court that Sergeant Dean Kelly (MIC) will be outside of the jurisdiction.
- I do not object to the application.
- RCB to CCJ District Court 18 on Tuesday, 7th May 2013 at 10.30am for mention to fix:
  Tuesday, 21st May 2013 at 10.30am for hearing, peremptory against the prosecution.
- Mr Storan understood the result and took a note of his next court date.
To: Mr George Dowling Sol.,
    Stuart Ó Dunlaing McKenna Sol.s,
    Parkgate Street,
    Dublin 8.

Re. District Court Free Legal Aid Fees.

Monday, 29th April 2013.

George,

Please find a note of fees for April District Court Appeal appearances below:

<table>
<thead>
<tr>
<th>Date</th>
<th>Client</th>
<th>Court</th>
<th>Our ref.</th>
<th>Type</th>
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<td>Brian Storan</td>
<td>CCJ 18</td>
<td>SOD 102</td>
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<tr>
<td>29 Apr 13</td>
<td>Brian Storan</td>
<td>CCJ 1</td>
<td>SOD 103</td>
<td>remand</td>
<td>€ 25.00</td>
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</tbody>
</table>

Subtotal  € 50.00
VAT @ 23%  € 11.50
Total     € 61.50

I appreciate your instructions.

________________
Lionel Hutz.

VAT NUMBER IE/1234567A