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OPINION

The Suit that Does Not Really Fit

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At just after 3pm on 15 August 1998 in a busy shopping street in Omagh, Northern Ireland, 29 people were murdered in a terrorist car-bomb atrocity. Most of the people blown up were women and children. The murder victims were both Protestant and Roman Catholic, and included a woman celebrating her 65th birthday with her pregnant daughter and 20-month-old granddaughter.

No one stands convicted of this crime¹. Years later, as the criminal law was seen to be ineffective in condemning the guilty, relatives of the victims brought a civil action. Four men and the Real IRA were recently held liable for the homicides.² Declan Morgan J awarded more than £1.6 million in damages to 12 relatives of 29 people but the compensation is unlikely ever to be paid and, in any event, the action was not motivated by money but by a quest for court justice.

Victor Barker, whose 12-year-old son, James, was killed in the attack said:

We've finally achieved some justice for the families. I will never get over the loss of my son, but I have done what I could for him and I'm proud that I stood up for him.

He noted that in 1998 the Prime Minister had pledged to convict the killers, leaving not one stone unturned, and added, 'Well, he clearly did because the families had to pick up all those stones and bring them to court'.³

The Omagh litigation is part of a growing use of the *civil* process to pin a legal judgment of liability on culprits who have not, but arguably should have been, convicted by the criminal law. That is not an index of a healthy legal system. The courage and perseverance of those who brought the Omagh civil action, and their legal win, are noteworthy but the victory is a limited one. The criminal law and the civil law have different purposes.

The purpose of the criminal law, according to Blackstone's elegant encapsulation, is to condemn and punish acts which 'strike at the very being of society'. He said that civil wrongs were wrongs that affected 'individuals, considered merely as individuals' whereas crimes were

* The views expressed in this article are those of the author and do not necessarily reflect the views of The Open University or *The Journal of Criminal Law*.

1 Colm Murphy was sentenced to 14 years in prison in January 2002 for conspiracy to cause the explosion, but the conviction was overturned on appeal and he is awaiting a retrial.

2 *Breslin and Others v McKenna and Others* [2009] NIQB 50 (Omagh Bombing case).

3 *The Times*, 9 June 2009.

wrongs which struck at the whole community 'in its social aggregate capacity'.⁴

If the civil justice system is being used in a makeshift way only because the criminal justice system has failed, the result is unsatisfactory. A civil suit does not really fit these circumstances.

It has been suggested that the Omagh Bombing case will promote a wider belief that civil actions can succeed against perpetrators when the traditional use of a criminal prosecution has failed.⁵ If that is so, there is likely to be a reduction not an enlargement of legal justice over time. The registration on the public record of some serious crimes will be hidden in the files of civil judgments. Another possibility is that some serious crimes will result in prosecutions and convictions, but only after a civil suit. Thus the civil action becomes a sort of rough rehearsal for a prosecution. I shall mention some cases like that below, but such cases just raise the question why citizens should bear a burden of evidence-gathering and argument formulation that could have been carried out by police officers or prosecutors.

An early use of the civil process to get a law court to condemn what was essentially a serious crime came in the case of Michael Brookes. In a civil case in 1991, a High Court judge ruled that Michael Brookes had killed Lynn Siddons, a 16-year-old stabbed 40 times in 1978. Her family were awarded £10,641 damages.⁶ Rougier J, however, applied the criminal standard of proof (that the case must be proven beyond a reasonable doubt) saying that a civil action for murder demanded no less.⁷ The original police investigation and case against another defendant were found to have been completely bungled, but, after the civil case, Brookes was later convicted following a fresh criminal investigation of the murder.⁸

In 1995, Linda Griffiths went to the civil courts in an action alleging that she had been raped by Arthur Williams, a former chef at the Dorchester, while working for him in 1991 as a dishwasher. The Crown Prosecution Service (CPS) had decided not to prosecute Mr Williams. In the civil case against Mr Williams for trespass against the person (arising from the same incident), Ms Griffiths won and was awarded £50,000 damages.⁹

In 1997, not long before O.J. Simpson was found liable in a Californian civil court for the homicide of his former wife Nicole and her friend Ronald Goldman, a civil summons relating to homicide was issued in London by the father of a murdered doctor, Joan Francisco. The following year, Alliot J identified Tony Diedrick as the killer of Dr

4 *Commentaries on the Laws of England*, vol. IV, 1, 5; Wayne Morrison (ed.) (Cavendish: London, 2001).

5 See 'Families of victims triumph in civil lawsuit over Omagh bombings', *The Times*, 9 June 2009.

6 *The Times*, 1 October 1991, 12 December 1991.

7 *Halford v Brookes and Another*, *The Times* (3 October 1991).

8 *The Times*, 9 October 1998.

9 *The Times*, 5 November 1997.

Francisco.¹⁰ He awarded her family £50,000. Diedrick was later convicted of the killing and sentenced to life imprisonment.

Alliott J decided the issue of liability (in an allegation of assault causing death) by reference to the balance of probabilities 'while bearing in mind that the allegation is of utmost gravity and can only be established by truly cogent evidence'.

He cited the decision¹¹ of the House of Lords in *Re H and R (Child Sexual Abuse: Standard of Proof)*¹² and, in particular, the speech of Lord Nicholls of Birkenhead in these terms¹³:

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury . . .

. . . The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451, 455: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'

That subtlety is important when a High Court judge comes to direct himself as to the standard of proof required in a civil case arising from an alleged crime. But, from a public perspective, put simply, the difference between the burden of proof in civil and criminal cases is that the burden of proof is lower in civil courts than in criminal courts. It is easier to prove a tort than a crime. This gives some opportunity for people successfully sued for alleged crimes to protest that just because their conduct is certified by the civil system as a civil wrong does not mean that a crime has been committed.

In *The Devil's Dictionary* Ambrose Bierce famously described a lawsuit as 'a machine which you go into as a pig and come out of as a sausage'. Never an enjoyable experience for litigants, litigation is especially harrowing when it is being taken by desperate victims of very serious wrongs who are doing so only because the state has evidently failed in its duty. Suing is a notoriously expensive and protracted experience so the fact that an apparently growing number of crime victims are disposed to fight their cases in the civil courts is a token of grave dissatisfaction with the ordinary prosecution process.

In some cases, prosecutors have been, are, and will be absolutely justified in declining to prosecute because there is insufficient credible and admissible evidence to satisfy the Code for Crown Prosecutors'

10 *Francisco v Diedrick*, *The Times* (3 April 1998).

11 This is also referred to in *Shah v Gale* [2005] EWHC 1087 at [17].

12 [1996] 1 FLR 80.

13 *Ibid.* at 96B.

criterion requiring there to be a 'realistic prospect of conviction'. There might be circumstances in which the acquisition of sufficiently good evidence to build a prosecution case is impossible. More troubling, though, are those cases in which inadequate police investigations effectively rule out a prosecution. That some police investigations are inadequate is strongly suggested where privately garnered evidence enables a civil win, and, thereafter, a public prosecution and conviction. British policing is, as you might expect from the world's earliest professionalised service, about the best in the world; but any unprosecuted serious crime hurts people at large, radiating out from the immediate victim, by allowing a wrongdoer to strike at the roots of society with impunity.

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