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22nd June 2017

The Department of Finance is currently considering a range of measures to combat the excessive cost of insurance. Despite being lobbied hard by ISME to do so, the Department is not considering the introduction of a statutory offence of perjury as one of these measures. In the following we will set out why we believe the enactment of a Perjury Act is an essential component in the fight against white-collar crime in general; and for lower insurance costs in particular.

BACKGROUND

Introducing a perjury statute is not in itself a solution to the problem of false and exaggerated claims. In fact the offence already exists in common law. It is simply that it is extremely difficult to prosecute, and the state has generally only resorted to prosecution in the most serious of cases. However, a statutory offence of perjury would be a significant brick in the defensive wall against a false or exaggerated personal injury claim. Prosecution of a statutory offence would be far less onerous. In instructing counsel for a personal injury, a plaintiff would be put on notice by their solicitor that their liberty was in peril if they falsified or materially exaggerated their claim. Furthermore, such a plaintiff could find themselves without representation. The Law Society's *Guide to Good Professional Conduct for Solicitors*¹ states that '*a solicitor must decline to act further in any proceedings where a solicitor has knowledge that the client has committed perjury or has misled the court in relation to those proceedings unless the client agrees to make a full disclosure of his conduct to the court.*'

It is not simply personal injuries cases which are affected by the absence of a statutory offence of perjury in Ireland. The then Competition Authority sought the codification of the offence of perjury in its Submission on White Collar Crime² to the then Department of Justice and Law Reform in February 2011 *White Paper on Crime Discussion Document No. 3 'Organised and White Collar crime'*. This submission (See Appendix I) recommends a prison sentence for perjury, but summarises the difficulty in mounting a successful prosecution for perjury under the existing common law, which requires demonstration of:

1. Proof of the authority to administer the oath,
2. The occasion of administering it,
3. The form of oath administered,
4. The materiality of the matter sworn,
5. The falsity of same and the corrupt intention of the person making the perjured statement, and,
6. At least two separate witnesses to the act of perjury

Nothing has happened with this recommendation since. The introduction of a robust and effectively actionable statute of perjury is a defence not just against false or exaggerated claims of personal

¹ <https://www.lawsociety.ie/Documents/committees/conduct-guide.pdf>

² <http://ccpc.ie/sites/default/files/S-11-002%20Submission%20on%20White%20Collar%20Crime.pdf>

injury. As the Competition Authority noted above, it would have widespread application in the prosecution of white collar crime. It would also help protect the citizen against the potentially ruinous consequences of false, vexatious or malicious prosecution in the civil or criminal courts, up to and including the loss of liberty. For those in doubt of the gravity of the matter, a perusal of the Supreme Court's judgment in *Shortt -v- The Commissioner of An Garda Síochána & ors* [2007] IESC 9³ will prove instructive. (Of course when it is the state itself that commits perjury, the cost of damages incurred falls upon the citizen).

The technical reason that a codified statute on perjury is desirable from an insurance perspective, is that Section 14 of the Civil Liability and Courts Act 2004⁴ requires that every personal injuries claim presented to the courts must be tendered under sworn affidavit. The form of oath is specified by SI 526 of 2005⁵ (Appendix II).

HISTORICAL CONTEXT

Perjury seems to have been a problem for some considerable time in Ireland. The Perjury Act 1586⁶ noted that *'this realm of Ireland is greatly troubled and hindered by reason of wilfull perjurie daily committed...'* but did not define the offence.

Similarly, the Perjury Act of 1729⁷ did not define the offence, but did define its punishment: *'such person to be sent to some house of correction within the same county for a time not exceeding seven years, there to be kept to hard labour during all the said time or to be transported to some of his Majesty's plantations beyond the seas for a term not exceeding seven years, as the court shall think most proper...'* It seems Westminster thought it best to leave trifling details such as the objective nature of offences to be properly adjudged by their magistrates in Ireland.

Prior to Irish independence, the British Parliament passed the Perjury Act 1911,⁸ which codified the long-standing common law on perjury. However, the act was not extended to Ireland or Scotland.

Prosecutions for perjury are rare but not unknown in Ireland. A man who took the stand in a trial over the murder of John Butler in Cork in 2002 and claimed he could not remember the night of the offence was sentenced to two year's imprisonment (one year suspended). Another man, who gave a detailed statement on the murder of Eric Leamy in Limerick in 2001 which he retracted at trial also received a one year prison sentence.

ISME has found one example of a prosecution for perjury in a civil case. Ms Remona O'Leary-Quilligan of Killarney appealed a personal injury case, which was dismissed by the Circuit Court, to the High Court in 2012. The High Court also dismissed her claim. Questioned by gardaí in 2014 about the evidence she had given in the two court cases, she made another false statement. She was prosecuted before Cork Circuit Criminal Court in February 2016, after it became apparent she was 60 or 70 miles away from the locus of the car accident at the time of its occurrence in 2009. While the insurer, Alliance Insurance, did not have to pay out on her claim, they did have to pay €33,000 in defending it. In an extraordinary and incomprehensible judgement (given that, in civil cases, ['costs follow the event'](#)),

³ <http://www.bailii.org/ie/cases/IESC/2007/S9.html>

⁴ <http://www.irishstatutebook.ie/eli/2004/act/31/enacted/en/html>

⁵ <http://www.irishstatutebook.ie/eli/2005/si/526/made/en/print>

⁶ <http://www.irishstatutebook.ie/eli/1586/act/1/enacted/en/print.html>

⁷ <http://www.irishstatutebook.ie/eli/1729/act/4/enacted/en/print.html>

⁸ http://www.legislation.gov.uk/ukpga/1911/6/pdfs/ukpga_19110006_en.pdf

Judge Donagh McDonagh permitted her to repay €4,500 in cash she had ‘gathered’ following the offence, and a further €100 per month for five years; a total of €10,500 if she completes her repayments. She was given a suspended prison sentence.

It is apparent that, even in those rare cases where perjury is prosecuted, judges apply terms of imprisonment at the lower end of the scale, if at all.

In the UK, they take the offence of perjury considerably more seriously, even in civil cases. The imprisonment of Jonathan Aitken and Jeffrey Archer for perjury in libel cases is noteworthy, and useful in illustrating the need for us to enact a statutory offence.

Former cabinet minister Jonathan Aitken was imprisoned for perjury and perverting the course of justice in 1999. He was a minister in charge of Defence Procurement, and banned from taking hospitality which might place him under an obligation, when the media accused him of doing just that in 1993. He sued the Guardian Newspaper and Granada TV for libel in 1997. The 16-day libel hearing collapsed after evidence was produced that Mr Aitken's wife and daughter were in Switzerland during the weekend of September 17-19, 1993, when he had said they were in Paris. He was sentenced to 18 months imprisonment.

Jeffrey Archer was convicted of perjury and perverting the course of justice in 2001. In 1987, he successfully sued the Daily Star newspaper, winning £500,000 sterling in libel damages, after it alleged that he paid prostitute Ms Monica Coghlan for sex in September 1986. Archer was brought to trial as the result of a chain of events put into motion when he decided to run as the Conservative Party's candidate in London's mayoral race in 1999. His former friend, television producer Mr Ted Francis, disclosed that Archer had asked him to lie about an alibi in 1986 that related to the events of the libel trial. Archer was sentenced to four years imprisonment.

As far back as 2003, Carol Coulter, then Legal Affairs Correspondent for the Irish Times, wrote on the situation, saying simply “it is difficult to prosecute for perjury in Ireland because there is no prohibition on perjury on the statute books.” She quoted Judge Peter Charleton, who commented that ‘the law here in its usual haphazard state.’⁹ Nothing since has changed.

Perhaps it is the association of the offence with the religious concept of the oath that has not been helpful in Ireland. We had DeValera's ‘empty formula’ response to the Oath of Allegiance issue¹⁰ in 1927. This was an intellectual solution to a political problem, which was predicated on the assumption that the act (of perjury) was acceptable if the intentions of the perjurer were good; and the significance of the oath was therefore diminished in the eyes of the perjurer.

More recently we had the late Cardinal Desmond Connell, responding to allegations concerning sexual abuse in the Dublin archdiocese, using the term ‘mental reservation’¹¹ (albeit not on sworn testimony) to explain his failure to describe truthfully his dealings with Gardaí.

It is therefore more constructive to think of perjury not in religious or moral terms, but in contractual terms. It is common in commercial contracts to append a guarantee, which although it might be stated in dense legalese, is simply a statement by the guarantor acknowledging their contractual obligations, and accepting that those obligations are enforceable against them in accordance with the terms exchanged. This removes any moral ambiguity, subjectivity, or ‘reservation’ from the mind of the guar-

⁹ <http://www.irishtimes.com/opinion/the-haphazard-state-of-perjury-law-1.357008>

¹⁰ <http://treaty.nationalarchives.ie/wp-content/uploads/2011/11/De-Valera.pdf>

¹¹ <http://www.irishtimes.com/news/church-lied-without-lying-1.849726>

antor, since ultimately they accept the objective opinion of a third party in resolving a disputed obligation. A guarantor accepts the notion that their truthfulness (or otherwise) is not a matter for them to decide.

STATUTE LAW IN OTHER COMMON LAW JURISDICTIONS

Section [1621](#) of the **United States Code** (USC) describes perjury:

Whoever-

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

The **Consolidated Criminal Code of Canada**¹² defines perjury as follows:

131 (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

In view of the maximum permitted punishment, the offence is obviously viewed most seriously:

132 Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

In **Australia**, the law is delegated to State parliaments. The **New South Wales** Crimes Act 1900¹³ defines perjury as below, and specifies imprisonment for up to ten years on conviction.

327 Offence of perjury

(1) Any person who in or in connection with any judicial proceeding makes any false statement on oath concerning any matter which is material to the proceeding, knowing the statement to be false or not believing it to be true, is guilty of perjury and liable to imprisonment for 10 years.

¹² <http://laws-lois.justice.gc.ca/eng/acts/C-46/>

¹³ http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s327.html

(2) A statement can be considered to have been made in connection with a judicial proceeding whether or not a judicial proceeding has commenced, or ever commences, in connection with it.

The **New Zealand** Crimes Act 1961¹⁴ defines perjury as:

108 Perjury defined

(1) Perjury is an assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of his or her evidence on oath, whether the evidence is given in open court or by affidavit or otherwise, that assertion being known to the witness to be false and being intended by him or her to mislead the tribunal holding the proceeding.

Interestingly, New Zealand law ensures that punishment for perjury is commensurate with the gravity of the purpose for which it was committed:

109 Punishment of perjury

(1) Except as provided in subsection (2), everyone is liable to imprisonment for a term not exceeding 7 years who commits perjury.

(2) If perjury is committed in order to procure the conviction of a person for any offence for which the maximum punishment is not less than 3 years' imprisonment, the punishment may be imprisonment for a term not exceeding 14 years.

CONCLUSION

ISME calls on Dáil Éireann to legislate a Perjury Act in Ireland in the next Dáil term. The offence of perjury under this proposed Act should carry a sentence of five years on indictment (see Administrative Issues below). Claims initiated in court under an affidavit of verification should, as a matter of course, be referred to the DPP where there is a material departure from the facts as stated in the claim.

If, following a period of review after enactment, the judiciary fails to take sentencing policy for perjury seriously, the Dáil should introduce minimum sentencing.

Beyond the benefits that will flow, in time, from an ability to more readily prosecute this offence, ISME believes that codifying it will alter our social and judicial culture. It is an important matter that where the life, limb, liberty, or personal property of others is at stake, we must tell the truth. If we are willing to do otherwise, we must be willing to accept loss of our own liberty.

ADMINISTRATIVE ISSUES

In calling for the introduction of a Perjury Act, ISME also calls on Dáil Éireann to provide for the following:

¹⁴ <http://legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

1. ISME believes that the New Zealand system, where punishment for perjury that has been used to procure the imprisonment of another attracts a higher tariff, has merit. Where this is the case, a maximum term of 10 years imprisonment should apply.
2. ISME also believes that an affidavit of verification should accompany a claim at the initial submission stage to the Injuries Board; and for the purposes of the Perjury Act, the claim should be treated as if it had been presented before a court of law.
3. ISME has anecdotal evidence from members that the Data Protection (Amendment) Act 2003¹⁵ is being exploited by some plaintiffs in such a manner as to restrict the ability of defendants to adequately defend themselves. Therefore we call on Dáil Éireann to widen the restrictions of Section 5 the Act so as to restrict the right of plaintiffs to present a data access request to a potential defendant until *after* the completion of their statement of claim.
4. ISME calls on Dáil Éireann to amend Section 8-(1) of the Civil Liability and Courts Act 2004¹⁶ as follows:

FROM;

8.—(1) Where a plaintiff in a personal injuries action fails, without reasonable cause, to serve a notice in writing, before the expiration of 2 months from the date of the cause of action, or as soon as practicable thereafter, on the wrongdoer or alleged wrongdoer stating the nature of the wrong alleged to have been committed by him or her, the court hearing the action *may—*

TO:

8.—(1) Where a plaintiff in a personal injuries action fails, without reasonable cause, to serve a notice in writing, before the expiration of 2 months from the date of the cause of action, or as soon as practicable thereafter, on the wrongdoer or alleged wrongdoer stating the nature of the wrong alleged to have been committed by him or her, the court hearing the action *will—*

(Italics inserted by ISME)

¹⁵ <http://www.irishstatutebook.ie/eli/1988/act/25/section/5/enacted/en/html#sec5>

¹⁶ <http://www.irishstatutebook.ie/eli/2004/act/31/enacted/en/html>

APPENDIX I COMPETITION AUTHORITY SUBMISSION ON WHITE COLLAR CRIME

3.1 There is a need for a perjury act in Ireland. Such an Act would clarify the law in this area and should be a law of general application. This would be of particular use and benefit if the power to summon witnesses suggested earlier is introduced for other investigative agencies. A new offence of perjury under this proposed Act would carry, at least, a maximum sentence of 5 years on indictment. This would make the offence an arrestable offence and would also help to deter persons from committing the offence.

3.2 Currently, perjury is a misdemeanour at common law which may be tried summarily in the District Court at the suit of the DPP. To sustain a conviction the prosecution must prove the authority to administer the oath, the occasion of administering it, the form of oath administered, the materiality of the matter sworn, the falsity of same and the corrupt intention of the person making the perjured statement. It is also a requirement that there be at least two separate witnesses to the act of perjury for a prosecution of perjury to succeed. Perjury cases are very difficult to prosecute successfully and as a result there have been very few such prosecutions under Irish law. Suborning perjury is also an offence at common law but is equally difficult to prosecute with any degree of success. Subornation of perjury is the procuring of another to take any oath or affirmation that is perjury or punishable as perjury.

APPENDIX II

S.I. No. 526 of 2005
FORM 6A(iii)

AFFIDAVIT OF VERIFICATION

O. 5A, r. 7

AN CHUIRT CHUARDA
THE CIRCUIT COURT

Record No.
Between

A.B.
Plaintiff

AND

C.D.
Defendant

I, AB,of , the (plaintiff, defendant or state other capacity or authority) in the above-entitled proceedings, aged eighteen years and upwards MAKE OATH and say as follows:

1. I beg to refer to the contents of the (personal injuries summons, defence, reply, further information etc. - as the case may be) delivered herein on behalf of the (plaintiff/ defendant) on the day of 20 *[to which this affidavit is appended] *[and upon a true copy of which marked "A" I have signed my name prior to the swearing hereof].

2. The assertions, allegations and information contained in the said (personal injuries summons etc.) which are within my own knowledge are true. I honestly believe that the assertions, allegations and information contained in the said (personal injuries summons, etc.) which are not within my own knowledge are true.

3. I am aware that it is an offence to make a statement in this affidavit that is false or misleading in any material respect and that I know to be false or misleading.

SWORN etc

*Delete if inapplicable.

**Insert where deponent is swearing in capacity of a next friend or committee.