

A CRITICAL ASSESSMENT OF THE DUTY OF DISTRICT COURT JUDGES TO GIVEN REASONS

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Introduction

The recent judgment of *Oates v District Judge Browne & anor.*,¹ delivered by the late Hardiman J., implies a stringent duty on District court judges to give reasons at trial. Whilst the judgment provides a comprehensive overview of the jurisprudence and case law on the general duty to give reasons, questions still remain as to the scope of the duty of District judges to provide reasons, when read against previous Supreme Court judgments. This article will review the case law on the duty to give reasons in a criminal court context in an attempt to outline the present scope of the duty of District court judges to give reasons in the currency of a criminal trial. The right of an accused to inspect and realistically test evidence, and the anterior duty of District judges to give reasons at trial will be elaborated upon.

It will be argued that *Oates* marks a point of departure from the more pragmatically orientated Supreme Court decisions of *Kenny v. Judge Coughlan & The Director of Public Prosecutions*,² and *O'Mahony v Ballagh*,³ towards an approach that places a greater emphasis on the rights of the accused to fair procedures. The dictum of one of the most renowned Irish jurists reflects a rebalancing of the relationship between the competing aims of efficiency and transparency. This article aims to critically assess this rebalancing.

Further, academic literature and policy considerations will be reviewed in light of *Oates*, with the aim of exploring whether or not the decision might be read in favour of arguments that District court judges ought be required to be transparent in giving reasons at sentence. Whilst *Oates* concerned a District judge failing to give reasons within the currency of a trial, a wider reading of the judgment fits within a growing body of literature calling for greater transparency in District court sentencing practices.

Import of *Oates*: right to realistically test evidence and the duty to give reasons

The applicant in *Oates* had been charged with a drink driving offence. His solicitor sought to have an expert examine the Intoxilyser, a machine now routinely used by the Gardai to analyse breath specimens, having been put on inquiry as to the condition of the machine when it produced a variation in readings. The District judge refused the applicant's requests, and gave no reasons for his refusal.

Charleton J. in the High Court decided not to disturb the conviction of drink driving, given that there was no reason "whereby it could be said that the machine for breath testing alcohol

¹ [2016] IESC 7 hereafter "*Oates*"

² [2014] IESC 15 hereafter "*Kenny*"

³ [2001] IESC 99 hereafter "*O'Mahony*"

consumption was malfunctioning.”⁴ Pragmatic considerations are made plain: criminal trials are far from theoretical or fictitious exercises, and ought to be conducted efficiently:

*in determining what is just in cases such as this, one must appreciate that justice is not only about the rights of the accused. There is also the public interest in the successful prosecution of offences to be taken into account and, in the context of summary proceedings where it is intended that justice should be dispensed in a simple and speedy manner, inordinate expense must be avoided. [...]*⁵

In overturning the applicant’s conviction, Hardiman J. focused on the failure of the District Judge to give reasons as to why the accused was refused his right to inspect the Intoxilyser machine. Hardiman J.’s reasoning that it should now be “second nature for a judge to give reasons”⁶ ought to be noted carefully by District court judges and practitioners. The position post-*Oates* appears to be that District judges are under a constitutional duty to give reasons for any decision they make that is adverse to the accused.

Applying *McGonnell v. Attorney General*⁷ and *Whelan v. Kirby*,⁸ Hardiman J. held that Mr. Oates had a right to apply for an inspection of the Intoxilyser, and for the documents relevant to the operation of the machine. Interestingly, Hardiman J. commented that unless the accused is given an opportunity to inspect the machine, the accused had no opportunity to realistically contest the evidence put against him. Thus, if an application for inspection is made, this application must be granted by the presiding District judge otherwise the accused is not in reality able to contest the validity of the prosecution evidence.⁹ This removes considerable discretion from the District judge,¹⁰ and differs from the position set out in *McGonnell* and *Whelan*, where it was stated it was not imperative for a judge to always grant an application for inspection.

Having established the (infallible) right of Mr Oates to inspect the machine, Hardiman J. was highly critical of the District judge having rejected the application for inspection without giving any reasons, despite being specifically requested by the applicant’s solicitor to do so: “any attempt to establish by some form of inference the reasons which actually operated on the learned Respondent’s mind is an exercise akin to trying to put the tail on the chalked figure of a donkey while blindfold.”¹¹

He subsequently surveyed the jurisprudence of the duty of a court or deciding body to give reasons. We turn to the relevant case law which outlines the present scope of the duty of District Court judges to give reasons in the currency of a trial.

Present scope of the duty

In *O’Mahony*,¹² a conviction of drunk driving was overturned, as the trial judge had failed to address the arguments put forward by counsel for the accused. At the conclusion of the

⁴ *Oates v. Browne & anor* [2010] IEHC 381

⁵ *Ibid*, para 5

⁶ *Oates v District Judge Browne & anor.* [2016] IESC 7, para. 54

⁷ [2007] 1 IR 400 hereafter “*McGonnell*”

⁸ [2005] 2 IR 30 hereafter “*Whelan*”

⁹ *Maier v. The Attorney General* [1973] IR 140

¹⁰ In that if an application for inspection of an Intoxilyser machine is made, it would be unconstitutional if the accused did not have an opportunity to rebut that statutory presumption of the validity of a certificate produced by the Intoxilyser machine – see *Maier v. The Attorney General* [1973] IR 140

¹¹ *Oates*, para. 41

arguments of defence counsel, the trial judge merely commented, “he was drunk, wasn’t he”¹³. He made no specific ruling on the arguments addressed to him, and proceeded with conviction and imposition of sentence. The import of *O’Mahony*, therefore, is that District judges, i.e. the judge must make clear what arguments they are accepting and rejecting.¹⁴ Murphy J. noted that this is an essential exercise, as the applicant and his defence counsel needed to know which of the arguments were accepted or rejected, in order to decide whether or not they should go into evidence.

*I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable - and perhaps impossible - to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing [...]*¹⁵

O’Mahony does not necessitate a particularly onerous duty on District judges to account for their decisions, with Murphy J. holding that

every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing”.¹⁶

This statement acknowledges the difficulties facing District judges in disposing of cases, and marks an acceptance that it is not always possible, nor practical to elaborate the reasons for a decision at trial.

Kenny further reflects these considerations of efficiency and practicality. The case concerned an appeal of a speeding offence conviction in the District Court. A context-based approach was adopted by Denham J., who held that the scope of the duty of the give reasons will depend on the circumstances:

*the degree and extent to which a decision of the District Court must be explained by giving reasons will depend in turn on the nature and circumstances of the case. In some cases it may be necessary to succinctly but fully explain the reasons for the decision so that the parties have a proper understanding of the reasons upon which it was based. In this case the offence was simply that of speeding and the mode of trial was summary. This was one of hundreds of such cases that come before the District Court routinely every day of the week [...] There was no requirement for the trial judge in such a situation to elaborate on the obvious.*¹⁷

In holding that there is no onus on District judges to elaborate on the obvious, Denham J. cited *Delaney v. Judge Donnchadh O Buachalla and anor* with approval:

The onus which this places on a particular judge will vary in any given case [...] in the lower courts, and in the District Court in particular, where heavy lists and crowded schedules do not always afford the district judge the luxury of reserving judgments, the judge does not always have the time to compose

¹² *O’Mahony*

¹³ *O’Mahony*, para 4

¹⁴ *O’Mahony*, para. 18

¹⁵ *Ibid*, para. 19

¹⁶ *Ibid*.

¹⁷ *Kenny*, para. 24

*an articulate, orderly and expansive exposition of the reasons for the judgment [...] the judge may not have had the time to fully or comprehensively articulate the reasoning. In some cases, the reasoning may be obvious and may not require elaboration [...] a pragmatic view must be taken of the time pressures imposed on the district judge by heavy lists.*¹⁸

The case law reflects the concern that “there can be a danger of overkill in applying a basically sound concept too widely”.¹⁹ Implementing systematic reason-giving at District Court level could hinder speedy resolution of disputes, and the particular judges’ case-management responsibilities.²⁰ Moreover, in many instances in the District Court ‘the decision is so obvious and so inevitable and so virtually automatic, that laboriously giving reasons would be a task entirely of supererogation’.²¹

The tensions involved in the duty to give reasons, namely, between conducting a criminal trial efficiently, and allotting sufficient protections to the constitutional rights of the accused were expressly recognised in *Murphy v Ireland*.²² Judge O’Donnell stated “[...] any consequent obligation to provide reasons, is limited. There is here, as in other areas of the law, a tension between supposed demands of logic, and those of pragmatism and experience.”²³

It is in the District Court in which almost all criminal cases begin, and most of them end. In 2009, the District Court disposed of 521,058 offences, whilst the Circuit Criminal Court dealt with 3,500, the Central Criminal Court 108.²⁴ The onerous workload has been recognised in academic circles, and criticism has been voiced at “presenting [judges] as responsible and diligent actors in a system that asks too much of them”.²⁵

O’Donnell J in *Murphy* remarks that the majority of criminal trials in this jurisdiction are conducted in the District Court. However, of relevance are his comments that the same constitutional standards apply “whatever the court in which that person is tried... Most criminal trials are summary trials in the District Court and even the majority of trials on indictment are resolved by pleas of guilty. But in summary trials the standards applied are those derived from trial on indictment before a jury.”²⁶

Whilst recognising the substantial workload of the District courts, O’Donnell J.’s comments emphasise the constitutional duties imposed on District judges when disposing of criminal trials - there is no middle ground when it comes to upholding constitutional standards of fairness.

¹⁸ *Delaney v. Judge Donnchadh O Buachalla and anor* [2011] IEHC 138, para. 34, cited in Kenny

¹⁹ Alec Samuels ‘Giving reasons in the criminal justice and penal process’ (1981) *Journal of Criminal Law* (41) p. 55.

²⁰ Cohen ‘When Judges Have Reasons not to Give Reasons: A Comparative Law Approach’ (2015) *Wash and Lee Law Review* (72) 484, pp. 514-517.

²¹ Alec Samuels ‘Giving reasons in the criminal justice and penal process’ (1981) *Journal of Criminal Law* (41) p. 55

²² [2014] IESC 19 hereafter “*Murphy*”

²³ at para 31

²⁴ O’ Malley, *Sentencing: Towards a Coherent System* (Thomas Round Hall, 2011) 251.

²⁵ Ruadhan Mac Cormaic ‘Lifting the lid on the District Court’ *Irish Times* (Dublin, 14th July 2014)

<http://www.irishtimes.com/news/crime-and-law/lifting-the-lid-on-the-district-court-1.1863184> 13.05.2016.

He was relaying the portrayal of District Court judges put forward Dr. O’ Nolan’s recent book on the District Court. See Caroline O’ Nolan, *The Irish District Court: A Social Portrait* (Cork University Press: 2016).

²⁶ O’Donnell J, *Murphy v Ireland*, my emphasis

We would argue the reliance on *Mallak v MJELR*²⁷ evident in Murphy and Oates, signals a shift away from the pragmatic, context-based approach the Supreme Court had previously adopted towards the administration of justice in the District court to an approach that more robustly attends to the rights of the accused.²⁸ Oates marks a point of departure in this light. Hardiman J's emphatic use of language implies a robust right of an accused to reasons. If an accused has a right to appeal, or a right to seek judicial review, then this "triggers a right to a statement of reasons".²⁹ Hardiman J cited *O'Donoghue v. An Bord Pleanála*,³⁰ stating that first, the duty exists first to enable a higher court to review the decision, but secondly, and more fundamentally, there exists a duty to give reasons, satisfying the constitutional requirement that justice not only be done, but be seen to be done.³¹ *Mallak* is also referenced to bolster the second limb of the rationale behind the duty to give reasons, that persons affected by decisions "have a right to know the reasons on which they are based, in short to understand them".³²

Extending the duty to give reasons at sentencing

Whilst *Oates* concerned a District judge omitting to give reasons for refusing an application within the currency of a trial, the judgment may be read in favour of extending the duty of District judges to give reasons in sentencing. Arguably, reasoning of Hardiman J resonates with calls for greater transparency in District court sentencing procedures.³³ In their 2003 Report on Penalties for Minor Offences, the Law Reform Commission³⁴ recommended that, when handing down a custodial sentence,

'District Court judges should be required to give concise, written reasons for any decision to impose a prison sentence, rather than a non-custodial sentence....further...District Court judges should record the aggravating and mitigating factors which influenced the decision, with particular emphasis on why the non-custodial options available to the judge are not appropriate'.³⁵

This recommendation was echoed by the Irish Penal Reform Trust, in research carried out over an eight-week period.³⁶ During this period, the details and outcomes of 356 cases were recorded. The research found that only 32% of judges gave reasons for handing down a custodial sentence.³⁷ This rather finding is exacerbated by the fact that, for the purposes of this study, the 'IPRT' coded any remark made by a judge in relation to his or her sentencing decision as a "reason".³⁸ Arguably, these findings sit uncomfortably with justifications grounded in practicality and efficiency. These recommendations create considerable grounds for expanding the duty to give reasons in the currency of a criminal trial, as set out in *Oates* and require District judges to give reasons for their decisions at sentence. As Ashworth notes

²⁷ [2011] IEHC 306 hereafter "*Mallak*"

²⁸ Interestingly, Kenny is not referenced in *Oates*.

²⁹ *Oates*, para. 51

³⁰ [1991] ILRM 750

³¹ *O'Donoghue v. An Bord Pleanála* [1991] ILRM 750, at 757

³² *Mallak v. Minister for Justice* [2012] 3 IR 297, Fennelly J. stated at p.322, para. 68 – 69

³³

³⁴ Law Reform Commission, *Report on Penalties for Minor Offences* (LRC 69 – 2003)

³⁵ *ibid.* p. 50.

³⁶ Claire Hamilton, 'Sentencing in the District Court: Here be dragons' (2005) 15 (3) *Irish Criminal Law Journal* 9, p. 14.

³⁷ *Ibid.* p. 9.

³⁸ *Ibid.* p. 13.

“it is a fundamental tenet of natural justice that decision-makers should give reasons for their decision and the argument is surely at its strongest where the decisions affect the liberty of the subject”.³⁹ Hamilton notes that requirements of natural and constitutional justice in this context have been re-emphasised under Article 6 of the European Convention on Human Rights.⁴⁰ Oates, read in parallel with ECHR case law,⁴¹ lays a strong foundation for requiring judges to give reasons, in particular where an individual’s liberty is in issue.

Justice requires that persons convicted of crimes should be furnished with reasons for their conviction. Confidence in the criminal justice process lies in decisions that are rationally made and the duty to give reasons enhances transparency, accountability and fairness in the criminal justice process. A requirement to give reasons for sentence could require the judge to take a more comprehensive, reasoned approach to the myriad of factors typically under consideration in a criminal trial.⁴² As noted by Samuels “the more exposure there is [to the decision-making process of judges], the better”.⁴³ This is not to suggest that judges are incapable of comprehensively appraising evidence in the absence of an obligation to give reasons. However, a duty to give reasons works towards safeguarding against the possibility of a judicial decision being arrived at irrationally or arbitrarily.⁴⁴

As well as promoting public confidence in the criminal justice system, the recording of reasons at sentencing by District judges could aid the development of sentencing standards and advisory guidelines at District Court level. Empirical research into the Irish sentencing system is disappointingly scarce.⁴⁵ However, the conclusion drawn from existing research into District court practice reveals that the lack of a coherent policy towards sentencing, coupled with the broad amount of sentencing discretion conferred on judges “does little to enhance consistency in sentencing practices”.⁴⁶

Recent years have witnessed ‘[changing] attitudes within the legal community...regarding the need for consistency in sentencing’⁴⁷ (‘consistency in sentencing’ meaning like cases being treated alike and different cases being treated differently⁴⁸). In this regard, the Court of Criminal Appeal has handed down a number of offence-specific guideline judgments for serious offences at Central Criminal Court level.⁴⁹ However, as has been noted,⁵⁰ these

³⁹ Andrew Ashworth *Sentencing and Criminal Justice* (3rd ed., Buttersworth, 2000) p. 305.

⁴⁰ Hamilton op. cit. (n 38) p. 13.

⁴¹ Hamilton op. cit. (n 38) p. 13.

⁴² David A. Thomas ‘Sentencing- the Case for Reasoned Decisions’ (1963) *Criminal Law Review* p. 243.

⁴³ Alec Samuels ‘Giving reasons in the criminal justice and penal process’ op. cit (n 24) p. 54.

⁴⁴ It should be noted, however, that some scholars have questioned whether or not this would bring about the desired result. For instance, Cohen, through an analysis of a series of cognitive-based studies, concluded that the ‘actual reasons that guide decisions may or may not correspond to those reported by the judges. Imposing strict reason-giving requirements on judges may yield insincerity and artificiality in judicial discourse, rather than promoting accountability and transparency’. Cohen ‘When Judges Have Reasons not to Give Reasons: A Comparative Law Approach’ (2015) *Wash and Lee Law Review* (72) 484, p. 522.

⁴⁵ See Prime Time, *Prime Time Investigates the District Court*, RTE 1, 13 December 2004. See also Hamilton op. cit. (n 38). See also Niamh Maguire, ‘Consistency in Sentencing’ [2010] (2) *Judicial Studies Institute Journal* 14. See also Dermot Walsh and Paul Sexton, ‘An Empirical study of Community Service Orders in Ireland’ *Department of Justice, Equality, and Law Reform* (Dublin, Stationary Office 1999).

⁴⁶ Niamh Maguire, ‘Consistency in Sentencing’ (ibid) p. 24.

⁴⁷ Thomas O’ Malley, ‘A quiet revolution occurred this month; sentencing guidelines were introduced’ *The Irish Times* (Dublin, 31st March 2014) <<http://www.irishtimes.com/news/crime-and-law/a-quiet-revolution-occurred-this-month-sentencing-guidelines-were-introduced-1.1741707>> accessed 5 February 2016.

⁴⁸ Thomas O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 49-50

⁴⁹ See *People (DPP) v Prins* [2007] IECCA 142, *People (DPP) v Murray* [2012] IECCA 60, *People (DPP) v WD* [2008] 1 IR 308 *People (Attorney General) v Kelly* [2005] 1 ILRM 19.

guideline judgments are of little use for sentencing judges in the courts of summary jurisdiction i.e. The District Court. Consequently, District Court judges exercise a wide discretion without any guidance.

Maguire has highlighted the problem of unbridled judicial discretion in the District Court as exacerbating the “worst effects of judicial variability”.⁵¹ The phenomenon of judicial variability has been defined as the manner in which judges differ “in their penal philosophies, in their attitudes, in the ways in which they define what the law and social system expect of them, in how they use information, and, [ultimately] in the sentences they impose”.⁵² Maguire found that “judicial variability was most pronounced in relation to three key aspects of the sentencing decision in the District Court: the seriousness of the offence, the weight to be given to various mitigating and aggravating factors and the efficacy of, and circumstances in which, the penalties should be used”.⁵³ It follows that a requirement to give reasons⁵⁴ would enable academics and practitioners to better scrutinise sentencing decisions.

Oates has significantly reduced the discretion enjoyed by District judges in requiring them to give reasons within the currency of a trial. When read against previous Supreme Court judgments, and academic commentary, it can be criticised as inconvenient from a time-management point of view – it is inconvenient for judges who lose time preparing such reasons, and also for litigants, who may see an increased delay in the final disposition of cases. Moreover, a legal realist might argue against giving reasons “in the manner outlined above”⁵⁵, in that the exercise is an *ex post facto* means by which judges justify their intuitive hunches. This casts the requirement to give reasons into considerable doubt. Would the requirement of reasons at District Court level fit with the aims of promoting transparency, accountability, and confidence in the justice system? Would requiring reasons create inordinate delays in already strained District court lists? Would a requirement to give reasons result in sincere decision-making, or would the reasons provided simply amount to ‘censored expositions’?⁵⁶ Hardiman J.’s final judgment opens up these broader questions. How District court judges will balance the values of pragmatism and efficiency, against an accused’s rights to reasons in the wake of the judgment remains to be seen. What is clear is that following *Oates*, District judges may be all the more wary of falling into an unconstitutionality.⁵⁷ Hardiman J.’s decision resonates with the increasing intolerance towards the failure to give reasons.

⁵⁰ See O’Malley, *Sentencing Law and Practice* op. cit. (n 48) pp. 57-63. See also O’ Malley, *Sentencing: Towards a Coherent System* (Thomas Round Hall, 2011) pp.111-130

⁵¹ Maguire ‘Consistency in Sentencing’ op. cit. (n 46) p. 52.

⁵² Hogarth, *Sentencing as a Human Process* (University of Toronto Press, 1971) pp. 385-86.

⁵³ Maguire ‘Consistency in Sentencing’ p. 52.

⁵⁴ See n. 48. The most extreme version of Legal Realism proposed that the reasons given by judges are in no way reflective of the real motivation behind their decision. See, for example, Joseph C. Hutcheson, Jr., ‘The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision’ (1929) *CORNELL Law Quarterly* (14) 274. This train of thought has long since been discredited. However, in the discretionary, largely rule-less arena of sentencing, it must be recognised that the reasons given by judges for a sentencing decision cannot be seen as fully explaining the reasoning behind the decision. The ‘invisible part of judicial decision-making’ (discretion) ensures that we must be sceptical of claiming that a recording of the reasons given by judges will significantly enhance our understanding of judicial behaviour. In order for this to occur, studies of the extra-legal factors that (unconsciously) affect the decision of judges will have to be forthcoming in an Irish context. See John N. Drobak, Douglas C. North ‘Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations’. (2008) *Washington University Journal of Law & Policy* (26) 131-152.

⁵⁵ See n. 32.

⁵⁶ See n 52.

⁵⁷ *The State (Holland) .v. Kennedy* [1977] IR 193, at 201

