



No offence intended: An examination of officially induced error in Ireland from its international roots

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Defining Officially Induced Error:

The definition of officially induced error, as seen throughout the progression of this article, is heavily dependent upon historical contexts and jurisdictions. However, in the context of the defence and its application in Ireland, it could be defined as such:

A defence applicable in a criminal trial whereby the accused submits that they were acting on the legal advice offered by an authority, and that the accused, in acting upon that advice, had reason to accept that advice as true.

This definition could be said to be a blending of the various versions of the defence across the multiple jurisdictions in which it is active. Each will be explored in the following sections.

Introduction:

“True ignorance is not the absence of knowledge, but the refusal to acquire it.”¹

The above quote could be said to aptly summarise what is a key principle enshrined in common law. Law, and its many forms, is everchanging – constantly in motion, moving and adapting as society moves and adapts to new challenges brought about with the passage of time. So just how is one to be expected to be fully aware of, and truly understand, the gravity of the law as it is applied?

¹ Karl R Popper, *The Open Society, and its Enemies* (Princeton University Press 2013).

Would it be just to convict a person who has committed a criminal offence under the genuine belief that they were acting within the parameters of the law? Furthermore, would it be just to convict a person who has committed a criminal offence, despite having taken all reasonable steps to ascertain what their legal responsibilities were, but still found themselves on the wrong side of the law due to a misunderstanding of what the law actually is?

At first glance, under the common law maxim of *ignorantia juris non excusat*; that being that ignorance of the law is no excuse, the answer is yes. It would be just to convict a person who has committed a criminal offence on the basis that they did not know, or fully understand the law. The principle of *ignorantia juris non excusat* is built upon the assumption that an ordinary person ought to know the laws of the county in which they reside, or in the case where they live abroad, the laws of the country in which they carry out business.² Yet, the principle is a fundamentally flawed one, failing to account for the law's transient nature. Furthermore, it fails to consider the fact that not all considerations affecting a person's guilt are put forth as defences.³ It suggests that not only the average person ought to read legislation, but purports a burden upon them to understand it.

In the work of Hunt,⁴ it is noted that in the context of Irish legislation, the ordinary person does not concern themselves with the finer details of the law. Instead, the principle readers of legislation are those who shoulder the responsibility of applying it - notably the judiciary, regulatory authorities and the police force.⁵ It would not be foolish to suggest that this disinterest held by the ordinary person is due to the inaccessibility of the law as a whole.

² J.P Bishop, *Commentaries on the Criminal Law* (6th edn, Little, Brown and Co 1877) at section 294, page 165 <<https://babel.hathitrust.org/cgi/pt?id=cool.ark:/13960/t66409c9p&view=1up&seq=193&skin=2021>>, accessed June 6 2022.

³ Douglas Husak, 'Mistake of Law and Culpability' (2010) 4 *Criminal Law and Philosophy* 135.

⁴ Brain Hunt, *The Irish Statute Book: A Guide to Irish Legislation* (Bloomsbury Professional 2007).

⁵ *ibid.*

When referring to ‘inaccessibility’, one does not mean the inability to find or gain access to various pieces of legislation, as thanks to various technological advancements, that is now easier than ever. One instead refers to the inaccessibility of understanding the law. As noted, the primary readers of legislation are those who apply it, and therefore it would be reasonable to assume that they possess some pre-existing knowledge of the law. In a similar vein, the language used in the drafting of legislation is overtly technical and in order to totally understand it, pre-existing knowledge of the law is necessary. In that respect, it is hardly fair to expect an ordinary person to be able to read and gain an understanding of the law when the language used actively prevents them from doing so.

That is not to say that drafters, when facing the task of writing legislation, deliberately use language that would be unfamiliar to an ordinary person. There is a need for legislation to be drafted in a manner that clearly defines the parameters of the law it concerns. Justice Stephen in the case of *Re Castioni*,⁶ aptly summarised the need for precision in drafting:

“... people continually try to misunderstand, and in which it is not enough to attain a degree of precision when a person reading in good faith can understand it but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot pretend to misunderstand it.”⁷

Despite its flaws, the principle is widely regarded by many legal theorists as a necessary element of the common law,⁸ and therefore, it remains enshrined as a fundamental concept in common law.

⁶ [1891] 1 QB 149.

⁷ *ibid.*, at page 168.

⁸ *ibid.*, at n3, section 292, page 165.

Cases certainly have, and indeed will continue to arise wherein a person has found themselves convicted for an offence of which they were unaware existed. Of course, their ignorance of the situation might well act as a mitigating factor at sentencing, but it raises the question: could there be any circumstances in which they may be able to escape conviction altogether? Under Article 38.1 of the Irish Constitution, an accused person has a guaranteed right to trial in due course of law. One could consider this right to include, albeit in limited circumstances, an entitlement to rely on ignorance of the law as a defence. On that basis, a second question arises: would convicting a person in the aforementioned circumstances encroach on their right to a fair trial in due course of law, thereby rendering this long-standing principle to be set aside, inferior to a person's constitutional rights?

The very idea that ignorance of the law should not be used to excuse the committing of a crime is not rooted in the notion that it is what is fair and equitable,⁹ but rather finds itself on the basis that a person should not be held responsible for a fault they committed due to the inability of legislators to precisely define the law.¹⁰ From this line of thought stems the basis of a plea for *officially induced error*, or *entrapment by estoppel* as it is referred to in other jurisdictions.

This article endeavours to explore the defence of officially induced error as an exception to *ignorantia juris non excusat* by examining the development of the defence in other legal jurisdictions, notably those of the United States and Canada. Further, it will examine the recognition of the defence in this jurisdiction following the case of *The People (DPP) v Casey*.¹¹ It aims to compare and contrast the substantive nature and application of the defence in the aforementioned jurisdictions and the vitality of common law in its ability to adopt solutions to current problems through comparative law and policy transfer. Finally, it will

⁹ *R v Campbell* [1972] 21 CRNS 273.

¹⁰ Fairall and Barrett, *Criminal Defences in Australia* (5th edition 2017).

¹¹ *The People (DPP) v Casey* [2019] IESC 7.

explore the feasibility of expanding the scope of the defence to include advice beyond those working in a regulators' capacity, and to include professional practitioners

Officially Induced Error in the United States:

[A] The development of the defence in the U.S.:

The defence of officially induced error, entrapment by estoppel, has been acknowledged in courts across America since the late 1950s, brought forth by the case of *Raley v Ohio*.¹²

Set against the backdrop of a post-war America, and within the timeline of the deployment of US forces to Vietnam to fight against the threat of communism, *Raley* pertained to the establishment, by the State of Ohio, of a committee to hunt for so-called “communist infiltrators”. When brought before the committee, alleged spies were informed that they had a right against self-incrimination, when in actuality, a pre-existing State Statute negated this right.¹³ In the United States Supreme Court, Justice Brennan cited the case of *Sorrells v United States*,¹⁴ and concluded that to offer guidance leading those who came before the committee to believe that they were protected from self-incrimination, as the chair of the committee did, “would be to sanction the most indefensible sort of entrapment by the state”.¹⁵ Criminal sanctions could not be said to adhere where contrary commands are given.¹⁶ The mitigating factor in this case was that the accused persons who came before the committee were unlikely to have acted in the manner that they did, had they not been given advice by a public official, one upon whom they were reasonably entitled to rely.

¹² *Raley v Ohio*, 360 US 423 (1959).

¹³ Jeffery Wohlford, ‘A Defence by Any Other Name: Entrapment-by-Estoppel as a Criminal Defence in Arizona’, (2013) 55 Arizona Law Review 805, 809.

¹⁴ *Sorrells v United States*, 287 US 435 (1932).

¹⁵ *Raley v Ohio* 360 US 423 (1959) 427.

¹⁶ *United States v Cardiff* 344 US 174 (1952) 176-77.

This can be compared to the latter case of *Cox v Louisiana*,¹⁷ wherein the court effectively affirmed its position on advice offered by public officials. *Cox* involved a conviction for picketing near a courthouse, prohibited under a statute written to deter judicial proceedings from “mob influence.”¹⁸ It was particularly vague in regard to the word “near”.¹⁹ The Court, citing *Raley*, overturned the conviction because it transpired that the defendant was moved to a location on the instruction of a police officer. The court reversed the convictions on the basis of the Due Process Clause.²⁰ To reiterate the shared factor in both cases, it was determined that the defendant had reason to act and rely upon the advice the police offered.

However, this contrasts greatly to the approach adopted by the district court of Western Pennsylvania in the case of *United States v Pennsylvania Chemical Corporation*.²¹ The court of first instance refused to allow the defendants to prove that they had relied on the regulations of the Army Corps of Engineers which limited violations to those impeding navigation. The Court of Appeal reversed this decision because the defendants should have been allowed to prove that they had been affirmatively misled. The Supreme Court cited favourably an article,²² which was written in the early years of the Administrative Procedure Act, and identified an increasing recognition that the government was allowing the Estoppel Defence.²³

The reoccurring theme in each of the above cases is that they all involve public or state officials/departments and the defendants’ reliance on the advice given was key in the conduct that led to the prosecution. Furthermore, not a single one actually uses the phrase ‘entrapment

¹⁷ *Cox v Louisiana* 379 US 559 (1965).

¹⁸ *ibid.*, 560-562.

¹⁹ *ibid.*, 568.

²⁰ *ibid.*, 571 (citing *Raley v Ohio* 360 US 423 (1959)).

²¹ *United States v Pennsylvania Chemical Corporation* 411 US 65 (1973).

²² Frank Newman, ‘Should Official Advice be Reliable? – Proposals as to Estoppel and Related Doctrines in Administrative Law’ (1953) 53 Columbia Law Review 374.

²³ Jeffery Wohlford, ‘A Defence by Any Other Name: Entrapment-by-Estoppel as a Criminal Defence in Arizona’ (2013) 55 Arizona Law Review, 805, 811.

by estoppel’, but rather a “reliance defence.”²⁴ In the case of *Lansing*,²⁵ it was accepted that a defence could exist in limiting circumstances whereby misleading Government advice would prove sufficient, if the advice was truly accepted and the individual was honestly trying to adhere to the law. The decision of the court in *Lansing* became the basis of the reasonable requirement of a test to establish the defence. Forty-two years later, in the case of *Batterjee*,²⁶ the test was further developed with the court outlining the five essential elements to establish a defence of entrapment by estoppel. Justice Fletcher described entrapment by estoppel as misleading, whereby an authorised government official informs a person that certain conduct is legal, and this person believes that advice and acts upon it. It is in this simple definition that the necessary elements are underlined:

Firstly, the erroneous advice must be offered by an authorised government official. Secondly, this authorised government official ought to be aware of all the facts pertaining to the matter. Thirdly, this government official, in providing the advice, must state that the conduct carried out is permissible. Fourthly, the guidance offered by this government official must be followed. Finally, as noted above, the person who having received this guidance and acted upon it, must have had solid reason to rely on it.

These defined principles in *Batterjee* expand upon the decisions of two other cases: *United States v Brebner*²⁷ and *United States v Tallmadge*.²⁸ Both of these cases offer a clear outlook on the defence – in order to rely upon it, the defendant must show a reasonable reliance on the advice to an extent that any reasonable person would have acted upon it. In other words, the requirements of the objective test outlined above should be met.

²⁴ 2 Paul Robinson, *Criminal Law Defences* § 183 (2012).

²⁵ *United States v Lansing* 424 F 2d 225, 226 (9th Circuit 1970).

²⁶ *United States v Batterjee* 361 F 3d 1210, 1212, 1216-17 (9th Cir 2004).

²⁷ *United States v Brebner* 951 F 2d 1017, 1024 (9th Cir 1991).

²⁸ *United States v Tallmadge* 829 F 2d 769 – 70 (9th Cir 1987).

As outlined in the previous section, the position adopted is clear: the defendant must have acted on specific advice that he or she has sought, that advice must have been given by an authorised public official, and it must satisfy the objective test as to the reasonableness of the defendant's reliance and subsequent conduct. One can draw a comparison with estoppel in civil or commercial law in that there must be a clear and unequivocal promise, the promise in this instance being clear and unequivocal advice. This idea is supported in the case of *United States v Giffen*,²⁹ wherein it was reaffirmed by the court that the defendant must have been unwavering from the course of action which was described when the advice was originally offered. The court also made clear that the defence is not a license to commit crime. This effectively inserts a good faith clause, meaning that the defendant must have been truthful in his or her intentions and that the advice sought was not for the purpose of garnering a defence for intended criminal actions, as evidenced by the court in *United States v Wilson*.³⁰

[B] The current application of the defence in America:

The decision of the court in *Wilson*³¹ demonstrates the reluctance of the judiciary to allow for the defence, and instead highlights that it is preferable to use it in limited circumstances. This is plainly stated by Justice Restani in *Corso*: "... the courts invoke the doctrine of estoppel with great reluctance."³² He goes on to say that the court does not interfere with the functions of, or undermine the policies of, the executive. This is a principle that was expressly stated in *United States v Howell*,³³ where it was held that the defence is rarely available and that it only applies when the defendant was acting with "actual or apparent authority."³⁴ Furthermore, to avail of the defence, the government must have actively misled the defendant.³⁵ This is

²⁹ *United States v Giffen* 473 F 3d 20 (2nd Cir 2006).

³⁰ *United States v Wilson*, 721 F.2d 967, 975. *United States v Wilson* 721 F 2d 967, 975 (4th Cir 1983).

³¹ *ibid.*

³² *United States v Corso* 20 F 3d 521 (2nd Cir 1994).

³³ *United States v Howell* 37 F 3d 1197 (7th Cir 1994).

³⁴ *ibid.*, 1204.

³⁵ *ibid.*

evidenced in the more recent decision of *United States v Georgescu*.³⁶ In *Georgescu*, the defendant was charged with conspiracy offences. The defendant, under the belief that he was working undercover for the CIA, facilitated the sale of weapons to a guerrilla group in Colombia. He attempted to rely on the defence of entrapment by estoppel on the basis that he had a telephone call with the CIA and thought there to be an agreement to work in an investigative capacity for the agency. It was determined that it was appropriate to put in place a requirement that the defendant must prove that “*affirmative conduct or statements* of a government official caused him in good faith to believe,”³⁷ that he was permitted to facilitate such actions.

Considering the manner in which the American courts have applied the defence thus far, it is reasonable to suggest that the defence is a substantive defence, granted with great caution. At its heart, it offers an executory answer to a criminal charge – a double-edged sword for the courts to a certain extent. On one hand, the courts must be seen to acknowledge the age-old concept that it is better to let ten guilty persons walk free than to convict one innocent one;³⁸ but on the other, if a person commits a crime, they should face the repercussions for doing so. Yet, in examining the procedural development of the defence, two questions remain largely unanswered: firstly, for exactly what offences does this defence apply; and secondly, who gets to determine whether it is acceptable or not to reply upon the defence?

It is not unreasonable to equate relying upon this defence as something akin to a constitutional right, or even a broader human right. By virtue of the United Nations Declaration of Human Rights,³⁹ anyone charged with an offence has a right to a public trial in which they have been

³⁶ *United States v. Georgescu*, 16-4159-cr (2nd Cir. Oct. 27, 2017).

³⁷ *ibid.*, at n.25, at 15.

³⁸ Blackstone’s Ratio, William Blackstone, *Commentaries on the Laws of England*, 1760’s, 358.

³⁹ Universal Declaration of Human Rights 1948, Article 11, available at <
<https://www.un.org/sites/un2.un.org/files/udhr.pdf>>

given all the guarantees required for their defence. In light of this, one could argue that the defence of officially induced error should apply to any penal offence. However, what if the offence committed is a so-called specific intent crime such as murder?⁴⁰ The US courts have in the past been faced with such a question,⁴¹ and seem to favour the position that the defence will not apply.

In regard to cases wherein a jury is charged with determining a person's guilt, the application of the defence can be more complicated. Indeed, there are arguments supporting either side of the debate.

The courts have expressed their own views on the matter, as evidenced in the case of *United States v Hall*,⁴² wherein it was determined that a judge has the power to ignore the doctrine even if the necessary elements are present, and absent any policy considerations that would require him to do so. In his 1994 article,⁴³ Sean Connelly notes that in this respect, criminal juries should not be placed in the position whereby they are required to weigh policy considerations in respect of government conduct.

However, upon examination of cases such as *Evans*⁴⁴ would suggest that there are times in which the question of entrapment defence should even be put to the jury. Connelly suggests that it is only a jury matter when the defendant's intent is a material element of the

⁴⁰ Sean Connelly, "Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law" (1994) University of Miami Law Review 48(3), 627. Sean Connelly, 'Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law' (1994) 48(3) University of Miami Law Review 627.

⁴¹ See the case of *Tanner v United States* 483 US 107 (1987) 128 .

⁴² *United States v Hall* 974 F2d 1201, 1205 (9th Cir. 1992).

⁴³ Sean Connelly, 'Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law' (1994) 48(3) University of Miami Law Review 627, at 640.

⁴⁴ *United States v Evans* 928 F 2d 858, 860 (9th Cir. 1991).

offence.⁴⁵ John Lundquist, in his 1997 article,⁴⁶ purported the idea that it is the goal of the defendant to obtain a jury instruction on the matter.

If the issue of entrapment by estoppel is a matter deemed solely for the court, it opens a doorway to the appellate courts. Following the decision of *Burks*,⁴⁷ it is a generally acknowledged rule that a jury verdict cannot be appealed by a government. In that respect, it is understandable that most defendants would prefer to argue the defence before a jury, where they have a greater rate of success without the looming fear of an appeal.

It would appear that the answer to the question of whether a court or a jury is preferable to plead the defence before is vague, and is for the most part, circumstantial in its determination. One thing, however, is clear – the defence of entrapment by estoppel in the United States, although imperfect, has evolved into a phenomenon used in limited circumstances and granted with even greater caution.

The Canadian Approach:

In Canada, the elements of the defence are substantially similar to those developed in the United States, with some key exceptions. Firstly, the defence is referred to as “officially induced error,” and secondly, in Canada it is a procedural defence and not a substantive one. This means that instead of officially induced error being a defence to be raised at trial before a judge or jury, it is instead an objection to the criminal process proceeding on grounds that it would be contrary to the accused’s right to a fair trial in the due course of law. This was presented nicely in its seminal Irish Case as being at its heart, “*a plea of fundamental unfairness*”.⁴⁸

⁴⁵ Sean Connelly, ‘Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law’ (1994) 48(3) University of Miami Law Review 627.

⁴⁶ John W. Lundquist, “‘They Knew What We Were Doing?’: The Evolution of the Criminal Estoppel Defense’ (1997) 23(4) William Mitchell Law Review 844, 845.

⁴⁷ *Burks v United States* 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). *Burks v United States* 437 US 1 (1978)

⁴⁸ *The People (DPP) v Casey* [2019] IESC 7, at para 32.

The defence as it stands in Canada has evolved over time from so called “due diligence” defences. For instance, in the case of *R v City of Sault Ste Marie*,⁴⁹ the Canadian Court of Appeal held that any charge would require proof of mens rea, which based on the facts would then acquit the defendant. In doing so, the court recognised three categories of offence:

- (1) ‘true’ crimes which require some element of mens rea, in the sense that the defendant knowingly, wilfully, or intentionally engaged in the prohibited act;
- (2) strict liability offences requiring no proof of mens rea (the act itself being enough to impose liability);
- (3) absolute liability offences, wherein mens rea need not be proved and for which there are no defences.

In justifying the categorisation of the offences, Justice Dickson asserted a need to have a category that had a lower standard than true crimes but not as harsh as absolute liability – a procedural middle ground. It is important to note that in this instance, the defence of due diligence carries a reverse burden of proof. The defendant must evidentially prove that they had acted with due diligence and in the same manner as a reasonable person because offences of strict liability carry a presumption of negligence as opposed to a presumption of innocence carried in true crimes. The cases of *Re BC Motor Vehicle Act*⁵⁰ and *R v Wholesale Travel Group Inc*⁵¹ both emphasise the first principles of fundamental justice and the distinction between “true crime” and regulatory offences.

While this can reasonably be said to be the groundwork for a plea of officially induced error, a defence of due diligence in these scenarios is a substantial defence, much like entrapment by

⁴⁹ *R v City of Sault Ste Marie* [1978] 2 SCR 1299.

⁵⁰ *Re BC Motor Vehicle Act* [1985] 2 SCR 486.

⁵¹ *R v Wholesale Travel Group Inc* [1991] 3 SCR 154.

estoppel in the United States. In Canada, it has subsequently expanded and developed into a procedural defence through the following cases.

The rationale behind *The City of Sault Ste Marie*⁵² was that a penalty of imprisonment for infringement would have been contrary to the right of liberty. This was built upon in *R v MacDougall*⁵³ where the court held that to imprison someone for an offence committed through no fault of their own, but rather because they were misled by a government official, could give rise to a similar issue.⁵⁴

The defence was first formally recognised in the case of *R v Cancoil Thermal Corporation and Parkinson*.⁵⁵ Justice Lacourciere analysed the defence as one that is available to an alleged violation of a regulatory crime, wherein the accused had reasonably relied upon erroneous legal advice of an official who is responsible for the administration of a particular area of law.⁵⁶ Cancoil Thermal Corporation was a manufacturer of heat transfer coils. The foreman Parkinson who was co-defendant in the case, with the general manager, removed a guard in the honest belief it was creating a hazard. Both the defendants were subsequently charged with an offense under The Occupational Health & Safety Act.⁵⁷ A key issue in this case was that the removal of the guard was approved by an official inspector from the Occupational Health and Safety Division of the Department of Labour, a public and regulatory body. Both defendants were acquitted because they were charged with an absolute liability offence which, according to the cases of *MacDougall*⁵⁸ and *The City of Sault Ste Marie*,⁵⁹ would have been a violation of their rights under section 7 of The Canadian Charter of Human Rights.

⁵² *R v City of Sault Ste Marie* [1978] 2 SCR 1299.

⁵³ *R v MacDougall* [1982] 2 SCR 605.

⁵⁴ *ibid.*, 613.

⁵⁵ *R v Cancoil Thermal Corporation and Parkinson* [1986] 27 CCC (3d) 295.

⁵⁶ *ibid.*, 303.

⁵⁷ The Occupational Health and Safety Act, S14.

⁵⁸ *R v MacDougall* [1982] 2 SCR 605.

⁵⁹ *R v City of Sault Ste Marie* [1978] 2 SCR 1299.

A deciding factor in terms of allowing for a plea of due diligence or officially induced error was that in this situation it was an “error in law” because there was a second guard on the machine (operating a foot pedal which in turn activated the machine). The court further highlighted a number of factors including consideration of the efforts made on behalf of the accused to ascertain their responsibilities under the law, the complexity of the law, the position of the official who offered the advice, and the exacting nature of the advice.

Another seminal case in the Canadian development of the defence is that of *R v Jorgensen*,⁶⁰ which involved the proprietor of an adult video store. He was prosecuted for the apparent knowledge that the videos in his store were of an obscene nature and he was absent of any legal right or excuse to provide such materials for sale.⁶¹ Undercover police performed an operation where eight videos were purchased and three of them were considered to be obscene at trial.

The issue at the heart of the case was whether the Criminal Code⁶² required that the retailer have specific knowledge of the facts contained in, and relating to any product that they sell, or whether mere general knowledge would suffice in order to attach criminal liability.

Ultimately, the appeal was allowed because the films in question had been approved by the censor’s office, a public regulatory body. Justice Sopinka defined “knowingly” as specific knowledge in order to establish mens rea. This was not present in the current case. The Supreme Court further dismissed the concept of “wilful blindness”, expressly stating that it applied only when the accused’s suspicion is aroused but he or she fails to make, or deliberately omits further enquires, preferring instead to remain ignorant⁶³.

⁶⁰ *R v Jorgensen* [1995] 4 SCR 55.

⁶¹ Paul Tackaberry, ‘Canada: Obscenity – Pornographic Videos’ (1996) Entertainment Law Review 7(4), E76.

⁶² The Criminal Code, S163(2)(a).

⁶³ *R v Jorgensen* [1995] 4 SCR 55, 167 Sopinka J.

Although not conclusive evidence of Jorgensen’s innocence, the fact that he was aware of the censor’s approval greatly aided his case. Justice Lamer, concurring in the judgement, identified the main criterion for when ignorance of the law may be accepted as an answer to a criminal charge, and went on to call this exception “Officially Induced Error of Law”.

It is at this point that the defence arises on procedural grounds, and it can do no more than justify a stay of proceedings after the Crown has proven all the relevant elements of the offence. In order for officially induced error to be successfully pleaded, the following criteria must be satisfied through proof:

- (i) the error was truly an error of law, or mixed law and fact, not just an error in fact;
- (ii) the accused considered the legal consequences of his/her action prior to the conduct in question;
- (iii) the advice obtained must have come from an appropriate official, generally from the government who are actively involved in the administration of the law in question;
- (iv) the advice must have been reasonable in the circumstances;
- (v) the advice must have been erroneous (this is also the only element that the accused need not prove);
- (vi) the accused must have relied upon the advice during the conduct in question;⁶⁴

Jorgensen was found to have satisfied all six of these criteria.

Although Justice Lamer’s consideration was not immediately taken up by the majority of the court, the doctrine was subsequently adopted in a number of provincial courts until 2006 when

⁶⁴ *R v Jorgensen* [1995] 4 SCR 55, para 25.

the Canadian Supreme Court unanimously recognised it in the conjoined cases of *Levis (City) v Tetreault*; *Levis (City) v 2629-447 Quebec Inc.*⁶⁵

The Situation in Ireland:

The heart of the defence in this jurisdiction rests in Articles 34.1 and 38.1 of the Constitution of Ireland.⁶⁶ These Articles state that justice is to be administered by the courts, and that no person shall be tried on any criminal charge save in the due course of law. Therefore, the courts' primary objective must be to pursue justice.⁶⁷ This is evidenced in the case of *Nash*,⁶⁸ wherein the court held that in principle, the State can be found liable for damages where it has breached a person's constitutional rights regarding criminal charges in the due course of law. It is primarily the trial judge who bears responsibility for ensuring procedural fairness at trial.

This raises the fundamental question of an exception defence – can the right to a fair trial be observed where a person is charged and subsequently convicted despite having acted reasonably and in good faith by making reasonable efforts to ascertain his responsibilities, albeit unsuccessfully? Furthermore, could a person be deemed criminally liable for contemplated actions?

Per the decision in *Nash*,⁶⁹ it is suggested that the State may be liable for failing to administer justice, contrary to the constitution. However, this could be problematic in assessing the circumstances and the defence, as it would likely result in a finding that would consider a guilty verdict as an affront to justice.⁷⁰ All defences in criminal law are a matter for assessment, based on the nature of the offence, the conduct and circumstances of the defendant, and the burden

⁶⁵ *Levis (City) v Tetreault* [2006] 1 SCR 420. OR *Levis (City) v Tetreault* [2006] 1 SCR 420, [2006] SCC 12.

⁶⁶ *Bunreacht na hÉireann*.

⁶⁷ Sinead Kane, 'Evidence and Procedure Update' (2019) 29(2) Irish Criminal Law Journal 50, para 4.

⁶⁸ *Nash v DPP* [2015] IESC 3.

⁶⁹ *ibid.*

⁷⁰ *People (DPP) v Casey* [2019] IESC 7, para 38.

and standard of proof required.⁷¹ This was affirmed in the more recent case *The People (DPP) v Gleeson*.⁷² On that basis, if one is to rely solely on the suggestion put forth in *Nash*,⁷³ the judgment would require great scrutiny.

However, it ought to be recalled that under Article 38.5, nobody may be tried for a serious criminal charge without a jury, subject to two exceptions that are irrelevant for present purposes. This calls into question the existence of procedural defences – which officially induced liability is – as generally, defences of this nature are decided upon by a judge, prior to a trial commencing before a jury.

By analogy, it may be argued that a person who can genuinely rely on officially induced error should not have to undergo trial and thereby risk being convicted. Therefore, this is not a substantive or excusatory defence that comes under the purview of Article 38.5 but a plea of fundamental unfairness, or a plea that the case does not reach a jury.⁷⁴ The Northern Irish case of *R v Bellingham*⁷⁵ has been said to neatly encapsulate all elements of this doctrine.⁷⁶

It was this consideration and an analysis of leading authorities from other jurisdictions that led the Supreme Court in *Casey*⁷⁷ to adopt the Canadian approach of a procedural defence instead of the American substantial approach. The judgment in *Casey* also highlights the vitality of the common law and its ability to react to novel situations and find solutions, often inspired by developments in other jurisdictions. *Casey*, in fact, might be seen as an example of policy transfer, given the clear influence of Canadian jurisprudence on the ultimate decision. Courts are not, of course, required to adopt a policy word for word. They can adapt it as they consider

⁷¹ *People (AG)* [1965] IR 366, at 382.

⁷² *People (DPP) v Gleeson* [2018] IESC 53.

⁷³ *Nash v DPP* [2015] IESC 3.

⁷⁴ *ibid.*

⁷⁵ *R v Bellingham* [2003] NICC 2.

⁷⁶ Gerard Coffey 'Entrapment in the Criminal Law: Reassessing the Contours of the Procedural Defence' (2019) 29(3) Irish Criminal Law Journal 68.

⁷⁷ *People (DPP) v Casey* [2019] IESC 7.

necessary or appropriate in light of the facts of the case with which they are dealing. It must remain within their power to do so as long as they do not encroach on the law-making functions of the legislature or act contrary to any constitutional provision.

*People (DPP) v Casey*⁷⁸ was the first time a plea of officially induced error was acknowledged in this jurisdiction. The case concerned misstatements involving positive account balances belonging to Anglo Irish Bank Plc and Irish Life & Permanent Plc, involving seven transactions totalling €7.2 billion in deposits. One of the defences raised at trial was that such a manner of accounting was permissible by the financial regulator. The defendant stated he relied on previous conversations with the regulator which led him to believe that his conduct was in fact permissible, and furthermore it was accepted through a “pattern of tolerance.”⁷⁹

The accused argued that the existence of a “green jersey agenda” - which is the desirability or need to support national agenda - meant that he was expected to downplay matters of concern to the regulator.⁸⁰ Mr. Casey was looking to rely on these conversations through a demonstration of the regulator’s awareness of the transactions to allow his defence to succeed.⁸¹ Although the court acknowledged the availability of the defence in this jurisdiction, Casey’s appeal failed on grounds of vagueness regarding his conversations with the financial regulator; the court cited “*very broad terms*”⁸² and a complete absence of official authorisation for the conduct in question.

The Supreme Court, while acknowledging the availability of the plea in this jurisdiction, set out a number of very stringent criteria all of which must be met in order to avail of the plea:

⁷⁸ *ibid.*

⁷⁹ *ibid.*, para 8.

⁸⁰ *ibid.*, para 9.

⁸¹ *ibid.*, para 11.

⁸² *ibid.*, para 14.

- (i) the accused must have sought, in good faith, legal advice from a relevant authority;
- (ii) the proposal which solicited the advice was accurate and specific in nature;
- (iii) the subsequent advice offered by the official must be specific and amount to legal advice;
- (iv) the advice given must cover the situation that was originally described, and should not by any reasonable standard cause the accused to conduct further investigation;
- (v) the advice must have been accepted honestly and have been of such a nature that any reasonable person would act upon it;
- (vi) the accused did not deviate from the course of action for which they received apparent authorisation.⁸³

In analysing the test, it seems to be one of due diligence which, interestingly, was expressly rejected in this jurisdiction in *Shannon Regional Fisheries Board v Cavan County Council*.⁸⁴ Mr. Justice Keane (as he then was) dissented in that case, preferring to adopt the Canadian approach in *The City of Sault Ste Marie*⁸⁵ case. However, it does not follow that the Supreme Court in *Casey* overruled *Shannon Regional Fisheries* because in the latter the question was whether to accept due diligence as a substantive answer to strict liability.

When it comes to officially induced error, the due diligence portion of the test must be considered in conjunction with the honesty requirement. The accused must have honestly believed that their conduct was in fact legal; furthermore, they must have actively engaged in

⁸³ *ibid.*, para 49.

⁸⁴ *Shannon Regional Fisheries Board v Cavan County Council* [1996] IESC 7, 3 IR 267.

⁸⁵ *R v City of Sault Ste Marie* [1978] 2 SCR 1299.

efforts to ascertain their legal responsibilities. It would be inaccurate to say that this is simply a test of due diligence because the test effectively has three components.

The first two components were discussed above, in that the accused must have acted in good faith and have been honest in their efforts and have exercised due diligence. The third component is that the honest and diligence requirements must fit within the specific and objective nature of the test.⁸⁶ This means that all conversations and advice sought must have been specific, and ought not to have left doubt or questions in the mind of any “responsible person”. For the purposes of clarity emphasis has been placed on the due diligence and honesty requirements of the test, but it is pertinent not to simply isolate these components because they must all be looked at in conjunction with the other criterion.

However, despite the criterion of the test being so clearly defined, there are many questions that remain, such as what constitutes legal advice as referenced in point (i) of the test; and at point (ii), reference to the word “specific”. Does it need to be specific to the exact circumstances faced by the individual, or would it be appropriate to interpret it as more generalised? For example, can a public official working in a non-regulatory capacity be deemed an official? These questions have yet to be addressed by the courts in this jurisdiction.

The Potential Scope of Officially Induced Error in Ireland:

Will a time ever come when the plea of officially induced error can be extended to legal practitioners or other professionals? The law is often in the unfortunate position that it can only react to situations after they have occurred, and damage has already been done. As the law shapes and moves the social order, the social order in turn shapes and moves the law. Technological advancements occur on a near daily basis. High street banking no longer holds

⁸⁶ Gerard Coffey, “*Entrapment in the Criminal Law: Reassessing the Contours of the Procedural Defence*”, Irish Criminal Law Journal 2019, 29(3), 68-62, 68.

a monopoly on the business, and you no longer have to call a stockbroker on the phone to order shares. The law is often slow to react and it can reasonably be said that today's marketplace could not have been anticipated by the legal minds of the day when well-known principles and maxims such as "ignorance of the law is no excuse" were being developed.

Considering the intricacies of modern law, especially in the field of regulation, and the principle of legality in that the law must be public and precisely defined, is it still fair, just and reasonable to say that ignorance is not an excuse? It is worth remembering that the plea of officially induced error was born out of the need to prevent a "fundamental unfairness" that would be contrary to the course of justice. In this light, it would seem that in a certain set of circumstances, punishing ignorance of the law with a conviction would be totally unjust.

The courts understandably want to keep the test for officially induced error as stringent as possible, which is why the key criteria will always be honesty and the position of the advisor. This is to avoid inadvertently introducing a defence of plausible deniability, instead emphasising whose advice is it reasonable to rely on. Remembering that this is an example of policy transfer, it is pertinent to re-examine the international case law for the advisor at the heart of them.

In the US case of *Raley*,⁸⁷ it was a committee empowered by the State of Ohio. In *Cox*,⁸⁸ it was a police officer. The case of *Pennsylvania Chemical Corporation*⁸⁹ involved regulations by an Army Corps of engineers. Moving to Canada, *Cancoil*⁹⁰ involved a safety inspector from the department of labour, while *Jorgensen*⁹¹ involved the film censor, an office that holds a regulatory power in the certification and suitability of film.

⁸⁷ *Raley v Ohio* 360 US 423 (1959).

⁸⁸ *Cox v Louisiana* 379 US 559 (1969).

⁸⁹ *United States v Pennsylvania Chemical Corporation*, (1973) 411 US 655.

⁹⁰ *R v Cancoil Thermal Corporation and Parkinson*, (1986) 27 CCC (3d) 295.

⁹¹ *R v Jorgensen* [1995] 4 SCR 55.

The common thread in the above cases is that they all involved a public authority in a regulatory position, with the exception of *Cox*,⁹² where a police officer was the authority involved. If a plea of officially induced error is raised in order to protect the constitutional rights of a defendant, given the potential complexity of regulatory law for a layperson (or a non-legal mind), it would seem reasonable to allow for the extension of the test to officials working in a non-regulatory capacity. In this light, the question is raised – could this extension of the defence be granted scope wide enough to include legal practitioners? After all, it is generally deemed as reasonable to obtain and rely upon advice from a solicitor or a barrister.

It is a long-enshrined principle in not only Irish constitutional law, but on the larger scale of both European human rights law and international law, that the criminal law ought to be precise and ascertainable. There should be no ambiguity in the law that results in a person being convicted for a crime they did not know existed. However, the criminality of some kinds of conduct is more obvious than others. Even without any particular legal knowledge, people know that killing, the infliction of non-fatal violence, theft, robbery, and similar conduct (traditionally classified as *mala in se*) are wrong. But even people well versed in law, business and commerce can find themselves lost in the complex web of regulatory offences. Furthermore, some people simply do not have the facilities to carry out their own research into the law, and often those who do, find that the result is rarely simple, clarifying or even reliable.

When considering the future of the defence of officially induced error, one can look to the concept of mistake of law, a principle often found in tort and contract law. Mistake of law occurs when a person has knowledge of the facts, but is incorrect in their assessment of the legal consequences of an act or event. The private law has remedies for this instance; in contract

⁹² *Cox v Louisiana*, (1969) 379 US 559. *Cox v Louisiana* 379 US 559 (1969).

law one can simply recede the contract, whilst in tort a plaintiff can pursue damages for negligent misstatement under the principles set out in *Hedley Byrne*.⁹³

Like officially induced error, negligent misstatement arises when a third party, who held themselves out as a professional or an expert to the injured party, offered inaccurate advice that was acted upon and caused some form of loss. The injured party may, as a result of the advice given, be entitled to damages or recovery for economic loss.

Another private law example would be that of *Allen t/a David Allen Chartered Accountants v Dodd & Co Ltd*.⁹⁴ This case involved inaccurate legal advice acted upon by the respondent. He sought to rely upon the erroneous advice in his grounds of appeal. The appeal was dismissed on the basis that the advice received had not been unequivocal. The key takeaway from this case is that it is possible to rely upon sought legal advice, but it should be noted that lawyers do not often give unequivocal advice, and when they do, there is always a risk that the advice may be wrong.⁹⁵

This begs the question as to whether the criminal law ought to adopt a similar approach when an official has made a negligent or innocent misrepresentation? As regards innocent misrepresentation, it is a reflection of an absence of moral culpability; that anything beyond rescission could be penalising someone who is not ‘legally speaking’.⁹⁶ Does that mean that officials should become liable for such misrepresentations in these kinds of situations at a criminal level? No. There are several issues with this idea, a view shared by Mr. Justice Kenny in the case of *Bank of Ireland v Smith and Others*,⁹⁷ who, in reflecting on the dicta set forth by

⁹³ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

⁹⁴ *Allen t/a David Allen Chartered Accountants v Dodd & Co Ltd* [2020] EWCA Civ 258.

⁹⁵ Kelly Gibson, “Restrictive Covenants: *Allen t/a David Allen Chartered Accountants v Dodd & Co (CA)*”, Taylor & Emmet, The Employment Blog (11th December 2020).

⁹⁶ Gearoid Carey, “*Misrepresentation and the Avoidance of Liability*”, Commercial Law Practitioner 2001, 8(6), 131-140.

⁹⁷ *Bank of Ireland v Smith and Others* [1966] IR 646, [1966] 102 ILTR 69.

Lord Denning in the UK case of *Dick Bentley*,⁹⁸ expressed his distaste for the concept, and suggested a willingness to extend the doctrine of warranty in restricted circumstances.

Given that there are remedies for mistakes in tort and contract law, surely there is the scope to adopt similar remedies into criminal law? Understandably, the courts are reluctant to allow for such an occurrence, for fear of opening the floodgates to claims of misguidance by lawyers being the cause of the case before them. However, there must be other avenues for redress in instances where people find themselves facing possible criminal convictions as a result of relying upon inaccurate advice. For example, if the courts were to allow the tort defence of negligent misstatement in criminal cases, what would happen? The defence is likely to be applied in the same manner, with the conditions to be met. But in the grand scheme of things, even if the defence is successfully invoked, it won't remove the conviction of a criminal offence on a person's record – and that in itself, is the sole reason that there is a need for the defence of officially induced error.

The test for officially induced error is stringent, and should always remain as such. Every criminal defence ought to have strict conditions that must be met in order to assure the functioning of the criminal system in a fair and equitable manner. But just how strictly the defence is tested in Ireland, and how intensely it will be scrutinised by judges in this jurisdiction in the future, is a question that remains to be answered.

Conclusion:

While the future scope of the defence is difficult to predict, it is fair to say that honesty will always be key in deciding whether to permit pleas of officially induced error. Considering that

⁹⁸ *Bentley Productions Ltd v Smith* [1965] 2 ALL ER 65.

the plea is essentially designed to protect an accused person from fundamental unfairness, one can foresee the courts extending its scope to include non-regulators but it would be a stretch for them to accept the advice of a single official or practitioner who was operating in a non-regulatory capacity.

The most likely circumstance where a non-regulator would be accepted is one where the accused had sought out, in good faith, an individual who they had reason to believe was in a position to provide an accurate answer to the specific elements of the query, and that advice was later affirmed by a relevant professional third party. If the advice were given by an official from a local authority coupled with affirming advice by a professional lawyer, it would then be foreseeable and reasonable to consider that advice as reliable and accurate. This would be decided on a case-by-case basis, considering the accused's personal background and circumstances, the nature of the offence charged, and the degree of diligence exercised. However, this may involve asking the courts to introduce a subjective element to the test, relating to the accused's state of mind.

Indeed, it would be desirable for the courts to remain open to developing the plea and adjusting the criteria to reflect an ever-changing society, technological advances, and the complexity of regulations in a new era of law, but in the current legal landscape, where very little is permanent, that seems like a fantasy. In a system where little is absolute, one thing is known for definite – we should not allow the conviction of arguably innocent people, who unwittingly committed crimes founded on the reliance of bad advice.