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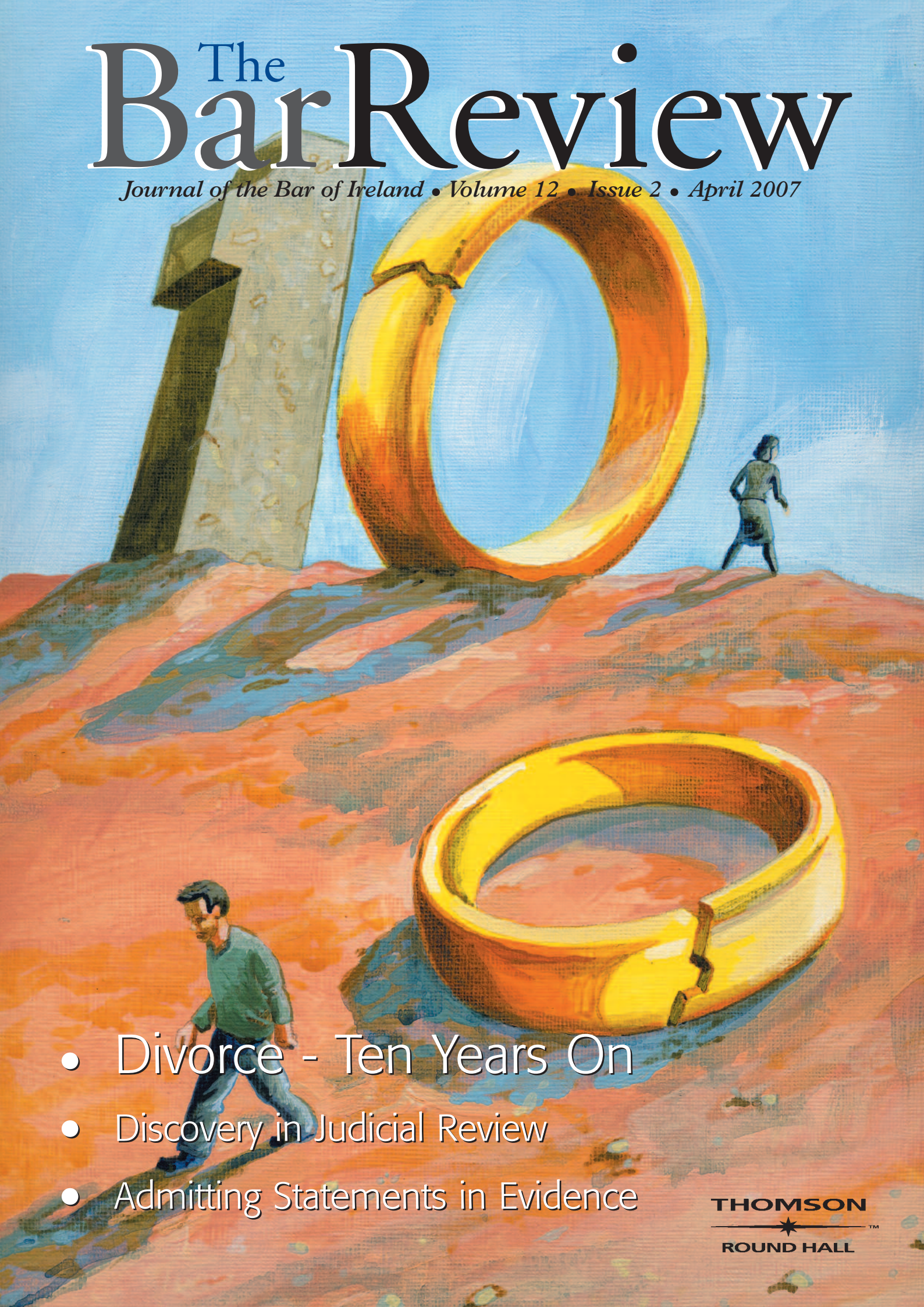

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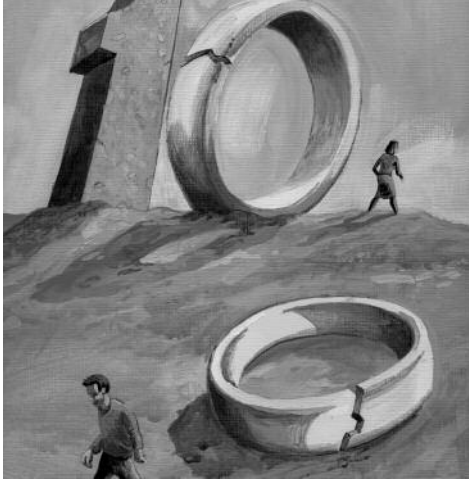

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Trends in Divorce on the Ten Year Anniversary of its Introduction

A Review of Recent Case Law

Inge Clissmann SC and Claire Hogan*

That was then…

> "A woman voting for divorce is like a turkey voting for Christmas."[1]

And this is now…

> "Each spouse has a continuing obligation to make proper provision for the other and the resources which are available to each of them may be taken into account so far as is necessary to achieve that objective."[2]

Introduction

In the ten years that have passed since the introduction of divorce, it is submitted that the "proper provision" criterion has dominated the Irish experience. Naturally, judicial support and recognition of the "proper provision" factor is an important constitutional and statutory imperative. Irish judges have deferred to Article 41 and section 20(1) of the 1996 Family Law (Divorce) Act,[3] by describing their task as ensuring that proper provision rather than proper division is carried into effect.[4] In this regard, those who argued that Daddy would say "bye-bye" and be free to shirk his responsibilities have had their fears largely unrealised.

However, it can also be argued that the shadow cast by "proper provision" may hamper the progression and development of our divorce law. Attempts to argue for a fresh approach to an issue are often met with a recital of this criterion. For example, many judges rely on this argument to reject the appropriateness of English solutions to Irish problems. For instance, there was some support for the "clean break" principle in the *T. v. T.* [5] judgment. However, so qualified were the words of the judges; and so couched in terms of the overriding need to ensure proper provision, that some five years later we are still struggling to discern firm principles from this decision

An important theme receiving much attention in the recent Irish caselaw is the "full and final settlement" clause. The first part of this article examines two recent decisions concerning the effect of the clause when it appears in a separation agreement or judicial separation consent order, which is later reviewed under section 20(3) of the 1996 Act at the time of divorce proceedings. There will also be a discussion of a recent case which examines the effect of this clause when a spouse seeks to vary the provision made on the basis of a consent order at the time of *divorce* proceedings; that is an attempt to get "another bite of the cherry".

"Full and Final Settlement" Clauses - the Emergence of Confusion

In order to put the most recent cases in context, it is useful to outline the apparent conflict between the decisions in the divorce and ancillary relief cases of *W.A. v. M.A.*[6] and *R.G. v. C.G.*[7] In the case of *W.A. v. M.A.*, which involved an earlier separation agreement, Hardiman J. stated:[8]

> "Particularly having regard to the terms of s.20(3) of the Act of 1996, I cannot approach the question of what is "proper" in the circumstances of this case without giving very significant weight to the terms of the separation agreement. I must also construe the word "proper" having regard to its context as part of a statutory provision."

The later case of *R.G. v. C.G* related to a settlement of judicial separation proceedings, rather than a separation agreement. Finlay Geoghegan J. stated:[9]

> "The proper provision for the parties must exist at the date of the hearing of the application for the Decree of Divorce. Further, it must be based upon the value of the assets of the parties at that

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This article originally formed part of a speech delivered to a Law Society of Ireland Conference on the 27th of February entitled, "Divorce: Ten Years On."

1 Alice Glenn, 1986.

2 The judgment of Murray J. in *T. v. T.* [2002] 3 IR 334 at 409.

3 Hereafter referred to as the 1996 Act.

4 See, in particular, the judgment of Denham J. in *T. v. T.* [2002] 3 IR 334 at 383.

5 [2002] 3 IR 334.

6 [2005] 1 IR 1.

7 [2005] 2 IR 418.

8 [2005] 1 IR 1 at 20.

9 [2005] 2 IR 418 at 428.

> date and the circumstances as they then exist. The acknowledgement included in the Consent of the 7th of November, 2000, if it is to relate to a proper construction of the Act of 1996 must be considered to be an acknowledgement of potential proper provision at a future unknown date. What if divorce proceedings had not been brought for a period of ten years? When so properly construed it appears too uncertain to be a matter this Court should take into account"

Therefore, the term in the consent four years previously acknowledging that proper provision was made was not given any weight. Conversely, in *W.A. v. M.A.,* Hardiman J. said that such terms in the separation agreement dating back 11 years carried "very significant weight". Naturally, considerable doubt emerged regarding the standing of prior settlements and the "full and final settlement" clauses therein.

Case No.1: *S. McM v. M. McM*[10]

The Applicant wife and the Respondent husband were married to each other in 1967, and had three children. The wife had been a secretary and gave up her employment for her marriage. The husband worked in a family firm, known as "the Group" and the family lived in "cautious comfort". They separated in 1991, after 24 years of marriage.

A deed of separation was executed on the 3rd of July, 1991, which contained a full and final settlement clause and acknowledged that the husband provided IR£83,000 to facilitate the purchase of a house for the wife. This sum represented approximately 60% of the proceeds of sale of the family home. He also agreed to pay IR£25,000 gross per annum in maintenance.

W.A. v. M.A. and *R.G. v. C.G.*- the Conflict Resolved?

Abbott J. held that this case was more aligned with the cases of *K. v. K*. and *R.G. v. C.G.,* rather than *W.A. v. M.A*., insofar as the settlement was of long years standing and did not represent "a sharing of assets and business opportunities between husband and wife such as occurred in *W.A. v. M.A*."

This decision provides clarification that the decision in *W.A. v. M.A*. to make no further order at the time of divorce is one which should be confined to cases where there was a severing of ties between the parties in a manner which represented fair, and generous or even equal sharing of the assets. In line with *K. v. K*., the settlement in question should also be fairly recent in order to warrant the making of no further order. Thus, it is submitted that the scope of *W.A. v. M.A.* has been curtailed significantly.

Factors Which Affect the Weight to be Given to the Separation Agreement

Abbott J. looked to the substance of the 1991 agreement and found that it was a "reasonable one", both in view of the available assets at the time, as well as the needs and contributions of the parties. He said that the agreement represented "a very solid centre of gravity restraining the court from going too far beyond the parameters thereof."

He went on to ask whether the further test in the *K. v. K.* and *R.G. v. C.G.* cases was met:

> "This test is whether the circumstances of the provider (the husband) have altered substantially and dramatically for the better since the making of the settlement a relatively long time ago in 1991."

First, it is doubtful whether the authority exists to distil such a clear "test" from the previous two cases. Secondly, the formulation of such a test begs the question, how dramatic does the alteration need to be? When financial disclosure was less than forthcoming at the time of separation, it is often difficult to state with accuracy the true levels of wealth of the parties at the time of execution of the settlement. The test might work an injustice in cases where the main provider was always very wealthy but failed to disclose this, with no subsequent *dramatic* increase in wealth at the time of divorce. Furthermore, why does the test only apply to the provider? Surely if the circumstances of the other spouse substantially and dramatically worsen, this too could warrant the making of further orders to satisfy the proper provision test.

In looking at the change in the financial circumstances of the husband in this case, it was the four-fold increase in the husband's salary (from IR£80,000 to €420,000) which was particularly salient, especially when compared to the current value of the wife's maintenance and other benefits such as VHI payments; which totalled €72,000 per annum. In simple terms, the wife's maintenance had represented over one-third of the husband's salary in 1991. In 2006, it represented roughly one-sixth of his salary.

Abbott J. declared that it would be unfair to allow the terms of the settlement, "to prevent the wife from enjoying the better standard of living experienced throughout the country in real terms, especially when they have been enjoyed…by the husband."

He stated that:

> "…the settlement should not act as a restraint in relation to providing reasonable resources to enable the plaintiff to catch up with modern prosperity and to receive an adequate and proper amount of resources to provide security which she will lose by foregoing succession rights in the post-divorce situation."

One might be forgiven for thinking that the economic benefits brought about by the Celtic Tiger gave *carte blanche* for the provision of a generous sum to the wife. However, the "centre of gravity" provided by the separation agreement was deemed to be a counter-weight:

> "The settlement should be of influence in ensuring that the shares in the Group in the hands of the husband should not be exploited to disrupt the family and inherited nature of the

10 Unreported, High Court, Abbott J., 29th November 2006.

business or to provide resources by aggressive provisions in the divorce order for realisation or use as security."

The total net assets of the husband amounted to €7,245,000, while the net assets of the wife amounted to €880,000. Abbott J. proceeded to apply the section 20(2) factors *ad seriatim*. He increased the maintenance award to €90,000 and ordered the husband to pay the wife a lump sum of €400,000. Furthermore, the learned judge ordered the division of the pension fund by providing the sum of €1.25 million for the provision of a retirement fund for the wife.

Finally, he directed that the husband, his successors and personal representatives would hold from henceforth 10% of his shares in the family company in trust for the wife with the intent that she would hold and dispose of same by deed or will. This came with an important caveat that the wife could not call for the vesting of the shares, but that she would be entitled to dividends and cash proceeds. This award is a novel approach for an Irish Court to take, as the ties between divorcing couples are more usually severed (apart from the case of maintenance awards) and it was frequently deemed inappropriate to give a spouse some shares and thus an ongoing interest in the other spouse's company. This award could represent a more imaginative approach to achieving a just solution, and the beginnings of a step-back from any tentative Irish "clean break" strategy.

A clean break is often the preferred solution of both parties and of course, this is the outcome favoured in England by s.25A of the Matrimonial Causes Act 1973. However, in the English case of *F v F (Clean Break: Balance of Fairness)*[11] Singer J. held that the courts were "not prepared to surrender fairness for sacrifice on the altar of finality." At this point, it is interesting to deviate slightly and consider the approach of the English courts to this issue.

English Caselaw on Allocation of Shares in Private Companies

In the case of *C. v. C. (Variation of Post-Nuptial Settlement: Company Shares)*[12] the husband and wife started an organisation concerned with drug testing. The husband, with the wife's full knowledge, set up a Cayman Islands settlement into which his 41% shareholding in the company was transferred. As settlor, the husband nominated the wife as a beneficiary. Negotiations for the sale of the company foundered despite a large consideration being offered. In the aftermath of a boardroom upheaval, the husband and wife ceased to be company directors. In her application for divorce and ancillary relief the wife sought, *inter alia*, a variation of the Cayman Islands settlement to transfer shares in the company to her.

Coleridge J. decided to transfer to the wife 30% of the husband's shares, that is to say 15% of the company and concluded:[13]

" I think almost as a matter of principle, in a case of this kind where a wife in Dr N's position has played a part and wishes to play a part in the future of a company, that there has to be a compelling reason why she should not be entitled to do so. Sometimes wives in her position completely step away from any involvement in the future running of the company. For that reason, there is no particular advantage in them owning shares rather than having a stake in the eventual sale value. But I think where a wife makes out a sensible case for holding shares, the court should, in fairness, accede to it."

In an age where there are successful Irish companies featuring in the assets schedules of many of the parties in "ample resources" cases, it is submitted that consideration should be given to allowing a spouse to gain or hold shares in the manner set out in the above case. Where a wife works in the home, thereby allowing her husband to concentrate on building up a successful family company, it is often only through a continuing stake in the company that she will get to taste the fruits of their partnership. The courts could retain the power to craft safeguard-clauses to avoid boardroom or shareholder disputes in the aftermath of such awards.

Case No.2: *S.J.N. v. PC. O'D*[14]

Another decision of Abbott J. delivered on the same day provides more elucidation on the relevance of prior settlements. The Applicant wife and the Respondent husband married in 1994 and had two children. Interestingly, in this case, the wife was significantly wealthier than the husband. At the date of their marriage, the husband was a wholesaler in the food business and the wife was a tour operator in England. When the wife moved into the family home in Ireland following the marriage, her travel business began to prosper and became a very successful group of companies. Furthermore, the husband introduced the wife to valuable business contacts. Following marital discord, the wife left the family home in 1999. The High Court granted a decree of judicial separation to the parties on the terms of a settlement reached by them after a short hearing. The settlement, dated the 16th of November 2001, contained a full and final settlement clause and provided as follows:

1. The husband was to pay the wife a lump sum of IR£300,000. The wife was to release any interest in the family home and another premises.

2. The husband agreed to pay the sum of €1,000 per month maintenance.

3. The husband released to the wife all his interest in any of her companies.

Shortly after the execution of the settlement, there was a re-structuring of the wife's group of companies and a substantial

11 [2003] 1 F.L.R. 847.

12 [2003] 2 FLR 493.

13 Ibid., at 505.

14 Unreported, High Court, Abbott J., 29th of November 2006

increase in her salary. The companies showed a far greater level of profit than was apparent from the figures available at the settlement. Abbott J. held as a fact that some of the information which led to the important financial developments constituted information which in hindsight should have been disclosed by the wife in the course of the proceedings. However, there was no *mala fides* or deliberate concealment- rather the information was incomplete and unavailable to the wife. The judge later referred to an "information deficit" in this regard.

The net assets of the wife now stood at €15,469,257, and at €2,824,586 for the husband. In addition there was a high potential earn-out for the wife under the purchase agreement of a dotcom company, sold in early 2006. She had clearly prospered since the settlement, amassing property in Ireland and England and having access to €10,500,000 lodged in an offshore bank. The husband had not fared so well, needing to sell the family home to pay the wife the sum of IR£300,000. His food business suffered the effects of two major food-scares and he claimed that he missed the opportunity to build a property empire, due to the financial implications of the separation settlement.

Factors Which Affect the Weight to be Given to the Settlement

Arising out of the judgments in *K. v. K.*, *W.A. v. M.A.* and *R.G. v. C.G.*, Abbott J. held that there was clear authority for the proposition that the weight to be given to a settlement is affected by any error or mistake preceding it, very much like the lack of disclosure which he considered existed in the case. It is submitted that this consideration will affect many prior settlements, and therefore it was important to articulate this factor as one which may cause an earlier agreement to lessen in insignificance. The issue of misrepresentation, lack of disclosure and undue influence in the making of separation settlements has not received much judicial attention in the Irish courts. In the Irish case of *L-M v. M*[15] it was held that a separation agreement is subject to the ordinary law of contract, and if entered into due to fraud or duress, it would be voidable. However, the husband in the case failed to establish that he had entered into an agreement under duress and so the affirmation of the principle was *obiter dicta.* It will be interesting to see how this area of the law develops over the next ten years; as more and more divorcing couples seek to re-assess the provision made for them at the time of separation.

Public Policy Interests Behind Section 20(3) of the 1996 Act

The learned judge summarised the interest of divorcing parties and the public in the full and final settlement clauses in family law proceedings, as follows:

1. Commercial and economic reasons
2. The sharing and avoidance of risk
3. The avoidance of personal and emotional turmoil by reason of uncertainty and unresolved conflict, including the risk of continued litigation
4. The avoidance of further costs

In relation to economic reasons, Abbott J. declared that we live in a market economy and that "relieving social legislation" should not be the cause of inhibiting the pursuit of commercial goals. In relation to risk, Abbott J. remarked that it was unusual in this case that the settlement stacked most of the risk-laden assets on the wife's side, and the "gilt-edged" assets on the side of the husband. The learned judge commented,

> "It is axiomatic that those who bear the most risk should enjoy the greater reward in economic terms. The full and final settlement clause is a means by which this basic fairness is established."

In relation to the emotional aspect, the judge noted that a party to family law proceedings might agree quite sensibly to a full and final clause in order to ensure a degree of emotional stability and to provide a cocoon of security for themselves and their children. So long as their adviser ensured that there was no undue influence, then this was a legitimate trade-off against the possibility of future economic gain. In relation to costs, the case of *K. v. K. (No. 3)*[16] was cited as a salutary reminder that the resources of the provider can be exhausted through successive litigation.

Abbott J. concluded on the basis of all of these considerations that "very considerable weight indeed" should be given to previous settlements and full and final clauses within them. The learned judge found that s.20(3) of the 1996 Act requires the court to consider whether the settlement is still in force and it may still be in force, notwithstanding obvious defects in its formation, such as were found in this case.

He felt that there was no doubt that the settlement of 16th of November 2001 was still in force for the following reasons:

1. The separation provisions therein had been effected and continued
2. The childcare provisions therein continued
3. The division of physical assets continued and had supported several property transactions in the meantime
4. The business and commercial arrangements of each of the parties had been conducted independently of each other, with varying degrees of success.
5. Both parties still continued to seek a full and final settlement, as in a clean break, save for the normal exceptions of childcare provisions and maintenance.

It might be wondered just what factors would cause the settlement to cease to be in force? Was it simply because the settlement terms had operated fairly smoothly that it was still in force? What about the

15 [1994] 2 Fam LJ 60 (SC) (March 1993)

16 [2006] 1 I.R. 284.

defects in knowledge and disclosure which were referred to earlier. What degree of seriousness would be needed to cause the agreement to no longer remain in force? More specific guidance will be needed in this area.

Final Award Made

Having decided to attach "considerable weight" to the clause in question, Abbott J. went through the section 20(2) factors. In relation to contributions, the learned judge acknowledged the fact that the husband introduced the wife to contacts in an airline who could deliver a major contract and business to her companies. It was held that the contribution of the husband was such that a person in a more calculating mood than a newly-wed husband and operating in an ordinary arms-length commercial context would have secured a shareholding in the Group to reflect a contribution of between 5 and 10%.

The children in this case were ten and eleven and were likely to continue to be cared for jointly. Therefore, despite his express finding that the clause in this case should be given "considerable weight", Abbott J. was anxious to prevent the husband being shown up by an embarrassing gap in wealth with the children's mother, as this could cause "a loss in self-esteem, grieving or obsession with the litigation" so that he "would easily lose the capacity to celebrate, enjoy and be bubbly with his children as a father should."

Ultimately, Abbott J. considered what the underprovision might have been in conditions where the wife's non-disclosures were in fact disclosed to the husband prior to the settlement in 2001.

The Information Deficit Loss (IDL) relating to the valuation of the wife's companies was such that the judge found it difficult to see how the husband might have been lumbered with the obligation to pay his wife IR£300,000. Neither would the maintenance award have been so high. In the end, the husband was awarded a lump sum of €2,148,800. The new adjusted nominal maintenance was set at €7,000 per annum.

Conclusions

Although in each of these decisions, the full and final settlement clauses were expressed as being, "a very solid centre of gravity" (*McM. v. McM.*) and also due "very considerable weight" (*N. v. O'D*), it is submitted that there are now too many countervailing considerations for these clauses to be given much weight. If the settlement is of distant origin, it will be less relevant in the current divorce proceedings. The same rule applies if there was no fair and generous sharing of the assets and opportunities at the time of execution. If the financial situation of one of the parties has dramatically and significantly changed for the better, this will also render the settlement less important. The same applies when there are young children involved. If there has been any impropriety such as non-disclosure, then this is yet another consideration. Thus, it is submitted that cold comfort can be derived from full and final settlement clauses in any settlement prior to divorce. The "proper provision" criterion simply does not permit the parties to oust the jurisdiction of the Court at the time of divorce. The aims of certainty and financial security expounded in the *N. v. O'D* case are all very laudable. However, it is submitted that separating spouses cannot be afforded any strong reassurance by the invocation of full and final settlement clauses.

Taking a "Second Bite of the Cherry" Post-Divorce

Case No.3: *J.C. v. M.C*[17]

The Applicant husband and the Respondent wife were married to each other in 1979. There were five children of the marriage. They divorced in May 2000, with a consent order setting out the provision to be made for each of them. A maintenance order provided that the husband pay the wife the sum of IR£48,500 maintenance per annum, split into IR£36,000 for her own needs, and IR£12,500 for those of the children. About two weeks after the settlement, the husband's assets increased significantly with the sale of a company of which he was director and substantial shareholder. However, the terms of the settlement reflected the fact that the business had previously been in financial difficulty, and had lost a major contract. The wife argued that the settlement was considerably inadequate, and that the maintenance order prescribed was no longer proportionate to the Applicant's means. She now sought a variation of the periodical maintenance under section 22 of the 1996 Act, and a further lump sum order under section 13.

Preliminary Issue-Jurisdiction to Grant New Orders

Section 13 of the Family Law (Divorce) Act 1996 sets out that, "On granting a decree of divorce or at any time thereafter", the court may make:

(a) a periodical payments order

(b) a secured periodical payments order

(c) a lump sum order requiring one spouse to make payments in favour of the other or of any dependent member of the family.

Section 22 of the 1996 Act sets out orders which may be varied by the court on application to it. Section 22(1) sets out the orders to which the variation provisions apply, including the following:

(a) a maintenance pending suit order,

(b) a periodical payments order,

(c) a secured periodical payments order,

(d) a lump sum order if and in so far as it provides for the payment of the lump sum concerned by instalments or requires the payment of any such instalments to be secured

17 Unreported, High Court, Abbott J., 22nd January 2007

The variation provisions do not apply to lump sum orders *generally*, to property adjustment orders, nor to various other orders under the Act.

In the *T. v. T.* case, Keane C.J. referred to the English case of *Minton*[18] as authority for the proposition that a new order for maintenance cannot be made where one was not granted in the prior divorce proceedings.[19] The wife in *T. v. T.* was therefore precluded from bringing a further application for maintenance because there was no continuing order. By analogy, it was argued that the wife in this case could not come back for a new lump sum order where a continuing order is absent. Referring to section 22(1) of the 1996 Act, it was argued that lump sum orders, property adjustment orders and various other orders are left out, so that parties should not be allowed to "come in and make more" of the orders in later cases.

Counsel for the wife argued that the wording of section 13 of the Act- "On granting a decree of divorce or at any time thereafter…" meant that parties were entitled to return to the court post-divorce on any number of occasions that they wished to seek further ancillary relief. It was argued that even though certain orders were excluded under section 22, a court would have the jurisdiction to make an order for maintenance after a decree of divorce, regardless of whether or not there was a maintenance order in existence.

The Court was reminded that the constitutional "proper provision" criterion was a specific tool used to allay the fears of those who were loath to approve the divorce referendum. It was argued that *T. v. T.* only expresses desirability for finality where circumstances permitted. If there were sufficient resources there for the court to get a result which would make it more likely that the matter would never come back to Court, then that was to be encouraged. But this did not mean that the courts, having made orders could declare that the parties could never come back.

Making Proper Provision - the Master not the Slave

In relation to full and final settlement clauses, Abbott J. commented that the motivation for most parties who enter into agreements where they settle is that they might pay a bit more or do something more than they would ever be willing to do, in order to achieve finality and certainty. Was there a benefit from the trade-off which itself might be within the broad meaning of the term "proper provision" within the meaning of the Constitution and the 1996 Act? Abbott J. adopted the position that in relation to the construction of particular provisions of a statute of a relieving or social nature, the Court must have regard to the scheme of the legislation, and be wary of reliance on English authorities.

He remarked:

> "While the English legislation in many instances does provide that the provision of such so-called ancillary relief is a pre-condition for divorce, - in a number of specific cases this is not so, and a decree of divorce may be granted on the basis that the so-called ancillary reliefs may be resolved later. The source of the word ancillary derives from the old Latin for a female slave. In my view, the Irish counterparts of the so-called English authority may be regarded not as a slave to divorce, but rather as a master."

Strategy and Fine-tuning

Abbott J. held that the central question in the case was whether a strategic application (including an application for a lump sum order) as opposed to a fine-tuning one could be made *after* the conclusion of the proceedings. It was held that divorce actions could not be viewed just in the context of ample resources cases. Most cases involve circumstances where the resources are such that both parties suffer a severe reduction in their standard of living. It was easy to envisage situations where two earners had eked out a divorce settlement, only to find that resources had declined into serious imbalance, resulting in catastrophe for one and good fortune or windfall for the other. Abbott J. declared that it was entirely inconsistent with the relieving nature of the legislation and the constitutional imperative underlying same that the court would not be able to relieve a catastrophe by granting an application for a lump sum even where the original divorce or settlement did not contain an order for such relief.

Therefore, Abbott J. held that the *obiter* comment of Keane C.J. in *T. v. T.* relating to the *Minton* case was not applicable to the majority of cases where the resources unfortunately are far from ample. Apart from the judgment of Keane C.J., there was little authority for the proposition that the making of a lump sum award or any other provision of strategic relief is a bar to the jurisdiction of the court to consider an application for such an order.

In a case of ample resources, it might well be that a court would find that it was neither appropriate nor permissible to make a further lump sum order, but this fact does not go to *jurisdiction*. The learned judge was of the view that the ample resources reasoning in the *T. v. T.* case was not applicable to the case at hand and that the jurisdiction of the court to grant a lump sum order was not lost by reason only of the provision of a lump sum order. Still less so is the jurisdiction of the court hindered by reason of the maintenance order granted to the wife, as the provisions of section 22 allow an increase of maintenance such as sought by the wife.

Was the Jurisdiction of the Court Ousted by the Full and Final Settlement Clause?

The second part of the preliminary issue was whether the jurisdiction of the court was ousted by the provision relating to "full and final settlement" in the consent signed by the parties. To hold that the full and final clause was not of import would have practical ramifications in that a judge approving a settlement containing such a clause would be either:

(a) approving a settlement and making an order where there was a clause which was of no effect, or

(b) approving a settlement where the clause was of such effect as was not defined by statute or by the Constitution, and was only possibly explained by reason of an emerging jurisprudence relating to separation agreements, which is an entirely different matter.

This degree of vagueness was not consistent with the proper making of an order dealing with provision under the Constitution. Therefore, Abbott J. concluded that the effect of the court having ruled on the

18 [1979] AC 593.

19 [2002] 3 IR 334 at 372.

clause was such as to "not permit" (in the sense of excluding jurisdiction) the court to make another order in relation to a provision which has in fact *been executed and performed*. This important ruling means that the full and final settlement clause had the effect of precluding the making of another lump sum order. As a result of this decision, agreeing to a full and final settlement clause would appear to command a substantial premium.

However, it was more difficult to say that the full and final clause might have or be intended to have any effect on the periodic payments or maintenance order. Abbott J. declared that such a clause should be construed strictly and that it should not apply to a periodic payment or other provision which may be varied to operate forward in the future, unless there are specific provisions expressly providing alternative provision in substitution for the right to vary these future periodic payments or other like provisions into the future. He therefore declared that there was jurisdiction under section 22, to vary the periodical payments in favour of the wife.

Conclusion - Proper Provision Wins the Day

Discretion is a key feature of Irish divorce law. In contrast to this, the recent ruling in the House of Lords combined cases of *Miller v. Miller* and *McFarlane v. McFarlane*[20] shows a desire to enunciate a rationale for decisions. In that decision, three strands were said to form the basis of awards; needs, compensation and sharing. Further exposition of the thinking behind awards might help Irish practitioners to confidently advise a woman who gave up her career that she would be compensated, for example. However, it is also true that revealing the philosophy behind ancillary relief awards can add yet more layers of uncertainty and vagueness.

Ten years on since the introduction of divorce, one thing is certain, the turkeys didn't vote for their own early gravy. The "proper provision" requirement has avoided the "feminisation of poverty" and has been a template for our approach to all awards and reviews of previous agreements. The Irish judiciary has stuck to the framework provided by the Constitution and the 1996 Act. While we might bemoan the fossilisation of approach in the area of family law decisions, this is the model of divorce for which we voted back in 1996. However, there is still ample room for improvement - something to work towards for the next ten years●

20 [2006] 1 FLR 1186.

Admitting "Statements" in Evidence Pursuant to Section 16 of the Criminal Justice Act 2006

Genevieve Coonan BL

Introduction

Section 16 of the Criminal Justice Act, 2006 came into operation by virtue of Ministerial order on the 1st August, 2006.[1] The principal function of the section is to allow for the admissibility of witness statements *as evidence of the facts contained therein* where a witness subsequently refuses to give evidence, denies making the statement or gives evidence which is inconsistent with the statement. The section seems to be intended to take its place within a new arsenal of procedural devices that the Minister has stated would "strengthen the hand of the Gardaí in their task of enforcing the law of the land".[2]

In contrast with the current law on hostile witnesses and previous inconsistent statements, section 16 is a useful prosecutorial tool as it allows the possibility of admitting statements where the bottom has literally fallen out of the case against the accused.[3] However, the section is not without its difficulties and the purpose of this article is to examine its scope of application and discuss some of the potential problems which may arise in its day to day practical application.

Section 16(1). Scope of Application

Section 16 sets out the circumstances within which a party may apply to the trial judge to admit a "statement"[4] in evidence in any trial for an arrestable offence. The provision allows for the admission of such a statement *as evidence of any fact mentioned therein* if the statement is relevant[5] and if the witness who made the statement, "although available for cross-examination":

(a) refuses to give evidence,

(b) denies making the statement, or

(c) gives evidence which is materially inconsistent with it.[6]

Thus, the circumstances in which a statement may be admitted seem to be reasonably self-explanatory – section 16 allows for the admission of statements where the witness who made the statement refuses to give evidence, denies making the statement, or gives evidence which is materially inconsistent with it.

However, in spite of the seemingly clear language used in the section, its application nevertheless presents a significant difficulty. That problem is precisely this – can a previously made statement be admitted where a witness asserts on the stand that he cannot remember making the statement or cannot remember the events which are the subject of that statement? Can it be said that in such circumstances the witness has refused to give evidence, has denied making the statement or has given evidence which is materially inconsistent with the statement?

These are not abstract or fanciful questions. The Minister for Justice specifically envisaged that the section would apply to these type of cases. At the Committee Stage discussion of the Bill he stated that:

> "In Ireland, we were faced with a number of high profile cases where people seemed to have given the Garda very detailed accounts, in witness statements, of murders but trials were collapsing when amnesia was suddenly striking the witnesses with regard to why they made the original statements.

1 See the Criminal Justice Act 2006 (Commencement) Order, 2006.

2 See "Minister McDowell commences Criminal Justice Act 2006", available at www.justice.ie/80256E01003A02CF/vWeb/pcJUSQ6S9M99-en.

3 There are obvious similarities between the circumstances within which a statement may be rendered admissible pursuant to section 16 and the circumstances under which such a statement may be admitted pursuant to the law on hostile witnesses and sections 3-6 of the Criminal Procedure Act, 1865. However, despite these similarities, it must be noted that in some very important respects section 16 is radically different to the provisions found in the 1865 Act. That it is so different is supported by the fact that section 16(6) explicitly states that section 16 "is without prejudice to sections 3 to 6 of the Criminal Procedure Act, 1865."

4 Section 15 of the 2006 Act defines a statement as one, "the making of which is duly proved and includes (a) any representation of fact, whether in words or otherwise, (b) a statement which has been video-recorded or audio-recorded, and (c) part of a statement."

5 This explicit requirement is surprising having regard to the fact that relevancy is already, at common law, a pre-condition to admissibility – *see*, for example, the comments of Fennelly J. in *The People (DPP) v Ferris* Unreported, Court of Criminal Appeal, 10th June, 2002 and those of Hardiman J. in both *The People (DPP) v O'Callaghan* [2001] 1 I.R. 58 and *The People (DPP) v Shortt (No.1)* [2002] 2 I.R. 686.

6 See section 16(1).

They simply said that they could not remember anything. They could not remember why they made the statements or what had happened. The question that arose in that context was what we could do about such situations."[7]

It would seem then that notwithstanding the difficulty of understanding or gathering the intention of Parliament, that at the very least the Minister's understanding of the section was that it would apply to "amnesia" cases.

However, in spite of the fact that the section was designed to address such problem cases, where a witness merely asserts that he cannot remember making the statement or that he cannot remember what happened on the night in question, such evidence does not necessarily allow a statement to be admitted pursuant to section 16.[8] This is due to the fact that merely testifying that one cannot remember making the statement in question or that one cannot remember the events which are the subject of that statement does not necessarily involve giving evidence which is *materially inconsistent* with the contents of that statement. Nor does a witness's assertion that he cannot remember all of what occurred on the night of the incident in question constitute evidence which is inconsistent with his previous statement. Memory is a fluctuating thing. A witness may remember what he said to the Gardaí on Tuesday and forget it on Wednesday. That does not, however, mean that one is contesting the contents of the statement or even the fact that one made the statement.

Furthermore, can it be said that a sudden onset of amnesia, as described above, constitutes a refusal to give evidence? In this regard, the law on hostile witnesses may be noted. For example, the decision of the High Court of Australia in the case of *McLellan v Bowyer*[9] seems to lay down the principle that where a witness cannot honestly remember a particular incident he cannot be classified as a hostile witness. The obvious implication of this is that witnesses who can remember making a statement but who *dishonestly* testify that they cannot remember can be classified as hostile.

However, this decision is not of great assistance to the issue of whether a forgetful witness may be said to be "refusing" to give evidence under section 16. In the first instance, at no point in its decision in *McLellan* did the Court expressly state that a pretended failure to remember will constitute a "refusal" to give evidence. Rather such persons are categorised as "hostile". Furthermore, having regard to the significant differences between section 16 and the law on hostile witnesses (in particular the reasons for which such statements are admitted), it does not necessarily follow that the reasoning employed in *McLellan* will apply to the section.

In any event, it is quite likely that the courts will adopt a plain and straightforward interpretation of the phrase "refuses to give evidence". To put it simply, the courts hopefully are likely to find that a refusal to give evidence is quite simply that – a refusal to give evidence – and that where a witness *takes to the stand and testifies* that they cannot remember a particular event, the court should find that that does not constitute a refusal to give evidence.

Reliability Requirement

In addition to falling within the scope of application of section 16, a statement must also satisfy the conditions laid down by section 16(2) in order to be admitted. That sub-section states that:

> "The statement may be so admitted if –
>
> (a) the witness confirms, or it is proved, that he or she made it,
>
> (b) the court is satisfied —
>
> (i) that direct oral evidence of the fact concerned would be admissible in the proceedings,
> (ii) that it was made voluntarily, and
> (iii) that it is reliable,
>
> *and*
>
> (c) either –
>
> (i) the statement was given on oath or affirmation or contains a statutory declaration[10] by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or
> (ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth."

Section 16(3) also states that:

> "In deciding whether the statement is reliable the court shall have regard to —
>
> (a) whether it was given on oath or affirmation or was video-recorded,
>
> or
>
> (b) if paragraph (a) does not apply in relation to the statement, whether by reason of the circumstances in which it was made, there is other sufficient evidence in support of its reliability, and shall also have regard to —
>
> (i) any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement, or
> (ii) where the witness denies making the statement, any evidence given in relation to the denial."

Thus, it seems that the fundamental test that a statement must satisfy before being admitted in evidence pursuant to section 16 is that of reliability.[11] Indeed, this is expressly stated to be a

7 Dail Debates, 19 April 2006, Vol. 74, p.5.

8 Although it should be noted that where a witness denies having made a statement on a previous occasion this may classify them as a hostile witness and on that ground the statement may be admitted. However in such circumstances the statement will only be evidence of the witness's inconsistency and will not constitute evidence of the facts contained therein.

9 (1961) 106 C.L.R. 95.

10 Such statutory declarations may be taken and received by a member of the Gardaí pursuant to section 17 of the 2006 Act.

11 That this is the overall test for the admissibility of such statements is supported by the comments of the Minister for Justice, Michael McDowell, during discussion at the Committee Stage of the 2006 Act. He said that section 16 sought to admit previous statements as evidence of the facts contained therein and in that regard followed the approach adopted by the Canadian Supreme Court in *R v B* [1993] 1 S.C.R. 74. He went on to state that in that case the Court had held that such previous statements could only be admitted where the trial judge was satisfied that the "indicia of reliability are present and genuine". (see Dail Debates, 19th April 2006, Vol. 74, p.5):

requirement under section 16(2)(b)(iii) and it is arguable that almost all of the other conditions to be satisfied before a statement may be admitted are merely other methods of ensuring that the reliability requirement is complied with. For example, the rationale behind the requirement that a statement must be made "voluntarily" is that no great stock can be placed in statements which have been coerced from witnesses.[12]

Similarly, the requirement that the witness understood the need to tell the truth when the statement was made is there to ensure that the witness was not lying when he made the statement, an issue which goes to the root of reliability.The Minister's understanding of the rationale behind the reliability requirement is that, "it must be clear that the witness was not cajoled into making a statement or told that he or she would not be released before giving a certain account of events."[13] Section 16 carries the obvious danger that it may be used by the State to attempt to admit evidence which has been obtained through pressure or improper means. The reliability requirement is therefore a necessary tool in helping to prevent this from occurring.

Indeed, the plethora of preconditions which must be satisfied in order to prove reliability tend to suggest that, if it is properly construed and applied, few statements may be admitted pursuant to section 16.[14] This is due to the fact that the standard to be satisfied in respect of proving reliability is relatively high. For example, if a statement is not given on oath or affirmation or was not video-recorded, the court must consider whether, "by reason of the circumstances in which it was made", there is other sufficient evidence in support of its reliability.[15] In addition, the court must also "have regard to … any explanation by the witness for refusing to give evidence or for giving evidence which is inconsistent with the statement or…where the witness denies making the statement, any evidence given in relation to the denial." In light of this requirement, it is arguable that where a witness gives a viable and plausible explanation for refusing to give evidence, for giving evidence which is inconsistent with the statement or for denying making the statement, then the court should refuse to admit the statement in evidence. For example, X may allege that he had made the statement in question after being kept awake for hours without a break and having been subjected to successive bouts of questioning by teams of Gardaí. If this explanation is accepted by the court as viable and plausible it should, in turn, render the previous statement unreliable and therefore inadmissible.

That said, it should be noted that even if a witness wishes to retract their statement and seeks to provide an explanation for making it which seems to undermine the statement's reliability, the court may nevertheless decide to admit the statement on the grounds that it is reliable. However, it is submitted that in order to do so the court must be satisfied that the statement complies with a significant number of the other requirements laid down by section 16. For example, in the Canadian case of *R v B*[16] witnesses to a stabbing made a statement to the police but subsequently recanted their evidence, stating that they had lied in order to exculpate themselves from possible involvement in the crime. Although that explanation was undoubtedly a matter which went to the issue of the statement's reliability, the trial judge had no doubt that the recantation was false. It is submitted that in such circumstances, where a trial judge has no doubt that a statement is true and reliable, he should be able to admit it pursuant to section 16. However, before so doing he should consider whether or not the statement has satisfied any of the other conditions laid down by section 16.

Finally, it should be noted that where a statement is admitted pursuant to section 16, deciding whether the statement or the testimony given in court should be relied upon is the jury's function alone.[17] As a result, the manner in which the trial judge must charge the jury in this regard is of great importance. In the first instance, where a statement is admitted pursuant to section 16 the trial judge must instruct the jury as to what facts it may be considered as evidence of. In addition, the trial judge may have to instruct the jury as to all the circumstances which came into play in deciding whether or not the statement could be admitted pursuant to section 16. This is due to the wording of section 16(5), which states:

> "In estimating the weight, if any, to be attached to the statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise."

As the jury alone is responsible for "estimating the weight" to be attached to the statement, it must be instructed as to all matters which tend to show that the statement is either accurate or inaccurate. Such matters would include the circumstances in which the trial judge found the statement to be reliable. For example, the trial judge may have to inform the jury of the fact that the statement was given on oath or affirmation or that it contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief. The jury may also have to be informed that the statement was video-recorded. Indeed, the jury may be entitled to view that video recording as the witness's demeanour (as evidenced on the tape) when making the statement could constitute a "circumstance" from which an inference could reasonably be drawn as to the statement's accuracy or otherwise. However it is quite unlikely that this issue will arise anytime in the near future. As video-recording of confessions is quite a recent happenstance,[18] it is highly unlikely that witnesses will be video-recorded when making their statement.

12 This approach is reflected in the decision of Nares J. and Eyre B. in the case of *R v Warickshall* (1783) 1 Leach 263.

13 Dail Debates, 19th April 2006, Vol. 74, p.5.

14 This is supported by the fact that the Minister stated at the Committee Stage that the preconditions laid down by section 16 constitute a "high fence to cross" and as a result, "the average witness statement in the average book of evidence would not comply with it" – see Dail Debates, 19 April 2006 p.5.

15 It is quite likely that, where a statement is sought to be admitted pursuant to section 16, the trial judge will have to consider whether this is the case as having regard to the fact that up until quite recently (*see The People (DPP) v Murphy,* Court of Criminal Appeal, 5th May, 2005) any statements made by the accused were, in general, not video-recorded, it may be said that it is highly unlikely that witness statements will be video-recorded.

16 [1993] 1 S.C.R. 740.

17 As the Minister stated at the Committee Stage discussion of section 16, "If the witness asserts that what he or she said to the Garda on a previous occasion was a pack of lies and what he or she is saying now is the truth, under oath, the jury must make up its mind on that matter. However, the jury can accept the earlier version if it appears to be more likely than the later testimony."

18 *The People (DPP) v Murphy*, Court of Criminal Appeal, 5th May, 2005.

Direct Oral Evidence of Facts Contained in Statement Must also be Admissible

In addition to reliability, the court must also be satisfied that direct oral evidence of the fact with which the statement is concerned would be admissible in the proceedings. Thus, assertions contained in the statement in respect of which direct oral evidence could not be given are inadmissible. An obvious example of such an assertion is one caught by the hearsay rule. For example, if a witness asserts in his statement that X told him that the accused had told him that he had killed Y, direct oral evidence of that assertion is inadmissible as proof of the fact that the accused did in fact kill Y. In turn, so too is a statement to that effect under section 16.

Thus, those parts of the statement in respect of which direct oral evidence could not be given in court must be removed before the statement is admitted pursuant to section 16.[19]

Discretion to Exclude Statement Due to Risk of Unfairness

Finally, it must be noted that a statement shall not be admitted in evidence under section 16 if the court is of the opinion that:

> "(a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or
>
> (b) that its admission is unnecessary, having regard to other evidence given in the proceedings."[20]

It is not entirely clear what the first of these two criteria will mean in practice due to the fact that the issue of whether the admission of a statement is unfair to the accused will most likely depend upon the particular facts of the case before the court. It is submitted however that it will operate as a "catch all" provision, preventing the admission of statements which the court is satisfied are unreliable, in spite of the fact that they nevertheless formally satisfy all of the reliability criteria set out in sections 16(1)-(3).

In relation to the second requirement, having regard to the importance of avoiding a risk of an unfair trial to the accused, it is submitted that this section should be interpreted strictly. In other words, the term "necessary" should be interpreted to prevent the admission of statements in cases where the party seeking to admit the statement has other evidence upon which to rest his case. In other words, where the prosecution seeks to admit a statement on the grounds that its admission is "necessary", this should depend upon the complete absence of other evidence supporting the prosecution case. An exception to this would be where the only other evidence the prosecution has is circumstantial evidence, as it is arguable that in such circumstances a statement is nevertheless "necessary".[21]

Conclusion

Section 16 was enacted to aid the prosecution in cases where a witnesses to a crime, who has provided all the assistance he can to the Gardaí, including the making of a statement, conveniently claims to be unable to remember anything when asked to testify in court. However, it is arguable that the section does not go that far. In spite of these problems, it is clear that the section is nevertheless a prosecution tool of significant value. However, it must be remembered that having regard to the application of the reliability requirement, in conjunction with the condition that such statements may only be admitted where necessary, its use is likely to be restricted to only the most exceptional cases ●

19 Separation of the inadmissible parts of a statement from those which are admissible is possible due to the fact that a "statement" includes "part of a statement".

20 See section 16(4).

21 This is due to the fact that generally circumstantial evidence alone will be insufficient to rest a prosecution case on.

Legal Update

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A directory of legislation, articles and acquisitions received in the Law Library from the 6th February 2007 up to 14th March 2007
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Fair procedures - Experts – Duty of disclosure – Legality – Delay in cross–examination – Whether decision of tribunal irrational – Whether decisions of tribunal breach of applicant's rights – Whether tribunal had to disclose reservations – Whether the principle of proportionality applied in consideration of legality of tribunal decision – Whether tribunal unreasonable in not securing attendance of witness abroad – *O'Callaghan v. Mahon* [2005] IESC 9 (Unrep, SC, 9/3/2005) considered; *Bailey v Flood* (Unrep, Morris P, 6/3/2000), *Radio Limerick One Ltd v Independent Radio and Television Commission* [1997] 2 IR 291 applied; *Goodman International v Hamilton (No 2)* [1993] 3 IR 307 followed; *Hand v Dublin Corporation* [1989] IR 26, *Heaney v Ireland* [1994] 3 IR 593, *Maguire v Ardagh* [2000] 1 IR 385, *Georgopolous v Beaumont Hospital Board* [1998] 3 IR 132, *Errington v Minister for Health* [1935] 1 KB 249, *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642, *Reg v Health Secretary, Ex p U.S. Tobacco* [1992] QB 353 distinguished - Tribunals of Inquiry (Evidence) Act 1921 (11 & 12 Geo 5, c 7) – Tribunals of Inquiry(Evidence) (Amendment) Act 1979 (No 3) – Relief refused (2004/1115JR - Quirke J – 21/12/2005) [2005] IEHC 457
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AT A GLANCE

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Circuit Court rules (industrial relations acts) 2007
SI 12/2007

Circuit Court rules (mental health) 2007
SI 11/2007

District Court (mental health appeals) rules 2007
SI 19/2007

Rules of the superior courts (evidence) 2007
SI 13/2007

Rules of the superior courts (statutory applications and appeals) 2007
SI 14/2007

European directives implemented into Irish Law up to 14/03/2007

Information compiled by Robert Carey, Law Library, Four Courts.

European Communities (avian influenza) (precautionary measures) amendment regulations 2006
DEC/2005-734, DEC/2005-745, DEC/2005-855
SI 700/2006

European Communities (award of contracts by utility undertakings) regulations 2007
DIR/2004-17, DIR/2005-51
SI 50/2007

European Communities (protection measures in relation to highly pathogenic avian influenza of subtype H5N1 in wild birds) (no. 3) regulations 2006
DEC/2006-563
SI 698/2006

European Communities (protection measures in relation to highly pathogenic avian influenza of the subtype H5N1 in poultry) (no. 3) regulations 2006
DEC/2006-415
SI 699/2006

Fishing opportunities and associated conditions regulations 2007
REG/41-2006
SI 33/2007

Bills in progress up to 14/03/2007

Information compiled by Damien Grenham, Law Library, Four Courts.

[pmb]: Description: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dail or Seanad. Other bills are initiated by the Government.

Air navigation and transport (indemnities) bill 2005
1st stage- Seanad

Asset covered securities (amendment) bill 2007
1st stage- Dail

Biofuels (blended motor fuels) bill 2007
1st stage- Dail

Broadcasting (amendment) bill 2006
1st stage- Seanad

Building control bill 2005
Committee – Dail

Carbon fund bill 2006
2nd stage - Dail

Child care (amendment) bill 2006
2nd stage- *(Initiated in Seanad)*

Child trafficking and pornography (amendment) (no.2) bill 2004
Committee stage- Dail [pmb] *Jim O'Keeffe*

Civil law (miscellaneous provisions) bill 2006
Committee stage – Dail

Civil partnership bill 2004
2nd stage- Seanad [pmb] *David Norris*

Civil unions bill 2006
2nd stage- Dail [pmb] *Brendan Howlin*

Climate change targets bill 2005
2nd stage – Dail [pmb] *Eamon Ryan and Ciaran Cuffe*

Comhairle (amendment) bill 2004
2nd stage – Dail

Communications regulation (amendment) bill 2007
Committee stage- Seanad

Competition (trade union membership) bill 2006
2nd stage – Dail [pmb] *Michael D. Higgins*

Consumer protection bill 2007
2nd stage- Seanad [pmb] *Senator Mary O'Rourke*

Consumer rights enforcer bill 2004
1st stage –Dail [pmb] *Phil Hogan*

Control of exports bill 2007
1st stage- Seanad [pmb] *Mary O'Rourke*

Courts (register of sentences) bill 2006
2nd stage- Dail [pmb] *Jim O'Keeffe*

Credit union savings protection bill 2007
1st stage- Seanad [pmb] *Senators Joe O'Toole, Fergal Quinn, Mary Henry and David Norris*

Criminal justice (mutual assistance) bill 2005
Committee stage – Seanad

Criminal Law (amendment) bill 2006
1st stage- Dail [pmb] *Jim O'Keeffe*

Criminal law (home defence) bill 2006
1ST stage- Dail [pmb] *Jim O'Keefe*

Defamation bill 2006
2nd stage – Seanad

Defence (amendment) bill 2005
2nd stage – Dail [pmb] *Billy Timmins*

Defence (amendment) (No.2) bill 2006
1st stage – Seanad

Defence of life and property bill 2006
2nd stage- Seanad [pmb] *Senators Tom Morrissey, Michael Brennan and John Minihan*

Education (miscellaneous provisions) bill 2007
1st stage- Dail

Electricity regulation (amendment) bill 2003
2nd stage – Seanad

Electoral (amendment) bill 2007
1st stage- Dail

Electoral (amendment) (prisoners' franchise) bill 2005
2nd stage – Dail *(Initiated in Seanad)* [pmb] *Gay Mitchell*

Electoral (preparation of register of electors) (temporary provisions) bill 2006
1st stage- Dail [pmb] *Eamon Gilmore*

Electoral registration commissioner bill 2005
2nd stage- Dail [pmb] *Eamon Gilmore*

Enforcement of court orders bill 2007
1st stage- Dail

Enforcement of court orders (no.2) bill 2004
1st stage- Seanad [pmb] *Senator Brian Hayes*

Ethics in public office bill 2006
1st stage- Dail

European communities bill 2006
2nd stage- Seanad

Finance bill 2007
1st stage- Dail

Fines bill 2004
2nd stage- Dail [pmb] *Jim O'Keeffe*

Fines bill 2007
1st stage- Dail

Fluoride (repeal of enactments) bill 2005
2nd stage – Dail [pmb] *John Gormley*

Foyle and Carlingford fisheries bill 2006
Committee stage- Dail

Freedom of information (amendment) (no.2) bill 2003
1st stage – Seanad [pmb] *Brendan Ryan*

Freedom of information (amendment) bill 2006
1st stage-Dail [pmb] *Joan Burton*

Genealogy and heraldry bill 2006
1st stage- Seanad [pmb] *Senator Brian Hayes*

Good samaritan bill 2005
2nd stage – Dail [pmb] *Billy Timmins*

Greyhound industry (doping regulation) bill 2006
2nd stage – Dail [pmb] *Jimmy Deenihan*

Health bill 2006
2nd stage- Dail

Health insurance (amendment) bill 2007
1st stage- Dail

Health (hospitals inspectorate) bill 2006
2nd stage – Dail [pmb] *Liz McManus*

Housing (stage payments) bill 2006
1st stage- Seanad [pmb] *Senator Paul Coughlan*

Human reproduction bill 2003
2nd stage – Dail [pmb] *Mary Upton*

Independent monitoring commission (repeal) bill 2006
2nd stage – Dail [pmb] *Martin Ferris, Arthur Morgan, Caoimhghín ó Caoláin, Aengus ó Snodaigh and Seán Crowe.*

International peace missions bill 2003
1st stage-Dail

Irish nationality and citizenship (amendment) (an Garda Siochana) bill 2006
1st stage – Seanad [pmb] *Senators Brian Hayes, Maurice Cummins and Ulick Burke.*

Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003

Report – Seanad [pmb] *Feargal Quinn*

Land and conveyancing law reform bill 2006
2nd stage- Dail
Local elections bill 2003
2nd stage –Dail [pmb] *Eamon Gilmore*

Medical practitioners bill 2007
1st stage- Dail

Mental capacity and guardianship bill 2007
1st stage- Seanad

Mercantile marine (avoidance of flags of convenience) bill 2005
2nd stage- Dail [pmb] *Thomas P. Broughan*

Money advice and budgeting service bill 2002
1st stage – Dail

National development finance agency (amendment) bill 2006
1st stage – Seanad

National oil reserves agency bill 2006
Report stage- Dail

National oil reserves agency bill 2006
Report stage - Dail

National pensions reserve fund (ethical investment) (amendment) bill 2006
2nd stage- Seanad

Noise bill 2006
1st stage- Dail [pmb] *Ciaran Cuffe*

Nuclear test ban bill 2006
Committee stage - Dail

Offences against the state acts (1939 to 1998) repeal bill 2004
1st stage-Dail [pmb] Aengus Ó Snodaigh

Offences against the state (amendment) bill 2006
1st stage- Seanad [pmb] *Senators Joe o'Toole, David Norris, Mary Henry and Feargal Quinn.*

Official languages (amendment) bill 2005
2nd stage –Seanad [pmb] Senators *Joe O'Toole, Michael Brennan and John Minihan.*

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2nd stage – Dail [pmb] Eamon Gilmore

Planning and development (amendment) bill 2006
1st stage – Dail [pmb]

Planning and development (amendment) (no.3) bill 2004
2nd stage- Dail [pmb] *Eamon Gilmore*

Prisons bill 2005
Committee – Seanad

Prisons bill 2006
1st stage- Seanad

Privacy bill 2006
1st stage- Seanad

Prohibition of ticket touts bill 2005
2nd stage – Dail [pmb] *Jimmy Deenihan*

Pyramid schemes bill 2006
2nd stage- Dail [pmb] *Kathleen Lynch*

Registration of wills bill 2005
2nd stage – Dail *(Initiated in Seanad)* [pmb] *Senator Terry Leyden*

Registration of lobbyists bill 2003
1st stage- Dail [pmb] *Pat Rabbitte*

Residential tenancies (amendment) bill 2006
1st stage – Dail [pmb] *Deputy Fergus O'Dowd*

Roads bill 2007
1st stage- Seanad [pmb] *Senator Mary O'Rourke*

Road traffic (amendment) bill 2006
1st stage- Dail

Road traffic (miscellaneous provisions) bill 2006
2nd stage- Dail

Road traffic (mobile telephony) bill 2006
Committee- Dail [pmb] Olivia Mitchell

Sexual offences (age of consent) (temporary provisions) bill 2006
2nd stage – Dail [pmb] *Brendan Howlin*

Social welfare and pensions bill 2007
1st stage- Dail

Statute Law revision bill 2007
1st stage- Seanad [pmb] *Mary O'Rourke*

Tribunals of inquiry bill 2005
1st stage- Dail

Twenty-eighth amendment of the constitution bill 2005
1st stage- Dail

Twenty-eighth amendment of the constitution bill 2006
2nd stage- Dail [pmb] *Michael D. Higgins*

Twenty-eighth amendment of the constitution bill 2007
1st stage- Dail

Twenty-eighth amendment of the constitution (No.2) bill 2006
2nd stage- Dail [pmb] *Dan Boyle*

Twenty-eighth amendment of the constitution (No.3) bill 2006
2nd stage- Dail [pmb] *Dan Boyle*

Waste management (amendment) bill 2003
2nd stage – Dail [pmb] *Arthur Morgan*

Water services bill 2003
Committee - Dail *(Initiated in Seanad)*

Acts of the Oireachtas 2007 (as of 14/03/2007)

Information compiled by Damien Grenham, Law Library, Four Courts.

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Signed 19/02/2007

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Signed 22/02/2007

3/2007 Health Insurance (Amendment) Act 2007
Signed 22/02/2007

4/2007 Courts and Court Officers Act (Amendment) Act 2007
Signed 05/03/2007

5/2007 Electricity Regulation (Amendment) (Single Electricity Market) Act 2007
Signed 05/03/2007

6/2007 Criminal Law (Sexual Offences) (Amendment) Act 2007
Signed 07/03/2007

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IJEL = Irish Journal of European Law

Palestinian Lawyers

IBA Human Rights Trip

Michael Lynn BL

The daily struggle that faces a practicing Palestinian lawyer is daunting. Travel prohibitions, undignified body searches, the possibility of detention, and the denial to clients of basic fair trial rights, are among the challenges to be contended with. For many lawyers, the freezing of international funding to the Palestinian National Authority has also meant no salary.

Last month, I was privileged to spend one week working with fifty lawyers from the West Bank, and I learnt something of the difficulties that they face, even though I did not set foot on their territory - for security reasons, our meeting was held just over the border in Amman, Jordan.

It was a humbling experience. In the face of the denial of their collective right to self-determination[1] - the international community continues to allow Israel to occupy the Palestinian territories and violate international law - and despite on-going and daily breaches of individual human rights, Palestinian lawyers remain committed to the rule of law and to the international human rights legal system, despite its abject failure to provide adequate protection for them.

This dignified and noble stance was uplifting to the small team from the International Bar Association which was leading a week-long human rights law course, funded by the Swedish Government through the International Legal Assistance Consortium.[2] It was immediately apparent that the participants - a cross-section of lawyers chosen by the Palestinian Bar Association - brought first-hand experience of the reality of human rights violations.

The youngest lawyer present was Amani Handan, aged 25, from Ramallah. Her work includes assisting children in detention in Israeli run prisons. Some of those detained are as young as 12, incarcerated for allegedly throwing stones at Israeli forces. They can spend months in detention without trial. When visiting them, Amani is subjected to a body search by a male soldier. She admitted to finding the work difficult and depressing.

Fatimah Natsheh, aged 29, heads a team of 31 lawyers at the Palestinian Prisoners' Society, based in Bethlehem. They represent the more than 10,000 people who are detained on the order of Israeli military courts in the Occupied Territories. In phraseology that resonates with our recent past, Palestinian lawyers regard them as "political prisoners", whereas the Israelis regard them as criminal suspects. Fatimah and her colleagues have not been paid for over six months, since the international community froze grants to the Palestinian authority following the election of Hamas. She told me: "I still work. How could I let down our men in prison? They have to be represented. We will always be there for them." Her team of lawyers represent prisoners in court and prepare reports, at no cost to those detained.[3]

Some of the men who attended the course in Amman had previously been detained arbitrarily for periods of more than one year by Israeli forces. According to the Palestinian Prisoners' Society, the number of Palestinian men living in the Occupied Territories who have been detained under Israeli military regulations forms approximately 40 per cent of the total male population.

Ribhi Qatamish was detained for five years during which time he was tortured. After his release, he gave evidence to a United Nations investigation in Amman, and was later invited by the United Nations to give further evidence to its Committee Against Torture in New York. The Israeli authorities would not allow him to travel. The United Nations, it appears, put up no fight. He has since written *Torture of Palestinian Political Prisoners in Israeli Prisons* in which he describes the techniques used against detainees.[4]

In the session on torture and international law, Ribhi spoke of his experiences. He was kidnapped from a car, and was then imprisoned and subjected to torture to try to force confessions from him. "The ultimate objective was to make me hallucinate, so that I would answer questions", he said.

1 The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights contain a common article 1(1) proclaiming the right of all people's to self-determination, by virtue of which they "freely determine their political status and freely pursue their economic, social and cultural development". Furthermore, common article 1(2) provides that "all peoples may, for their own ends, freely dispose of their natural wealth and resources" and that "in no case may a people be deprived of its own means of subsistence". This common article can also be read in the light of the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was adopted by the United Nations General Assembly at the height of the decolonization process in 1960 and which equated "the subjection of people's to alien subjugation, domination and exploitation" to a denial of human rights and a violation of the Charter of the United Nations (operative paragraph 1).

2 The International Legal Assistance Consortium is based in Stockholm. Its projects include the development of justice systems in Iraq, Afghanistan, Liberia, Haiti, Morocco and Algeria. Its website is www.ilac.se.

3 For further information, see the Palestinian Prisoners' Society's website, www.ppsmo.org.

4 Addameer, October, 2003. Accessible on www.addameer.org.

Despite the failure of the international community to provide effective protection to him and his fellow Palestinians, Ribhi is committed to trying to work within the international human rights legal regime. He is a Council member of the Palestinian Bar Association, and is striving to build a legal community amongst his people. In the session on freedom of expression, he argued strongly that violence was not an appropriate response to the Danish cartoon that caused grave offence to Moslems. The proper reply, he said, was through public debate.

His evidence of torture was harrowing. The absolute and non-derogable prohibition against torture is, of course, enshrined in a number of international and regional legal instruments.[5] Article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture". Article 7 of the Rome Statute of the International Criminal Court provides that torture constitutes a *crime against humanity* "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

Israel, whilst a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has effectively side stepped the implementing body, the Committee against Torture, by refusing to recognise its jurisdiction.

- Article 20 of the Convention provides that "if the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State party", it "shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned". Israel has made a reservation to the Article stating that it does not recognise this particular competence of the Committee.

- Under Article 21, the Committee has competence to receive and consider communications from one State alleging that another State party is not fulfilling its obligations under the Convention, where that State party has made a declaration recognising the Committee's jurisdiction under the Article. Israel has not made a declaration recognising this jurisdiction.

- Under Article 22, the Committee may receive communications from individuals claiming to be victims of a violation of the Convention if the State party concerned has expressly recognised its competence to do so. Again, Israel has not made a declaration recognising the Committee's competence.

- Under the Optional Protocol to the Convention, adopted on 18th December, 2002, a mechanism for regular UN visits to State parties has been established. Israel is not a party to this Protocol.

- Under Article 30 of the Convention, any dispute between two or more State parties concerning the interpretation or application of the Convention which cannot be settled through negotiation or arbitration may be referred to the International Court of Justice by any one of the States parties. Israel has made a reservation to this Article such that it is not bound by it.

So, whilst the Convention makes the prohibition of torture absolute, and Israel is a signatory to the Convention, it has closed off the avenues of redress that are open to victims of torture. Israel is a party to the Convention but will not expose itself to examination under it.

Israel's disregard for international law is clear in its building of the Wall in the Occupied Territories and the consequent annexation of land belonging to Palestinians.[6] Its actions have been declared unlawful by the International Court of Justice in its Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, handed down on 9th July, 2004.[7] The Court held that the construction of the wall and its associate regime was in breach of the liberty of movement of the inhabitants of the Occupied Territories, and impeded their right to work, to health, to education and to an adequate standard of living.[8] The Court held that Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law, such that it was required to cease any further work on the wall, to dismantle what has already been constructed, to provide compensation or other forms of reparation for the Palestinian population and, where possible, to return the land and property annexed.[9] It has failed to comply with the judgment.

Of particular relevance to our own government and legal system were the International Court of Justice's findings as to the legal consequences for other States (underlining added):

> 155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection." ... The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.
>
> 156. As regards the first of these, the Court has already observed ... that in the *East Timor* case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

5 See, for example, Article 4(2) of the International Covenant on Civil and Political Rights, and Article 15(2) of the European Convention on Human Rights.

6 For an account of the impact of the Wall see *The West Bank Wall: Unmaking Palestine*, Ray Dolphin, Pluto Press, 2006.

7 For the full opinion, see www.icj-cij.org.

8 Paragraph 134 of the opinion. The Court held that it was in breach of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child.

9 Paragraphs 149-153 of the opinion.

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . ."

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" *(I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

The promotion of the rule of law is now a key aim of the International Bar Association, and high on the agenda of the American Bar Association. At a conference last September in Chicago, former President Mary Robinson was the keynote speaker at a two-day meeting on the rule of law, organised jointly by the International Bar Association and the American Bar Association. The presence of lawyers from around the world was an important expression of solidarity with American lawyers who had spoken out against the Bush administration's policies on the Iraq war, Guantanamo and rendition, and who had come under considerable pressure from the right wing in their country. Only last month, the International Bar Association's Human Rights Institute issued a statement condemning comments made by Charles Stimson, Deputy Assistant Secretary of Defence for Detainee Affairs at the United States Department of Defence, in which he encouraged US companies to refrain from using the legal services of law firms involved in representing Guantanamo Bay detainees.[10]

The role of lawyers, and their associations, to try to hold governments to account is an extremely important one. Our Palestinian colleagues need support from the international legal community in their fight to protect basic human rights on their territory. They have been let down to date, but will not give up their struggle. One Palestinian lawyer used an old Arabic saying to summarise their determination to continue to work for justice through the law - "It's better to light a candle than curse the darkness".

In his recently published collection of essays, *Causes for Concern*,[11] Michael D. Higgins, TD, included a report of a visit to Gaza which he made in August, 2005. His conclusion succinctly summarises the need to support international law:

> "If international humanitarian law continues to be broken with impunity, as is happening every day in Palestine, it is not only the Palestinians who will lose. We will all be the losers, now and into the future, in the most fundamental moral and legal sense, as we will be guilty of letting a great wrong continue. Now is the time to act, and to call upon those who speak in our name to act.
>
> "The Middle East deserves to be at peace. Palestinians have waited too long and there are many in Israel who realise that security will be best achieved when a viable, contiguous Palestinian state becomes their neighbour. We should not look away as we have done for so long. We should be working to bring about peace through solidarity, and support for international law"[12] ●

10 Issued on www.ibanet.org, and dated 15th January, 2007.
11 Liberties Press, 2006.
12 p268.

A Privilege for Psychotherapy?

Part 2

Simon O'Leary, Barrister and Psychotherapist*

In Part 1 of this article, published in the last edition of the Bar Review, I analysed the conduct of psychotherapy in the context of the existing, relevant law of privacy and privilege, with particular reference to sacerdotal privilege. In Part 2, I now suggest that a distinct privilege should attach to matters disclosed in psychotherapy.

The Usual Terms

Consent is fundamental to all analysis. A person having even the most sketchy acquaintance with the incidentals of any of the psychotherapies would assume that absolute confidentiality is the norm or would, at least, assume that nothing disclosed would be revealed without permission. You tell your innermost secrets to your therapist. These secrets can relate to yourself or others.

I have no doubt that many psychoanalyses commence and conclude without any specific mention being made of confidentiality. Both the analyst and patient, in these cases, take the requirement of confidentiality as implicit in their contract, unwise though this assumption may be. If the reality is that statute law or the courts could require or insist, at any time, that disclosure be made of material from a psychoanalytic session, or of notes concerning such a session, it is difficult to avoid the conclusion that it is incumbent on the analyst to inform the patient, at the initial interview, or at least when legal proceedings become a possibility, that this is the actuality. If an analyst were to make such disclosure without notice to the patient, having expressly contracted for confidentiality or even where an agreement for confidentiality was tacitly understood, such disclosure would operate as a devastating betrayal. Ann Hayman, a psychiatrist who was subpoenaed to give evidence about a patient, put it as follows

> "Patients attend us on the implicit understanding that anything they reveal is subject to a special protection. Unless we explicitly state that this is not so, we are parties to a tacit agreement, and any betrayal of it only dishonours us. That the agreement may not be explicit is no excuse."[1]

Waiver

At first sight, one might consider that once the patient consents to the disclosure of material from his analysis, no problem arises for the analyst. However, a patient's waiver is not to be taken at face value.

Anne Hayman refused to give evidence about her patient and, fortunately for her, the judge did not find her in contempt of court, on the basis that she was acting in accordance with her conscience and that he had a discretion to find in her favour in the circumstances. She explained herself subsequently as follows:

> "Some of the United States have a law prohibiting psychiatrists from giving evidence about a patient without the patient's written permission, but this honourable attempt to protect the patient misses the essential point that he may not be aware of unconscious motives impelling him to give permission. It may take months or years to understand things said or done during analysis, and until this is achieved, it would belie all our knowledge of the workings of the unconscious mind if we treated any attitude arising in the analytic situation as if it were part of ordinary social interchange."

The waiver could arise from "a temporary attitude engendered by the transference". Hayman gave the judge the example of a patient who had been in treatment for some time and was going through a temporary phase of admiring and depending on her; he might therefore feel it necessary to sacrifice himself and give permission, but it might not be proper for her to act on this. Waiver could act as a retrospective "torpedo" or final acting out of resistance to insight gained in the course of an analysis. Hinshelwood[2] refers to the, often unconscious, intention to thwart or circumvent the work of the psychoanalyst as an important factor.

Psychotherapy as Confession

Giving judgement in an early Illinois case, *Binder v. Ruvell*[3], in which privilege was held to apply to information given by a patient to a psychiatrist or psychotherapist, Judge Fisher said:

> "I am persuaded that it is just one of those cases where the privilege ought to be granted and protected …Out of this practice of psychiatry may come evidence of values that we have not in the past been able to see. It may even throw light on the value of the confessional, not from a religious point of view but from a psychotherapeutic point of view. It may be that the old adage "confession is good for the soul" may have greater depth than a mere adage. There may be therapeutic value in unburdening the things that trouble the mind."

* Member of the Irish Forum for Psychoanalytic Psychotherapy

1 Hayman, A. (1965) *Psychoanalyst Subpoenaed.* Lancet, Oct. 16. pps. 785-6.

2 Hinshelwood, R.D. (1997) *Therapy or Coercion.* London: Karnac.

3 Civil Docket 52 C. 25 35, Circuit of Cook County, Ill., June 24, 1952.

Patients can switch from therapy to religion and vice versa. In an article in the *Times,* under the sub-heading "Give me therapy, Father"[4], Richard Owen wrote:

> "Massimo Cicogna, Professor of Psychology and Anthropology at Rome University, said the number of Italians going to confession had risen by a fifth this year to 20 million … A study of 2500 Italians who had begun going to confession again showed… that many regarded the experience as a form of analysis or therapy, in which they could tell their troubles to an invisible priest rather than to a visible psychoanalyst… Professor Cicogna said his study indicated that 22% of Italians used the confessional to discuss their marital problems or to confess infidelity, 22% to express their professional frustrations or dissatisfaction with life and 12% to vent their feelings over family relationships."

There is traffic in the other direction. For example, writing of his experience of analyzing priests and nuns over a number of years, Skelton (2002) has found that while in such analyses, religious layers have fallen away, few of the priests and nuns have become atheists or agnostics but, for the most part, have found a less neurotic faith. Responding to Cicogna's research, Monsignor Alessandro Massiolini, Bishop of Como, is quoted, in the same article, as saying that to regard the use of the confessional as a substitute for the psychoanalyst's couch was a misunderstanding of the religious function of confession. This is, undoubtedly, true from the Monsignor's perspective. Indeed, from the perspective of the psychoanalytic psychotherapist, Skelton confirms that clinical practice, necessarily, continues to be separated from religious attitudes, although there seems to be wider recognition for the fact that to some extent, psychoanalysis and psychotherapies share some fundamental characteristics with world religions.

From the perspective of the patient/penitent, confession and psychotherapy tend to deal with the same issues. I suggest that the State should treat each relationship similarly in the context of privilege. A person can go to confession or consult a solicitor and disclose criminality, with impunity. He will not be betrayed. Society has decided that these are fundamental rights to be preserved; perhaps as gateways to salvation, justice or redemption. Similar protection should be given to the therapeutic relationship.

I now want to look at how the law regards these issues in some other jurisdictions.

England and Wales

No legal privilege arises out of the relationship between a patient and a doctor, a journalist and his informant or a psychotherapist and his patient. The position of priest and penitent has not been authoritatively decided, but the tendency of judicial dicta is that while, in strict law, the privilege does not exist, a minister of religion should not be required to give evidence as to a confession made to him, the court having a discretion to excuse a witness from answering a question when to do so would involve a breach of confidence.

The English Criminal Law Revision Committee[5] considered attaching a privilege to certain relationships viz. doctor/patient, psychiatrist/patient and minister/parishioner.

Although the Committee's "general view" was that the privilege should be conferred, they finally decided that it should not:

> "… so that there should be no restriction on the right of a party to criminal proceedings to compel a witness to give any information in his possession which is relevant to the charge, unless there is a compelling reason in policy for the restriction."[6]

They felt the arguments for the proposed privilege were not strong enough.

Western Europe

France, Germany, Italy, Portugal, Spain and Switzerland protect the privacy of a citizen's relationship with a professional person by invoking the concept of "the professional secret" and making it a criminal offence to reveal knowledge that is gained in the exercise of one's office or profession. Article 223-6 of the French Penal Code provides that a person who can prevent an offence against the bodily integrity of another by his immediate action, without risk to himself or others, must not abstain from acting. I am not at the time of writing aware of any decision in which "immediate action" is defined to *exclude* reporting.

Canada

The Canadian courts have also adopted the Wigmore test in a case relating to religious communications privilege. In *R v Gruenke*[7], the Canadian Supreme Court considered whether there was a privilege in Canada for religious communications, at common law.

The case concerned the admissibility in a murder trial of evidence of conversations between the accused and a pastor and a lay counsellor in the accused's church, a "born again" Christian church. The case also raised the question of the constitutional guarantee of freedom of conscience and religion, relevant considerations in Ireland, where our Constitution gives similar guarantees.

The majority judgement would not confer privilege on religious communications as a privilege attached to a class, like those between solicitor and client, because they were not inextricably linked with the justice system as the latter were. They would only confer privilege on a case by case basis, based on the Wigmore principles, and rejected the claim in the particular case.

The minority judgement of L'Heureux-Dube J. contains arguments in favour of a religious communications privilege which would be relevant in seeking a privilege for psychotherapy. They include:

> The utilitarian benefit in allowing the individual to draw psychological and spiritual sustenance from the relationship by allowing full and frank discussion of troubling matters;
>
> The benefit the community derives from the mental, emotional, and spiritual health of its members;
>
> The personal interest in the dignity of privacy for intimate relationships; and
>
> The impracticality of forcing clergy to testify. It would bring the administration of justice into disrepute if a clergyman had to choose between a breach of conscience and imprisonment.

4 The Times, June 19th, 2001

5 Criminal Law Revision Committee(1972), 11th Report on *Evidence (General)* London: H.M. Stationary Office.

6 P.158

7 [1991] 3 S.C.R. 263

The U.S.A.

After many decisions and much legislation in the other direction, Psychotherapy finally won a distinct privilege from the United States Supreme Court in 1996, in the case of *Jaffee v Redmond*.[8] This case began as a wrongful death claim brought by the surviving family members of a man killed in the line of duty by Police Officer Mary Lu Redmond, who thought he was going to stab another person. When the family heard that Redmond had taken part in 50 post-incident counselling sessions with a clinical social worker, they requested the notes of the sessions. The district court judge ordered disclosure of the notes even though Illinois state law granted privilege to licensed social workers. The Court of Appeal reversed, and after a further appeal, the United States Supreme Court agreed with the Court of Appeal, holding, *inter alia*, that confidential communications between psychotherapist and client are privileged and cannot be disclosed at trial. Using a balancing approach, the Court determined that the significant private and public interests at stake in recognising the privilege outweighed the evidentiary benefit in forcing the disclosure of communications. Though the Court used a balancing approach to recognize the privilege, it refused to create an uncertain privilege that would apply only at the trial judge's discretion on a case by case basis. Giving judgement for the majority, Justice Stevens concluded that the threat of disclosure of confidential communications between psychotherapist and patient would jeopardize the purpose and effectiveness of that relationship to such a degree that any value received from disclosing communications would be minimal. Therefore, by recognising a psychotherapist-patient privilege, the Court served both private and public interests in facilitating the effectiveness of the therapeutic relationship

Footnote 19 of the majority judgement reads:

> "Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."

Views differ about the significance and effect of this decision. Some psychotherapists would certainly think that the decision represents a very significant affirmation by the Supreme Court of the undisputed necessity of "absolute" confidentiality for psychotherapy in general and in particular for the psychoanalytic psychotherapies. However, Bollas[9] has written that, while the decision firmly supports confidentiality, it undoes this support (in footnote 19) by affirming the occasional exceptions to the rule of privilege. By both defending the rights of the therapist, and then undoing them, splitting their position in two, the Court seems to protect the therapist but sanctions exceptions that will violate the therapist's otherwise presumed rights. A therapist would like to believe that this decision actually protects confidentiality and provides privilege, but, in fact, it is only an empty gesture in this direction.

The Value of the Evidence from the Therapeutic Space

Whatever about the desirability of disclosing to a court matter arising in the therapeutic space, I am extremely sceptical as to its value as evidence. In the context of the criminal law, if the injured party is alive and competent, it is essential to have that party's evidence, and virtually inconceivable to present a prosecution without it. Mandatory reporting by a psychotherapist of abuse disclosed is worthless if the person abused is not prepared to give evidence. Again, if matter disclosed suggested that others were at risk and the potential offender was not already charged (in which case bail might be refused) nothing could be done to restrain him as the Constitution has been held to outlaw preventative justice.[10] Successful psychotherapy would, it is to be hoped, give a victim insight into his or her history, without any prompting or suggestion on the part of the therapist, and the strength to disclose any crime to the Gardaí and to give evidence in a prosecution. In most, if not in all, circumstances, there should be no need for any report or evidence from the therapist to bolster this evidence.

There is certainly a place, acknowledged by such as Bollas and Sundelson, for social therapy, **knowingly commenced** with a view to report and/or prosecution.

In any prosecution for abuse where the allegation springs from a memory recovered in the course of psychotherapy, and the truth of the allegation is challenged by the defendant, it is inevitable and, I must acknowledge, entirely reasonable, for the defence to seek the evidence of the relevant psychotherapist. In my opinion, if that evidence were not forthcoming, it would be unrealistic to proceed with the prosecution as it would, undoubtedly, be dismissed. Any therapist unprofessional or unscrupulous enough to elicit such a memory by suggestion or persuasion would probably give "inventive" evidence in any event. Writing as a psychotherapist, I think it more important that any recovered memory be successfully worked through in the therapeutic space without a prosecution. If working through were successful, perhaps a prosecution could be mounted afterwards, the therapist giving restricted evidence, with the patient's agreement, as to the spontaneous nature of the recovery of the memory. I cannot say I would be happy about it, in the context of the overall efficacy of the therapy.

Del Monte[11] warns:

> "Psychotherapists should watch their boundaries. The roles associated with engaging in psychotherapy and conducting court-work, on behalf of the same patient, should not overlap. It is not the psychotherapist's professional role to give advice on legal action, or to either encourage or discourage it. Where the patient wants or needs this he should be passed on to other professionals."

The rationale driving privilege for psychotherapy is that a patient must be entitled to reveal his innermost thoughts without fear of disclosure. As a

8 116 S. Ct. 1923 (1996)

9 Bollas, C. (2000) *The Disclosure Industry.* Paper delivered on 13th October, 2000 at the conference "Confidentiality and Society; Psychotherapy, Ethics and the Law", October 12-15, Montreal, Quebec, Canada

10 A referendum had to be held to permit a court refuse bail to an accused on grounds of anticipated further offending. Another view of the constitutional issues is to be found in the Law Reform Commission's *Examination of the Law of Bail* (L.R.C. 50-1995) p. 185.

11 Del Monte, Michael (2001) *Retrieved Memories of Childhood Sexual Abuse.* Irish Forum for Psychoanalytic Psychotherapy, Vol. 6, No. 1.

criminal lawyer, I am satisfied that even if the information protected by a psychotherapist-patient privilege were disclosed in order to supplement the fact-finding process, this information would be unreliable and inaccurate because it is only an abstract expression of the patient's inner feelings and emotions.

Psychotherapists, once their training is complete, would not usually take or keep notes of sessions with patients. They might note the occasional dream or record a cryptic aide-memoire of significant events or their own musings. Even a complete account of a session would be loose and sketchy, a kind of stream of consciousness, shadowing the treatment.[12]

The world of psychotherapy is not like the world of law or medicine… Even if there were a record, it would not pass muster under a business-records exception to the hearsay rule, which would allow the admission of records only when they have a high degree of accuracy and are customarily checked as to correctness. Psychotherapy is concerned with the tension between inner reality and the outside world. The law is concerned with the outside world, i.e., "with objective facts, with truth."[13] It is not the business of psychoanalytic psychotherapy to counsel or to give or record opinions or assessments.

Refreshingly, the Canadian Supreme Court judge, Madame Justice L'Heureux-Dube, shows understanding of the psychoanalytic process in her judgement in *R v O'Connor*[14]

> "… The assumption that private therapeutic or counseling records are relevant is often highly questionable, in that these records may very well have a greater potential to derail than to advance the truth-seeking process … medical records concerning statements made in course of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial. Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial, a witness is sworn to testify as to the particular events in issue. By contrast, in therapy, an entire spectrum of factors such as personal history, thought, emotions as well as particular acts may inform the dialogue between therapist and patient. Thus, there is serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted interferences by the trier of fact."

Having quoted this passage, David Sundleson, Bollas's collaborater, flying solo, as it were, says all psychotherapists should applaud a jurist who is doing their work for them, the work of elucidating for the public what takes place in psychotherapy that sets it apart from ordinary kinds of human discourse, creating something at once more fragile, more difficult to interpret properly and further from the zone of factual inquiry. Sundelson, a defence lawyer practising in California, says that L'Heureux Dube's hearsay objection to evidence from the session is particularly apt because it gives particular bite to the psychoanalyst's way of thinking, i.e. that the setting in which utterances are made is a crucial part of the difficult work of interpreting their meaning. Outside of that setting, the meaning of what is uttered, perhaps prima facie clear, is in fact almost impossible to understand and the disclosure of those utterances is therefore likely to produce evidence that is not only unreliable but inherently likely to be prejudicial, inflammatory, distracting or misleading rather than probative[15].

Thirty years earlier, Hayman reached the same conclusion, from the perspective of the psychoanalyst, after her experience as a witness. Observing that she was, in effect, given the same freedom to remain silent usually allowed to priests for the secrets of the confessional, she thought it possible that the judge was partly moved by the idea that any evidence she could give might only be of marginal relevance to the case:

> "Was I arrogating to myself an unwarrantable freedom from the ordinary responsibilities of a citizen by refusing to give evidence? Was it not rather that the attitude of responsibility towards patients was also one of responsibility towards the law? The fact that in theory people having analysis "tell everything" should not give rise to the misleading idea that we analysts are necessarily the repositories of secrets that would help the courts if only we would divulge them. The concern of psychoanalysis is with the ever-developing unraveling of the unconscious conflicts of our patients. We know that these can affect the patient's perceptions and judgments while they are operative, hence the advice sometimes given to avoid major decisions during analysis. We are not seeking the "objective reality" the Courts want, and generally we are not in a position to give it to them. Over the years we may hear a number of different versions of the same event, each completely sincere, but varying with the changing emotional focus of the analysand, each version being a clue to another level of unconscious conflict. To report on whichever is momentarily in the ascendant could mislead a court as, for example, a report on an applicant's blood-pressure after a night of vomiting could mislead an insurance company. I would suggest that in principle there may be less conflict between our moral obligations to the Law and to the rules of professional conduct than would appear at first sight. If a psychoanalyst or psychotherapist wished to offer a patient's description of an event as objective evidence, it would be necessary to produce every version of the event, explaining the differences by detailing all the known underlying meanings; with the misleading, probable, result of the court's either accepting one version unequivocally, or discrediting patient or therapist as unreliable. Justice, as well as our ethic, is likely to be served best by silence."

Freud's theory of free association is very specific. Those ideas that the patient deems to be the least relevant facts to report in a session are invariably the most valuable. The therapist is not looking for evidence or listening to

12 Bollas, C. and Sundelson, D. (1995) *The New Informants.* New Jersey: Jason Aronson.
13 Slovenko, R. (1975) *On Testimonial Privilege*. Contemp. Psychoan., 11, 190.
14 [1995] 4 S.C.R. para 109
15 Sundleson, D (2000) *Response to Madam Justice L'Heureux-Dube (*at Montreal Conference, Oct. 2000); downloaded from the Internet , http://home.ican.net/~analyst/sundelson.htm.

conscious disclosure but making it possible for unconscious thinking to take place. By virtue of moral neutrality, the analyst enables the patient to speak more freely and the unconscious then recognizes this relationship as a very special one, indeed in which one can really let oneself speak openly without fear of harm.

Conclusions

In my opinion, reliance on judicial discretion alone would not give the protection from intrusion which the practice of psychoanalytic psychotherapy requires. I fear that the arguments and reasoning of the English Criminal Law Revision Committee, I quoted earlier, would prevail in the Oireachtas and in the courts, particularly if zealous proponents of "false memory syndrome" were to get a sympathetic hearing.[16] The decision in *N.C. v. the Director of Public Prosecutions*[17] would bear this out. In that case, the Supreme Court held that in a case where the delay in prosecuting indecent assault was partly explained by the fact that memory was lost or repressed and recovered during a consultation, the person conducting therapy in the course of which memory was recovered was an extremely important witness. A person charged with very old offences on the basis of alleged recovered memory was entitled to seek to inform himself about *every aspect of the therapy*.

What type of privilege should be sought for psychotherapy? The ideal would be an absolute privilege attaching to the psychotherapist himself, as it does to the priest as confessor, the privilege which such as Bollas would consider absolutely necessary. Resistance to this is eloquently expressed by Scalia J. of the United States Supreme Court in his dissenting judgement in *Jaffee v Redmond*:

> "In the past, this Court has well understood that the particular value the courts are distinctively charged with, preserving justice, is severely harmed by contravention of the fundamental principle that "the public has the right to every man's evidence". Testimonial privileges, it has been said, are not lightly created nor expansively construed, for they are in derogation of the search for truth … The court (that is, the majority) today ignores this traditional judicial preference for the truth, and ends up creating a privilege that is new, vast, and ill defined, I respectfully dissent…"

He proceeds to express a perception of psychotherapy which may well be held by many in Ireland today:

> "When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, among others, parents, siblings, best friends and bartenders none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege… how come psychotherapy got to be a thriving practice before the psychotherapist privilege was invented? Were the patients paying money to lie to their analysts all these years?"

This "backwoods" perspective of psychotherapy, with its psychoanalytically intriguing idea of a mother/child privilege, typifies, colourfully, the rhetoric of resistance to a privilege for psychotherapy. It, very probably, anticipates the sort of arguments which would be advanced in the Oireachtas. I may be unduly pessimistic. In a recent interview in the Irish Medical News[18], Minister of State Tim O'Malley suggested that problems "incorrectly" defined as mental illness were the result of having nobody to talk to and that people too readily accepted what doctors said as gospel. This elicited a predictably frosty response from psychiatrists in the letters page of the Irish Times[19]. But Minister O'Malley also acknowledged that counsellors and psychotherapists might have a greater role to play in dealing with depression. Mothers, hairdressers and barmen can, it is true, impart wisdom on many of life's problems and keep loneliness at bay. But they will not dispel all depression. Much depression can only be dealt with by protracted, professional listening, medication or both. Organizations such as Aware will vouch that not all depression can be alleviated on their helpline.

Caroline Fennell, in her book on the law of evidence, writing before the *Johnstone* and *WW v PB* decisions, observes that "it can be seen that despite the adoption of Wigmore's principles, the Irish courts have not taken the opportunity to attach private privilege to certain confidential relationships satisfying those criteria." Writing, I would guess, from a "right to know" perspective, she continues "this is perhaps preferable in terms of the administration of justice, and although it leaves the anomaly of the recognition of such a privilege in certain circumstances with regard to a Catholic priest, perhaps the mode or route of reform should be the abolition of such a privilege rather than its extension to other analogous personages." [20]

Fennell does not advert to the fact that the sacrament of penance is an indispensable part of the Roman Catholic faith and would therefore come under the umbrella of Article 44 of the Constitution, which would give confession a legislative advantage over psychotherapy.[21] More and more voters are attending psychotherapists and counsellors and will wish to have their confidentiality preserved, just as it is in the confessional.

Scalia J., Fennell, Barr J, in *WW v PB*, the Court of Criminal Appeal in *N C v DPP*, the English Criminal Law Revision Committee and, I daresay, all lawyers who are not intimately acquainted with psychotherapy, all assume that desirable, relevant evidence emerges in the therapeutic space. I have attempted to give a different view. A conference on "Confidentiality and Society: Psychotherapy, Ethics and the Law" was held in Montreal in October, 2000, opened by the distinguished psychoanalyst, Otto Kernberg. He encouraged the conference to think about the concept of relevance but queried whether there was any situation in which any, questionable, relevance of material outweighed the harm disclosure would cause the patient and the privacy of the therapist. While the conference agreed on only one criterion for disclosure - relevance - most attendees seemed to agree that the content of psychoanalytic sessions is so subjective and open to interpretation that relevance is difficult to determine and nearly impossible to prove or disprove. Bollas, unrepentant, stuck to his guns and said that invasion of the therapeutic space could never be appropriate.

16 see Del Monte supra

17 Irish Times, 3rd Sept. 2001.

18 Nov. 6th '06

19 Nov. 16 '06

20 Fennell, Caroline (1992) *The Law of Evidence in Ireland.* Dublin: Butterworth (Ireland) Ltd, 185

21 It is to be noted that it is the formal, sacrament of confession which would be protected. The New York Times of July 17th, 2001 carried a report of a case in which a priest felt able to give evidence of a non-sacramental confession to murder made to him by a youth in his home, in a case in which two others had been convicted.

Writing as a lawyer, I know that it is virtually impossible for a lawyer to contemplate or acknowledge that relevant matter could **never** emerge in psychotherapy. Indeed, in replying to the contribution of Madam Justice L'Heureux-Dube, the keynote speaker at the Montreal conference, Bollas's erstwhile co-author, Sundleson, broke ranks, describing Bollas's view as absolutist. Bollas had attacked the judicial habit of balancing, Sundleson rejoinded that legal thinking, notwithstanding Bollas's critique, relies on balancing as a primary expression of fairness and of the recognition that equally legitimate social interests may find themselves in direct opposition. Sundleson observed that when the psychoanalyst seems to say that his professional principles are so important that they must outweigh all other values, including the search for truth and the constitutional rights of the accused to a full and complete defence, this sounds dangerously like a claim that psychoanalysts are above the law.

Madame Justice L'Heureux Dube has reached out across what might be seen as an unbridgeable gap between judicial and psychoanalytic modes of thinking. Psychoanalysts need to play their part in bridging that gap by fleshing out the account that she has given of their work and by explaining better how disclosure of that work is unlikely to aid the search for truth.

At the 3rd National Prosecutor's Conference held in Dublin[22], the Director of Public Prosecutions, James Hamilton BL, noting the "high degree of protection" given to therapists in other jurisdictions, notably the United States and Canada, regretted the lack of clarity in the law relating to "possible privilege in the area of psychotherapists' reports as it at present obtains in Ireland. Matters are left very much to the discretion of trial judges with little in the way of reported cases to guide them on how they should exercise that discretion. In my view, the time has come for the legislature to consider this question."

The Privacy Bill, recently introduced, does not deal with privacy in this context.

Irish courts have already adopted the Wigmore principles. Several of Madame Justice Heureux-Dube's arguments in favour of religious communications privilege can be made in favour of a privilege for psychotherapy. In *ER v JR*, approved in *Johnstone*, the High Court held that a privilege arises in marriage counselling conducted by a priest or clergyman. I would hope that this privilege could be extended to psychotherapy in general. Marriage counselling is not a matter grounded exclusively or at all in religion and, for a start, this privilege should be extended, without legal difficulty, to lay counsellors. Again, these decisions, incorporating approval of the Wigmore principles, give priority to considerations of privacy and intimacy over evidential considerations. Psychotherapists deal with most of the issues that would arise in marriage counselling, albeit in a non-directive way, and with many, indeed all, personal, private matters that can arise in a person's conscious and unconscious life and which are unlikely to arise anywhere else.

It is also noteworthy that s.7 of the Judicial Separation and Family Law Reform Act 1989, which makes provision for the adjournment of proceedings to assist reconciliation, provides that, for such purposes, any oral or written communication between either spouse and any third party and any record of such communication caused to be made by such third party, shall not be admissible as evidence in any court. Thus we have both judicial and statutory precedent for privilege attaching to confidential communications.

Decisions of the United States Supreme Court would always be persuasive precedents in the Irish courts. If the Oireachtas were to legislate[23] on the lines of the decision in *Jaffee v Redmond*, complete with a provision on the lines of Footnote 19,[24] it would be a good development for the practice of psychoanalytic psychotherapy in Ireland ●

22 11th May, 2002.
23 I envisage that any legislation would have to incorporate designation and recognition of appropriate training and qualification.
24 see p.29 et seq. supra.

Discovery in Judicial Review Proceedings

Dr. Ailbhe O'Neill BL*

Introduction

There are a number of authorities both from the U.K. and from Ireland which take a restrictive approach to discovery applications in the context of judicial review. In a recent decision, *Tweed v. Parades Commission for Northern Ireland*,[1] the House of Lords has indicated its willingness to adopt a more flexible approach to discovery in cases where the proportionality of the State's actions is at issue. This article traces the history and rationale of the distinction that evolved in both the Irish and U.K. courts between discovery in plenary and judicial review proceedings before analysing the decision in *Tweed*.

The rules

Prior to the coming into force of the current Rules of the Superior Courts (R.S.C.) in 1986, the High Court in this jurisdiction had the power to order discovery in "any cause or matter"[2] and this included stateside applications for public law remedies such as *certiorari*, *mandamus* etc. Order 84, rule 25 of the current R.S.C. provides that "any interlocutory application may be made to the court in proceedings for judicial review" and this includes applications for orders of discovery under Order 31. Thus, the Irish rules themselves have never drawn a distinction between public and private law proceedings as far as discovery is concerned.

In the U.K., there is distinction between the discovery rules applicable in England and Wales and those in Northern Ireland. In Northern Ireland, Order 24 of the Rules of the Supreme Court (Northern Ireland) 1980 applies in respect of judicial review proceedings. Rule 3(1) of this provides that the court may order any party to make disclosure by a list of documents and Rule 7(1) empowers the court to require a party to make disclosure by affidavit in relation to any specified document or class of documents. Rule 9 then goes on to limit the preceding rules by stating that the court shall refuse to make an order for discovery "if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

In England and Wales, an identical provision was replaced by the Civil Procedure Rules (C.P.R.) 1998[3] whereby discovery is now referred to as disclosure. The restrictive approach taken to discovery in judicial review proceedings was highlighted by the issuing of a practice direction which provides that disclosure is not required unless the court orders otherwise.[4]

The restrictive approach in the U.K.

In the seminal U.K. case on public law remedies, *O'Reilly v. Mackman*,[5] Lord Diplock indicated that leave for discovery in judicial review cases should be governed by the same principles as in plenary proceedings. In its review of this area in 1994, the Law Commission called for a more liberal approach to the availability of discovery in judicial review proceedings.[6] Despite this, U.K. case law continued to draw a distinction between the two and a restrictive approach to discovery in the context of judicial review remained the procedural orthodoxy.[7] For example, U.K. case law has generally taken the view that disclosure in judicial review proceedings should be limited to documents relevant to the issues emerging from the affidavits.[8] It has been held that it is inappropriate to order disclosure of documents solely to challenge the accuracy of the affidavit evidence in the absence of some *prima facie* evidence of inaccuracy.[9] A restrictive approach can be identified in some of the Irish case law also[10] although, as we shall see, there are also a number of authorities which are more flexible on this issue.

The basis for the distinction – the function of judicial review

The basis for the restricted availability of discovery in judicial review is that the function of discovery is essentially to clarify factual matters. As the defining feature of judicial review proceedings is their concern with the manner in which a decision was taken or the legal basis thereof, discovery logically plays a much reduced role in that context.[11]

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1 [2006] UKHL 53, Unreported, House of Lords, 13 December 2006. Hereafter referred to as "Tweed".

2 See O.31 of the 1962 R.S.C.

3 See the Civil Procedure Act 1997. The rules came into force on 26 April 1999.

4 CPR Practice Direction CPD 54.12.

5 [1983] 2 A.C. 237.

6 Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (1994, Law Com No 226, HC 669).

7 *R. .v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617, *R. v. Secretary of State for the Environment, Ex p Islington London Borough Council and the London Lesbian and Gay Centre* [1997] JR 121, *Re Glór na nGael's Application* [1991] N.I. 117, *Re McGuigan's Application* [1994] N.I. 143, *Re Rooney's Application* [1995] N.I. 398. See discussion in Sanders, *Disclosure of Documents in Claims for Judicial Review* [2006] JR 194.

8 *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617.

9 *R. v. Secretary of State for the Environment, Ex p Islington London Borough Council and the London Lesbian and Gay Centre* [1997] JR 121, *Re McGuigan's Application* [1994] N.I. 143, *Re Rooney's Application* [1995] N.I. 398.

10 *McDaid v. Minister for the Marine* [1994] 3 I.R. 321, *K.A. v. Minister for Justice, Equality and Law Reform* [2003] 2 I.R. 93, *Arklow Holidays Ltd. v. An Bord Pleanala* [2005] IEHC 303, Unreported, High Court, Clarke J., 3 August, 2005.

11 See discussion in Bradley, *Judicial Review*, Round Hall, 2001, at 364-365.

In *K.A. v. Minister for Justice, Equality and Law Reform*,[12] for example, Geoghegan J. noted that in most judicial review proceedings, facts are not in issue so that discovery is not necessary. The Irish case law clearly indicates that this restrictive approach is based on the function of discovery described above rather than some blanket restriction in the context of judicial review.

In *Shortt v. Dublin City Council*,[13] for example, O'Caoimh J. noted that the rarity with which discovery is ordered in judicial review proceedings is not due to some restriction in the right to apply for that order in such proceedings, it is simply a logical consequence of the fact that its necessity will be more difficult to establish in judicial review proceedings.[14]

The question of discovery in judicial review arose again in *Carlow Kilkenny Radio Limited v. Broadcasting Commission*,[15] where Geoghegan J. noted that discovery would not normally be seen as necessary where judicial review applications were based on some procedural impropriety or Wednesbury unreasonableness. He went on to note that discovery might be appropriate in judicial review proceedings where there was a clear factual dispute on the affidavits that required resolution. He also noted that in cases where an applicant relied on irrationality, discovery could be appropriate where the applicant raised some *prima facie* evidence that a body did not have before it a document it ought to have had or that it had before it some document that it ought not to have had.[16]

Rationality based judicial review can be seen as a very particular case which requires some basis in fact to succeed and the relaxation of rules relating to discovery in that context fits in with the functional basis for the distinction described above.

The traditional grounds for judicial review have lost some of their appeal in this jurisdiction where the sensible applicant will also turn to the Constitution to ground her application for judicial review if at all possible. One of the interesting questions which this raises is the extent to which the increasing constitutionalisation of judicial review might impact on the availability of discovery in such proceedings. The potential link between the two can be illustrated by considering the recent decision of the House of Lords in *Tweed*.

The background to Tweed

The judicial review proceedings in *Tweed* were taken to challenge a decision of the Parades Commission for Northern Ireland in respect of a proposed parade by the Dunloy Orange Lodge. Parades in Dunloy had for some time been a source of considerable friction in the town and in 1995, serious public disorder had erupted.

The Public Processions (Northern Ireland) Act 1998[17] established the Parades Commission. It requires persons proposing to organise parades to give notice to the police. One of the important statutory functions of the Parades Commission is to issue "determinations" in respect of proposed parades.[18] The scope of these determinations is quite broad. The Commission may attach such conditions as it sees fit including conditions in respect of the route of the parade. Furthermore, the Commission can prohibit the parade from entering any place. The Parades Commission had encouraged the Dunloy Orange Lodge to enter into a dialogue with the local residents in Dunloy but they had refused to do so. The Parades Commission had issued a number of determinations restricting parades in Dunloy since 1998.

In March 2004, the appellant, acting on behalf of the Dunloy Orange Lodge, gave notice to the police of a proposed parade on the following Easter Sunday. The police forwarded notice to the Parades Commission together with the comments that the parade was an annual one which had been contentious in the past and had been the subject of Parades Commission determinations in the past.

Around the same time, the Dunloy Orange Lodge sent out letters to local residents in Dunloy inviting them to an open day to be held on 2 April in Ballymoney. At the open day, an exhibition was mounted providing information about the Orange Order and the Dunloy Lodge. While some of the Parades Commission personnel attended the open day, none of the residents of Dunloy attended.

The Parades Commission received communications from both the police force and some of the authorised officers of the Parades Commission concerning the proposed parade. Essentially, the views expressed were that the Dunloy Orange Lodge had not entered into meaningful dialogue with the Dunloy residents, that the parade as proposed could lead to public disorder and that it could damage relationships in the community. The Commission in its determination placed considerable restrictions on the parade. In particular, it confined its route to a small area in front of the Orange Hall. Many members of the Lodge felt that this restriction was effectively a ban on the parade.

The Parades Commission Guidelines

The Parades Commission, in reaching its determination, had relied on the guidelines set out under s.5 of the 1998 Act. The appellant in *Tweed* sought to challenge a number of these guidelines, in particular those which focused on the relationships within the community and communications between the parade organisers and the community.

One of the matters to which the Commission must have regard is "any impact which the procession may have on relationships within the community". Furthermore, the guidelines go on to provide that:

> "The Commission will also take into account any communications between parade organisers and the local community or the absence thereof and will assess the measures, if any, offered or taken by parade organisers to address genuinely held relevant concerns of members of the local community. The Commission will also consider the stance and attitudes of local community members and representatives."

The Commission was required to formulate its own procedural rules under s.4 of the 1998 Act. One such rule, rule 3.3 provides for the confidentiality of oral and written evidence provided to it. It goes on to state that the Commission may express unattributed views it has been privy to, but only as part of an explanation of its decision.

12 [2003] 2 I.R. 93.
13 [2003] 2 I.R. 69.
14 See also *Aquatechnologie Ltd. v. National Standards Authority of Ireland* Unreported, Supreme Court, 10 July 2000 where the judgment of Murray J. applies the usual criteria for discovery under Order 31 without adverting to the type of proceedings at issue.
15 [2003] I.R. 528
16 See also *Fitzwilton Ltd. and others v. Mahon and others* [2006] IEHC 48, Unreported, High Court, Laffoy J., 16 February 2006.
17 Hereafter referred to as "the 1998 Act".
18 These are governed by s 8 of the Public Processions (Northern Ireland) Act 1998.

The context of the application for discovery

The appellant in this case argued that these guidelines were incompatible with the European Convention on Human and constituted a disproportionate interference with a number of Convention rights.[19] In response to the judicial review proceedings, a member of the Parades Commission swore an affidavit in which some of the communications before the Commission were summarised but not exhibited. The appellant was not satisfied with this and sought discovery of the summarised documents.

Discovery in the High Court and Court of Appeal

Girvan J. in the High Court ordered that discovery be made. He indicated that in cases where proportionality was an issue, all documents referred to in the affidavit should be disclosed. He noted that proportionality analysis requires "anxious scrutiny" or "intense review" by the courts. In such cases, he found, it was necessary that the court see the documents itself rather than the decision maker's summary or interpretation thereof.

The Court of Appeal overturned Girvan J.'s decision on the basis that it was premature to rule on discovery before the validity of the confidentiality required by rule 3.3 had been considered.

Discovery in the House of Lords

The House of Lords disagreed with the Court of Appeal. Lord Carswell gave the leading judgment in the case. In it, he noted that the restrictive approach to discovery in judicial review had been subject to extensive criticism. He identified the justification for the approach in the past to have been two-fold. First, the obligation on a public authority to make candid disclosure to the court about its decision making processes. Second, the desirability of preventing fishing expeditions.

Lord Carswell expressed the view that

> "it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances."

He did not, however, advocate this broader approach for all judicial review applications proposed by Girvan J., pointing out that many concern issues of law rather than fact. Lord Carswell went on to note that:

> "For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality, disclosure should be carefully limited to the issues which require it in the interests of justice."

He also urged applicants to specify particular documents or classes of documents rather than seeking orders for general disclosure.

Proportionality and judicial review

The more relaxed approach to discovery in the *Tweed* case was justified on the basis that judicial review proceedings where Convention rights are invoked require a proportionality analysis that is different to the usual approach taken in judicial review. This process of "intense review" or "anxious scrutiny" where Convention rights are involved means that the court requires sight of documentation referred to by respondents on affidavit and cannot simply rely on a summary thereof.[20]

From rationality to proportionality – discovery and the Constitution

The intensity of review required in the context of Convention rights has been a matter of much academic debate since the enactment of the U.K.'s Human Rights Act.[21] In particular, much of that debate has focused on the difference between traditional standards of review and the proportionality test, with the latter being heralded (or derided depending on the view taken of the judicial role) as involving the court in a more invasive review of administrative decision making.

One of the interesting aspects of the *Tweed* case from the perspective of Irish judicial review practitioners is the extent to which proportionality review might be justified under the Constitution in the context of judicial review proceedings.[22] There has been some support for the more structured framework of proportionality review, at least in the context of legislative challenges. In *Heaney v. Ireland*,[23] Costello J. advocated a test which mirrors very closely the approach taken by the European Court of Human Rights in the context of Convention rights:

> "The objective of the impugned provision must be of sufficient importance to warrant overriding an important constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must be rationally connected to the objective, and not be arbitrary, unfair or based on irrational considerations; impair the right as little as possible; and be such that their effects on rights are proportional to the objective."[24]

The constitutional requirements of fair procedures and natural justice might be thought to merit this more rigorous judicial probing in the context of judicial review proceedings. If such a structured approach was taken, the proportionality aspect of the Costello J. approach might well justify a more generous approach to discovery in the context of at least some judicial review proceedings ●

19 The appellant relied on Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) of the European Convention on Human Rights.

20 Interestingly, the House of Lords in *Tweed* did not order discovery to be made to the appellant. Instead, the documentation was to be disclosed first to the court which would then decide if the appellant should be allowed to view it. This was done to preserve the position of confidentiality under the Parade Commission rules pending a determination of their validity.

21 Lord Carswell referred in his judgment to some of the academic literature: Jowell , 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671; Craig, *Administrative Law,* 4th ed (1999), pp 561-563; Feldman, 'Proportionality and the Human Rights Act 1998', essay in Ellis ed., *The Principle of Proportionality in the Laws of Europe* (1999). See also *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532.

22 While Irish litigants frequently raise arguments based on the Convention, they are rarely determinative in this jurisdiction. See O'Connell, Cummiskey and Meeneghan, *ECHR Act 2003: A Preliminary Assessment of Impact* (Dublin: Law Society and Dublin Solicitors Bar Association, 2006).

23 [1994] 3 IR 593.

24 [1994] 3 IR 593, at 607. The application of this approach has been subject to criticism in the context of fair procedures in the criminal realm. See Hogan and Whyte, *The Irish Constitution,* 3rd ed., at 1047-1048. Although see also *Dunnes Stores Ireland Co. v. Ryan* [2002] 2 IR 60.