File No. 937-1

File Title: Surveillance Research

Nevertheless, when the preliminary examination was abolished by the Criminal Justice Act 1999 no provision was introduced enabling the DPP to send the accused forward for trial directly. However, the Act does make the consent of the DPP a precondition for an order of a District Court judge sending the accused forward for trial. If the DPP refuses to give his consent the judge is obliged to strike out the proceedings. Intriguingly, the legislation goes on to say that any such striking out is without prejudice to the institution of proceedings against the accused by the DPP. Since the DPP no longer enjoys a power to send the accused for trial directly, this must refer to the re-institution of proceedings before a District Court judge. In any event, the fact that the District Court judge must send the accused forward for trial where the statutory requirements have been satisfied should render superfluous any need for the DPP to retain a power to send the accused forward for trial directly.

M. Disclosure

1. Introduction

General Duty to Disclose

14–45 Although the Irish criminal process trial is based on an adversarial, as distinct from an inquisitorial, model, there are many aspects which are inconsistent with a pure adversarial contest. A primary example is the duty of disclosure. The prosecution is subject to an extensive duty to disclose material in its possession to the defence in advance of the trial where that material may be of assistance to the defence case. While the defence is not subject to a reciprocal duty, it may be obliged to make advance disclosure of some aspects of its case to the prosecution in certain circumstances. It will be seen later that the disclosure obligations on the defence are prescribed by statute and are quite narrowly circumscribed. The prosecution's duty of disclosure on the other hand is based partly on statute and partly on common law precepts which have yet to evolve to the point where they offer a comprehensive and detailed blueprint for the nature and extent of the duty.[168]

Book of Evidence

As discussed earlier, the Criminal Procedure Act 1967 (as amended by the Criminal Justice Act 1999) imposes an obligation on the prosecution to serve what is commonly referred to as the book of evidence on the defence in proceedings on indictment. This book of evidence will consist of all the evidence which the prosecution intends to rely on against the accused at the trial. As such it will include: a statement of the charges against the accused; a copy of any sworn information in writing upon which the proceedings were initiated; a list of the witnesses whom the DPP proposes to call at the trial; a

[168] For a discussion of the common law developments in the context of trials on indictment, see Mullan "The Duty to Disclose in Criminal Prosecutions" *Bar Review* 5 4 (2000) 174.

statement of the evidence that is expected to be given by each of them;[169] a copy of any document containing information which it is proposed to give in evidence by virtue of Part II of the Criminal Evidence Act 1992 (broadly speaking records compiled in the course of a business or by or on behalf of certain public bodies);[170] where appropriate, a copy of a certificate under section 6(1) of the 1992 Act (a certificate relating to the information contained in a record compiled in the course of a business);[171] and a list of the exhibits (if any).[172] There is also provision for the serving of a videotape of evidence which has been video-recorded pursuant to the provisions of the Criminal Evidence Act 1992. These materials must be served on the accused before he or she can be sent for trial on indictment.

Other Material Relevant to Defence

In the normal course of events the prosecution will have gathered much more evidence in its investigation of the accused than it intends to use at the trial. Much of this evidence will be innocuous in that it does not add to nor detract from the case against the accused. Some of it, however, may be of potential use to the defence because, for example, it undermines some aspects of the prosecution case, or because it supports an aspect of the defence or because it opens up a new line of defence which the accused had not considered because he was unaware of the material in question.

A simple illustration can be provided by a case which rests on disputed identification evidence. The prosecution will call a witness who has identified the accused in a line up. They may not reveal the existence of witnesses who failed to pick out the accused. Equally they may not reveal the fact that the witness was shown a book of photographs before picking out the accused in a line-up or in a public place. It may also happen that, unknown to the defence, the witness in question has a reputation for making false complaints to the police. None of these matters would necessarily be disclosed in the book of evidence, but they are all matters which would be in the possession of the prosecution and which could be of use to the defence. The question arises, therefore, to what extent if any is the prosecution under an obligation to reveal these matters to the defence?

Third Party Material

It may also happen that a third party is in possession of information which might be helpful to the defence. This raises the question of whether the third party is under any obligation to make that information available on request to the defence. Related to this is the issue whether the prosecution is under any duty to secure material from a third party for the benefit of the defence.

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[169] See District Court Rules, 1997, Ord.24, r.7 and Sched. B Forms 24.3 to 24.7 for the relevant forms, as amended by District Court (Criminal Justice) Rules 2001, r.8 Schedules 11 and 12.
[170] For further detail see Chap.18 – Trial Evidence.
[171] *ibid.*
[172] Criminal Procedure Act 1967, s.4B(1).

2. The General Principle

14–46 The fundamental importance of the prosecution's duty of disclosure is reflected by the fact that the European Court of Human Rights has held that disclosure of all material evidence to an accused is a requirement of a fair trial under Article 6 of the European Convention on Human Rights.[173] Similarly, the Irish courts see the disclosure obligation as being firmly rooted in the individual's constitutional right to fair procedures in a criminal trial. McCarthy J. stated the basic principle as follows in *People (DPP) v. Tuite*:

> "The constitutional right to fair procedures demands that the prosecution be conducted fairly; it is the duty of the prosecution, whether adducing such evidence or not, where possible, to make available all relevant evidence, parol or otherwise, in its possession, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so."[174]

Just what this general principle entails in particular cases will depend heavily on the meaning of the key elements such as, "relevant evidence" and "in its possession". Each will be considered briefly in turn. Because of its importance, privilege will also be addressed briefly. For a fuller treatment of these issues reference should be made to specialist texts.[175] It is also important to emphasise at the outset the overriding principle that the accused is entitled to fair procedures. It may be, therefore, that the facts of an individual case are such that the prosecution will be required to provide certain information even though one or other of these elements for the duty of disclosure may not be fully satisfied.

3. Relevant Evidence

14–47 The obligation on the prosecution is to disclose "relevant evidence". Relevant in this context refers to anything which is relevant to the defence case in the sense that it tends to undermine the prosecution case or assists the defence case. It follows that the prosecution is not bound to disclose everything just because it has been gathered in the course of the investigation which led to the charge being preferred. Beyond that, however, it is very difficult to offer a definition which clearly distinguishes between that which must be revealed from that which need not be revealed. In some of the Irish cases the judges use the term "material" evidence, but this hardly carries the matter much further, apart from the fact that it suggests that the disclosure obligation may reach beyond material considered to be relevant in the strict sense of that term in the law of evidence.

It is well established that where the prosecution has a statement of a person who may be in a position to give material evidence, whom they do not want to call as a witness, they are under a duty to make that person available as a

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[173] *Edwards v. UK* (1992) 15 E.H.H.R. 417.
[174] 2 Frewen 175 at 180–181.
[175] See, *e.g.*, Cahill *Discovery in Ireland* (Round Hall Sweet & Maxwell, Dublin, 1996).

witness for the defence, and any statements that he may have given.[176] Equally when the prosecution intend to rely on witness statement it is submitted that they are under a duty to supply the accused with any information in their possession about the circumstances or factors in which the statement was taken and which may affect the reliability of the statement. In *People (DPP) v. Meleady and Grogan*,[177] for example, the Court of Criminal Appeal quashed a conviction which had been based on identification evidence, at least partly because the defence was not made aware of the possibility that the key prosecution witness had been shown a book of photographs of suspects before making the identification.

4. In its Possession

Prosecution Duty to Retain Possession

14–48 The obligation to disclose relates to evidence in the possession of the prosecution. Presumably, for this purpose, no issue turns on how the evidence came into the possession of the prosecution so long as it is there. Once evidence is in the possession of the prosecution they are under an obligation to retain it where it may be relevant to the defence, even if the prosecution does not intend to rely on it at the trial.

In *Murphy v. DPP*[178] the accused was charged with a number of offences alleged to have been committed while driving a motor vehicle which had been crashed and seriously damaged. The wreck was in the possession of the Garda Síochána who advised that they would not be subjecting it to forensic examination as they would be relying entirely on identification evidence. The defence request to examine the wreck was granted, but before they managed to carry out the examination it was removed from Garda custody by the insurance company which was interested in its salvage value. Accordingly the defence sought an injunction restraining any further prosecution of the charges, essentially on the ground that the removal of the car had prevented them from adducing possible scientific evidence which might have served to refute the visual identification evidence. The defence also claimed that the actions of the gardai in failing to preserve evidence which might have been helpful in preparing the defence amounted to a breach of natural justice. Lynch J., having reviewed the authorities, concluded:

> "The authorities establish that evidence relevant to guilt or innocence must so far as is necessary and practicable be kept until the conclusion of the trial. These authorities also apply to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence."[179]

Applying that principle to the facts of this case the learned judge took into account that an examination of the car could possibly produce evidence that

[176] *DPP v. Special Criminal Court* [1999] 1 I.R. 60.
[177] [1995] 2 I.R. 517.
[178] [1989] 1 I.L.R.M. 71.
[179] *ibid.* at 76.

would rebut the identification evidence against the accused, and corroboration of his denial that he was the driver of the car. In other words the examination related to material evidence in the case. The learned judge also noted that the gardai were made aware at an early stage that the defence wished to examine the wrecked car. Moreover, the evidence in question was in their possession and there was no urgent need to return the wreck to its owner or the insurance company. Lynch J. concluded, therefore, that the Garda failure to retain the wreck has materially affected the preparation of the accused's defence to his detriment. This was sufficient to amount to a breach of fair procedures. Accordingly the learned judge granted the injunction restraining the prosecution of the driving offences, but emphasised that this did not necessarily affect the prosecution of other offences arising out of the same incident.

Lynch J's analysis was approved by the Supreme Court in *Braddish v. DPP*[180] In that case the accused was charged with the robbery of a shop which had been caught on video-tape. He was arrested on the basis of being identified on the video by a member of the Garda Síochána. While in detention he allegedly made and signed a confession. However, he was not formally charged until 9 months later. On his first appearance in the District Court his solicitor requested any signed statements, any video footage and any stills of video footage. The request was repeated five months later. One month after that his solicitor was informed that the video-tapes were no longer available as they had been returned to the owner after the accused had admitted the crime. The accused sought an injunction restraining any further prosecution. This was refused in the High Court, but granted on appeal to the Supreme Court.

In giving the judgment of the Supreme Court Hardiman J. noted that the prosecution was not relying on any evidence from the videotape. Instead they were content to rely on the alleged confession. Nevertheless, the learned judge considered that this did not relieve the prosecution of their obligation to retain the video evidence. The only real basis upon which the accused could challenge the admissibility of his confession was on the basis that the video had not afforded a sufficient basis to ground a reasonable suspicion for his arrest and subsequent detention. If the arrest and detention were unlawful then the confession would have been rendered inadmissible. To pursue this possible line of defence, however, the accused would need access to the video-tape as the stills taken from the tape were totally useless for the purposes of identification. By returning the video-tapes to their owner the gardai had effectively frustrated the accused from pursuing this line of defence.

Hardiman J. also took the opportunity to address directly and forcefully the issue of whether the prosecution can dispose of evidence which they do not intend to rely on at the trial simply because they feel that they have much stronger and better evidence. In doing so he couches his remarks specifically in the context of the facts of the case in which the gardai dispensed with evidence which actually showed the crime in progress in favour of confession evidence:

[180] [2001] 3 I.R. 127.

"More fundamentally, this is a video tape which purports actually to sh robbery in progress. It is not acceptable, in my view, to excuse the abse so vital and direct a piece of evidence simply by saying that the prose are not relying on it, but prefer to rely on an alleged confession. First confession is hotly disputed. Secondly, a confession should if possil corroborated and relatively recent history both here and in the neighb jurisdiction has unfortunate examples of the risks of excessive relian confession evidence. Thirdly the video tape has a clear potential to exc as well as to inculpate.

This video tape was real evidence and the Gardai were not entit dispose of it before the trial. It is now admitted that they should not have dc Lest however the sentence already quoted from the State Solicitor's lette which can only have been based on his instructions from the Gardai) can b to suggest that because the prosecution was based wholly on an alleged c sion, other items of evidence can be destroyed or rendered unavailable, I w state emphatically that this is not so. It is the duty of the Garda, arising fron unique investigative role, to seek out and preserve all evidence having a b or potential bearing on the issue of guilt or innocence. This is so wheth prosecution proposes to rely on the evidence or not, and regardless of whe assists the case the prosecution is advancing or not.

The evidence leading to the identification of a suspect often differs g from the evidence in the ensuing prosecution. This may be because the f would be quite inadmissible, such as anonymous information, or becaus evidence is cogent enough to suggest a suspect or a course of investig but not nearly cogent enough to prove the guilt of any particular person. are other possible explanations for the prosecution's unwillingness to d in evidence material which was used in the investigation. But the fact that material is not used can never justify its destruction or unavailability, c destruction of notes or records about it. This is because a particular fa piece of real evidence which it would be irrelevant or counter productiv the prosecution to deploy may (perhaps for that very reason) be very use the defence. It must therefore be preserved and disclosed. The prosecutio not entitled to take the view that once they have better evidence, or evid more convenient to them to deploy, they are entitled to destroy the evid which came first to hand. They are not entitled to say, for instance, *'This confession case: we will stand or fall on the confession and are ther entitled to ignore the video tape'*."[181]

The missing evidence in *Braddish* was clearly of very special significa The fact that it purported to show the crime in operation meant that it virtually certain to be of primary interest to the defence. Neverthe Hardiman J. emphasised that the duty on the prosecution to retain evid was not confined to such matters. It extended to items which may give ris the reasonable possibility of securing relevant evidence. It was not neces therefore to show that the items in question must contain evidence relevar the defence. A mere possibility that they will contain such evidence shoul sufficient. On the other hand if it is highly unlikely that the video-evid would have captured scenes relating to the commission of the offence,

[181] *ibid.* at 132–133.

obligation to retain the video or inform the defence of its existence would be much weaker and, perhaps, non-existent.[182]

Video Evidence

14–49 There is a growing acceptance that where evidence of a crime may have been caught on street or shop video cameras the Garda should take and keep possession of it for a reasonable time, even if the prosecution does not intend to rely on it as part of its case. The defence may wish to examine it and make use of it for the purposes of preparing its case. Accordingly, there may be circumstances in which the prosecution would be under a duty to notify the defence of the existence of the video-tape and even to give advance notice of their intention to destroy it unless the defence requested its retention. Geoghegan J. put the matter thus in the following *obiter dictum* in *Mitchell v. DPP*:

> ". . . as a general proposition, there would be cases where the gardai, in the interests of justice and fair procedures, would quite definitely be obliged to inform an accused person of the existence of video evidence and notify him of an intention to destroy that video evidence. An example is where the gardai fully intended in the first instance to use video evidence in the investigation or prosecution of the offence and then subsequently decided not to do so. But I think the duty goes beyond such a situation. For example, where gardai take away tapes (say from a shop) and retain them for a period on the basis that they may arguably be of evidential value but subsequently decide that the tapes would not be used by them, a requirement to inform the accused person before the tapes were destroyed or erased arises."[183]

It does not follow that gardai are under a duty to collect all video evidence that there may be relating to a crime and retain it until any proceedings in the case have been exhausted, even though the prosecution will not be relying on the video evidence. Much will depend on the facts of each case. Clearly the duty will be more onerous in a case where it was genuinely considered that the tapes could be of relevance or where the defence had specifically requested access to such tapes. However, gross delay on the part of the defence in seeking the tapes, particularly in a case where the accused has made and not retracted a full admission and the prosecution are not relying on any element of identification, is likely to defeat any attempt to stop a prosecution on the grounds that the tapes have not been retained by the prosecution.[184] Equally, gardai do not have to go to extraordinary lengths to retain items which may contain relevant evidence. Their duty is to preserve evidence in so far as it is "necessary and practicable" to do so. What this requires cannot be defined exhaustively or precisely in advance. Much will depend on the particular facts of individual cases.

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[182] *Mitchell v. DPP* [2000] 2 I.L.R.M. 396.
[183] *ibid.* at 398.
[184] *Dunne v. DPP* unreported, High Court, March 23, 2001.

Third Party Property

14–50 Further complications can arise where property belonging to an innocer party has been seized in the course of preventing or detecting crime. prosecution do not require it as part of their case they should return i owner unless the defence seeks an opportunity to subject it to analy failure to give the defence an opportunity to inspect it before returnin in *Murphy v. DPP*,[185] may result in the prosecution having to be aban where the material in question could provide evidence relevant to the de It would appear, however, that the courts will be slower to stop a prose in these circumstances where the gardai merely returned the material rightful owner instead of destroying it. In *Rogers v. DPP*,[186] for examp High Court refused to stop a prosecution where the gardai had retu stolen vehicle to its owner. Their action denied the defence the opportu subjecting the car to forensic analysis. The facts were very similar to th *Murphy* where the prosecution was stopped because of unfairness accused. In *Rogers*, however, the High Court refused the defence appli to stop the prosecution, partly because it felt able to distinguish *Murp* the facts. In particular it pointed out that there was some delay on the p the defence in advising the prosecution that they wished to inspect the v and, unlike the situation in *Murphy*, the vehicle had already been subjec forensic analysis with negative results. However, the court also laid emp on the significance of the need to return the vehicle to its rightful owner earliest opportunity:

> "I think that some consideration has to be given to the owner of a mot which has been stolen or unlawfully taken; similarly in relation to othe perty the subject of criminal charges where deprivation of possession th will seriously prejudice or inconvenience the innocent owner there relation to such property I would hold that any forensic examination, wh by the gardai or on behalf of an accused person, should be sought and s take place within a reasonable time, having regard to all the circumstanc the case, so that the property can then be returned as expeditiously as po to its true owner."[187]

5. Impossibility

14–51 The prosecution may not be in a position to hand over evidence because longer exists in any tangible or useful form. This will not necessarily re them of their obligations to the accused. As noted above, they are unc duty to retain evidence which may be relevant to the accused. If they fa fulfil this obligation and the accused's defence is prejudiced as a result th case may be withdrawn from the jury or a conviction quashed on appe does not follow, however, that the prosecution are obliged to retain posses of the evidence indefinitely until all proceedings, including any appeal, l

[185] 1989] 1 I.L.R.M. 71.
[186] [1992] 2 I.L.R.M. 695. See also, *Dutton DPP* unreported, High Court, July 14, 1998.
[187] *Rogers v. DPP* [1992] 2 I.L.R.M. 695 at 698.

been exhausted. If the prosecution have no reason to believe that the evidence is relevant to the defence and have not been put on notice by the defence that they wish to inspect the evidence and the evidence has since been dissipated or destroyed, the prosecution may be able to claim successfully that it is not possible to hand it over to the defence.[188] The success of such a claim will depend on the circumstances of the case and, in particular, the length of delay on the part of the defence in expressing an interest in examining the evidence.[189]

6. Third Party Disclosure

14–52 In the course of a criminal investigation the prosecution may be given or may seize material belonging to third parties but which is believed to be evidence relating to the offence. It has been seen above that the prosecution will be under an obligation in certain circumstances to retain possession of this material for the benefit of the defence even though the prosecution does not intend to rely on it as evidence against the accused. As yet there is no suggestion in the case law that the prosecution is also under an obligation to seek or secure material belonging to a third party, and which is not already in the possession of the prosecution, simply because it may be relevant to the defence. It would appear that it is a matter for the defence to secure access to this material through an order for third party discovery.

The jurisdiction to grant an order for third party discovery, and the applicable procedure, in a criminal trial are not at all clear. Nevertheless, it would appear that such applications are becoming more frequent in the Circuit Court.[190] The practice seems to be that the defendant seeks voluntary disclosure in the first instance. Where that does not produce the desired result he applies to the trial court for an order of discovery directed to the third party. It seems that the Circuit Court has been prepared to grant such orders at least where it is satisfied that the material may be relevant to an issue to be decided in the trial.[191] Where a trial (or appeal) court declines to exercise this jurisdiction it is worth considering an application to the High Court. Order 31, rule 29 of the Rules of the Superior Courts make provision for non-party discovery. There is nothing in this order which confines the exercise of the jurisdiction to civil cases. The availability of this jurisdiction would now seem to have been closed off as a result of the Supreme Court's decision in *People (DPP) v. Sweeney*.[191a]

In *Sweeney* the accused made an application for non-party party discovery under RSC Ord.29, r.31 against the Rape Crisis centre. On appeal against the High Court's decision to grant discovery the Supreme Court reviewed the jurisdiction of the High Court to order discovery in criminal proceedings.

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[188] *Mitchell v. DPP* [2000] 2 I.L.R.M. 396.
[189] *Dunne v. DPP* unreported, High Court, March 23, 2001.
[190] See, *e.g.*, *People (DPP) v. Flynn* [1986] 1 I.L.R.M. 317; *DPP v. SK* unreported, Circuit Court, December 14, 1999. Mullan "The Duty to Disclose in Criminal Prosecutions" *Bar Review* 5, 4 (2000) 174.
[191] *Ibid.*
[191a] [2002] 1 I.L.R.M. 532.

Giving the judgment of the Court, Geoghegan J. explained that there was no history of the current High Court, or its predecessors, exercising jurisdiction to order discovery of documents in criminal cases. The learned judge acknowledged that the Rules of the Supreme Court made provision for discovery in any 'cause' which is defined in the Rules generally as including any criminal proceedings. However, the Rules also state that the definition is not to apply if "there is anything in the subject or context repugnant thereto". Geoghegan J. considered that the nature of criminal proceedings was such that discovery was wholly inappropriate and, therefore, outside the discovery jurisdiction conferred on the High Court. Not only was there no history of the High Court exercising a discovery jurisdiction in criminal matters, but criminal proceedings were particularly unsuited to the exercise of such a jurisdiction. There was both a legal and constitutional obligation on the prosecution to serve all relevant documents in their possession on the defence, but no correlative obligation on the defence. Indeed, apart from a few statutory exceptions, the defence are entitled to conceal their case and evidence from the prosecution. It would be wholly inappropriate in this context to issue an order for discovery. The point is well made in the following passage from the judgment of Moriarty J. in *People (DPP) v. Flynn* and quoted with approval by Geoghegan J. in *Sweeney*:

> "2. The principle that each party should be entitled to know from the other in advance any information that would enhance his own case or destroy his adversary's case was less applicable in criminal proceedings where the entire burden of proof rested on the prosecution.
>
> Discovery was intended to be mutual between the parties and it could not be mutual in a criminal case because it would not be ordered against the accused. It followed that a non-party should not be subjected to a greater obligation than could be imposed on the accused."[191b]

It could be argued, of course, that this reasoning would not necessarily preclude a jurisdiction to order non-party discovery in a criminal case at the instance of the accused. Geoghegan J. explained that the jurisdiction to order discovery is normally exercised in civil cases only after the close of pleadings at which point the issues have been clarified with some precision. Where an order was being made against a non-party that party was entitled to know the issues raised by the pleadings with the same degree of precision as a party. Accordingly, the order for discovery should identify the issues. That, however, would not be possible in criminal proceedings given that the accused is not generally obliged to reveal his or her hand in advance of the trial. Geoghegan J. concluded, therefore, that discovery was not available against a non-party in criminal proceedings.

The judgment in *Sweeney* suggests that discovery is not available at all in criminal cases, although Geoghegan J. did specifically state that nothing in his judgment should be construed as expressing any view on the jurisdiction

[191b] *ibid.* at 539.

to make orders for discovery (including orders for non-party discovery) in applications to the Court of Criminal Appeal under section 2(1) of the Criminal Procedure Act 1993 (miscarriage of justice applications). It follows that if an accused wishes to gain access to material which is in the hands of a non-party he or she will have to be content with calling that party as a witness.

7. Privilege

Introduction

14–53 It will happen from time to time that the prosecution will be in possession of evidence which might be useful to the defence case but which the prosecution does not want to hand over to the defence because of the risk that it might present to others, the efficacy of criminal investigations or the security of the State. This situation can arise typically in relation to the sources of evidence which the prosecution intends to rely on at the trial. It may be, for example, that the life of an informer would be in jeopardy if it became known that he had supplied information to the police which led to the detection of the accused. Equally, if it was known that an informer's identity could be disclosed in the course of a trial individuals would be much less likely to give information in confidence to the police, thereby rendering the successful detection and prosecution of crime much more difficult. It may also happen that revealing how evidence was acquired in a particular case would expose police methods to the detriment of ongoing or future investigations or even to the security of the State. In any of these situations the police may calculate that the damage likely to be caused by revealing how they acquired the evidence, or even that they have the evidence at all, would be greater than the damage caused by failing to secure a conviction in the case at hand. The public interest in the detection of crime, therefore, would be defeated at least in the instant case.

From the perspective of the accused it can be vitally important to know the manner in which the police acquired the evidence in order to prepare his defence properly. If, for example, the evidence had come from a paid police informer, the accused would have a very clear interest in attacking the credibility of this informer. In order to do that effectively, he would need to know the identity of the informer, how he was recruited, how much he was being paid by the police and so on. Equally, it may happen that the police have resorted to unlawful or unconstitutional methods to obtain evidence against the accused. Again it would be vital for obvious reasons that the accused should be able to access documents or material evidence relating to these methods and their results. In short, the accused's right to have the opportunity to prepare his defence, and the public interest in the fairness and transparency of the criminal process, would be defeated if the prosecution was permitted to keep secret the existence or to deny access to, evidence that may be useful to the defence.

Demise of Class Privilege

14–54 The courts have developed a number of legal principles governing the resolution of these conflicting interests in an individual case. Previously these principles could have been discussed under the general heading of privilege. While Irish law still recognises the informer privilege and legal professional privilege it no longer recognises the notion of executive privilege for documents simply because they belong to a certain class.[192] Instead it is the responsibility of the court in the exercise of the administration of justice to resolve the conflicting public interests by inspecting the documents in question and determining whether, and if so to that extent, they should not be made available to the defence.

The prosecution cannot evade this general prohibition on privilege for certain classes of documents simply by asserting in respect of documents in an individual case that they consist of confidential communications by one police officer to another,[193] or between the police and the DPP's office, in connection with the initiation of a prosecution. In *Breathnach v. Ireland (No. 3)*,[194] for example, the prosecution made such a claim in respect of information which had been submitted to the DPP's office in respect of the plaintiff's alleged involvement in an armed robbery. The High Court considered that to permit such a claim for privilege in respect of these documents would effectively confer privilege on such documents as a class. Instead it would be necessary for the court to inspect the individual documents in order to determine whether the public interest favoured disclosure or non-disclosure.

Where the evidence in question is in any way relevant to the issues to be determined in the case the onus is on the prosecution to establish that the evidence in question should not be disclosed.[195] The court will normally conduct an inspection of the documents in order to decide the issue, although in very exceptional circumstances it may feel able to hold that the public interest must be decided in favour of non-disclosure without the need to inspect the documents. It is submitted that, at least in respect of material which may contain relevant evidence, this possibility would have to be confined to cases of legal professional privilege or informer privilege, otherwise it will result indirectly in the creation of executive privilege for certain classes of document.

Current Approach

14–55 Most of the case law on how the conflicting public interests at stake should be resolved concern civil matters. Nevertheless, the guidance they offer can be accepted as relevant to a criminal trial in the sense that they lay down the

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[192] *Murphy v. Dublin Corporation* [1972] I.R. 215; *Geraghty v. Minister for Local Government* [1975] I.R. 3000; *Ambiorix Ltd. v. Minister for the Environment (No.1)* [1992] 1 I.R. 277; *DPP (Hanly) v. Holly* [1984] I.L.R.M. 149; *Breathnach v. Ireland (No.3)* [1993] 2 I.R. 458.

[193] *DPP (Hanly) v. Holly* [1984] I.L.R.M. 149, effectively overruling *Attorney General v. Simpson* [1959] I.R. 105.

[194] [1993] 2 I.R. 458.

[195] *Murphy v. Dublin Corporation* [1972] I.R. 215; *Breathnach v. Ireland (No.3)* [1993] 2 I.R. 458.

absolute minimum entitlements of the accused in the criminal trial. Some of the civil cases actually arise out of criminal matters as, for example, where an individual sues for damages in respect of the methods employed by the police in the course of a criminal investigation. A few cases concern the accused seeking access to documents for the purpose of his defence in a criminal trial.

In *Breathnach*, Keane J., as he then was, proceeded to offer the following guidance on how the court should balance the conflicting public interests when deciding whether to order disclosure in an individual case:

> ". . . the court, as I understand the law, is required to balance the public interest reflected in the grounds put forward for non-disclosure in the present case. The public interest in the prevention and prosecution of crime must be put in the scales on the one side. It is only where the first public interest outweighs the second public interest that an inspection should be undertaken or disclosure should be ordered. In considering the first public interest, it is necessary to determine to what extent, if any, the relevant documents may advance the plaintiff's case or damage the defendant's case or fairly lead to an enquiry which may have either of those consequences. In the case of the second public interest, the various factors set out by Mr. Liddy [the prosecutor] must be given due weight. Again, as has been pointed out in the earlier decisions, there may be documents the very nature of which is such that inspection is not necessary to determine on which side the scales come down. Thus, information supplied in confidence to the gardai should not in general be disclosed, or at least not in cases like the present where the innocence of an accused person is not in issue, and the authorities to that effect, notably *Marks v. Beyfus* (1890) 25 Q.B.D. 494, remain unaffected by the more recent decisions, as was made clear by Costello J. in *Director of Consumer Affairs v. Sugar Distributors Ltd* [1991] 1 I.R. 225. Again, there may be material the disclosure of which may be of assistance to criminals by revealing methods of detection or combating crime, a consideration of particular importance today when criminal activity tends to be highly organised and professional. There may be cases involving the security of the State, where even disclosure of the existence of the document should not be allowed. None of these factors – and there may, of course, be others which have not occurred to me – which would remove the necessity of even inspecting the documents is present in this case."[196]

This guidance was handed down in the context of a civil case arising out of a criminal matter. While the general approach is equally applicable to a criminal prosecution it must be borne in mind that a very strong case would have to be made out for non-disclosure. The interest at stake in the criminal prosecution is the opportunity for the accused to establish his innocence as distinct from the opportunity to pursue a civil claim for compensation or to enforce a related civil right.

Informer Privilege

14–56 The mere fact that information has been given in confidence to the police is not in itself a ground for refusing disclosure of that information.[197] Informer

[196] *op.cit.* at 469.
[197] *Skeffington v. Rooney* [1997] 1 I.R. 22; *DPP v. Special Criminal Court* [1999] 1 I.R. 60.

Public Interest Immunity

From Wikipedia, the free encyclopedia

Public Interest Immunity (PII) is a principle of English common law under which the English courts can grant a court order allowing one litigant to refrain from disclosing evidence to the other litigants where disclosure would be damaging to the public interest. This is an exception to the usual rule that all parties in litigation must disclose any evidence that is relevant to the proceedings. In making a PII order, the court has to balance the public interest in the administration of justice (which demands that relevant material is available to the parties to litigation) and the public interest in maintaining the confidentiality of certain documents whose disclosure would be damaging.

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Seeking the order

An order that PII applies would usually be sought by the British government to protect official secrets, and so can be perceived as a gagging order. Where a minister believes that PII applies, he signs a PII certificate, which then allows the court to make the final decision on whether the balance of public interest was in favour of disclosure or not. Generally, a court will allow a claim of PII without inspecting the documents: only where there is some doubt will the court inspect the documents to decide whether PII applies.

Originally, a government minister was under a duty to advance a PII point where PII could be relevant, and the court took a certificate from a minister claiming PII as final and conclusive. However, over time, there has been an increase in both the ability of a minister to make a disclosure, notwithstanding the potential application of PII, and the ability of the courts to review a claim of PII. In *Conway v Rimmer* [1968], the House of Lords held that the courts retained the final decision on whether PII should be upheld, and, in *R v Chief Constable of West Midlands, ex parte Wiley* [1995], the House of Lords decided that a minister could discharge his duty by making his own judgment of where the public interest lies (that is, to disclose or to assert PII). In practice, this is thought to have led to a reduction in the number of cases when PII is asserted.

History

PII was previously known as **Crown privilege**, and derived from the same principle as the immunity of the Crown from prosecution before the Crown Proceedings Act 1947. However, PII is not limited to the Crown (see the *NSPCC* case mentioned below), and cannot be waived save in exceptional circumstances.

Infamously, a number of PII certificates were signed in relation to the prosecutions of individuals involved in the Matrix Churchill "Arms to Iraq" case, a subject that was subsequently investigated in the Scott Report.

Examples

- *Duncan v. Cammell Laird and Co. Ltd* [1942] AC 624. The submarine HMS *Thetis* sank on 1 June 1939 during sea trials with the loss of 99 lives. The families of the sailors who had been killed in the disaster claimed damages from the builders, Cammell Laird. The House of Lords upheld a certificate issued by the Admiralty claiming PII in relation to the plans of the submarine. The House of Lords also held that the courts should take a PII certificate at face value.
- *Conway v Rimmer* [1968]. The House of Lords held that the courts are the final arbiters of whether PII applies or not.
- *D v. National Society for the Prevention of Cruelty to Children* [1978] AC 171. The NSPCC investigated an allegation that D was mistreating her child. D claimed damages, and sought documents from the NSPCC to identify who had made the allegation. The House of Lords upheld the NSPCC's claim of PII, since its legitimate role in protecting the welfare of children was clearly in the public interest and would be threatened by disclosure.
- *Air Canada v. Secretary of State for Transport* [1983] 2 AC 384. A group of airlines claimed that the British Airports Authority had unlawfully increased landing fees at the instigation of a government minister. The minister disclosed some documents, but claimed PII in respect of others. The House of Lords decided not to inspect the disputed documents, holding that inspection was only required if they were "reasonably likely" to assist or damage a party's case.
- *R v Chief Constable of West Midlands, ex parte Wiley* [1995] 1 AC 274. The House of Lords decided that a minister could discharge his duty by making his own judgment of where the public interest lies, and was not obliged to claim PII in all cases where it may be applicable.
- The Scott Inquiry found that public interest immunity certificates had been issued which withheld from defense counsel certain documents which would have exonerated the defendants in the Matrix Churchill trial.
- *Crown Prosecution Service v Paul Burrell* [2002] - A Public Interest Immunity Certificate allowed the prosecution to apply to the judge for a ruling that disclosure of certain information would be harmful to the public interest and should not be made public.[1]
- *Crown Prosecution Service v Cornish Stannary Parliament* [2002] - A Public Interest Immunity Certificate was presented to the court by the Crown Prosecution Service after about ten minutes of this hearing. A possible reason for the introduction of the PII certificate, given by the Stannary Parliament, was that the Duchy of Cornwall refuses to reveal the circumstances under which it transferred several of its properties (including Tintagel Castle) to the care of English Heritage. [2]
- *Trial of Wang Yam for murder of Allan Chappelow* [2008] - In December 2007 the Crown Prosecution Service indicated it would ask for this trial for murder, burglary and deception to be held 'in camera', making it the first UK murder trial ever heard behind closed doors without access by press or public. A Public Interest Immunity certificate was sought by the Home Secretary Jacqui Smith; it was reported by the Times on 13 December 2007 that the grounds were 'on the basis of protecting national security interests and to protect the identity of informants'. A further order was made under the Contempt of Court Act 1981 prohibiting the press from any speculation as to the reasons for parts of the trial being held in private. In the Court of Appeal on 28 January, the 'gagging order' was upheld, with the Lord Chief Justice insisting that a fair trial would be possible even if some or all of it is held 'in camera'.[3][4]

European Convention on Human Rights

Article 6 of the European Convention on Human Rights protects the right to a fair trial. The European Court of Human Rights has held that Article 6 is not an absolute right and that measures restricting the rights of the defence so as to safeguard an important public interest are lawful is "strictly necessary".[5]

External links

- Legal Guidance (http://www.cps.gov.uk/legal/section20/chapter_i.html) published by the Crown Prosecution Service on PII in criminal proceedings
- Reforming Public Interest Immunity (http://webjcli.ncl.ac.uk/articles2/leigh2.html)
- The Use of Public Interest Immunity Claims in Criminal Cases (http://webjcli.ncl.ac.uk/1996/issue2/scott2.html)

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4. ^ *Regina v. Wang Yam*, (http://www.bailii.org/ew/cases/EWCA/Crim/2008/269.html) [2008] EWCA Crim. 269, United Kingdom Court of Appeal, Criminal Division, January 28, 2008
5. ^ Rowe and Davies v. UK, , (2000) 30 EHRR 1 (http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=rowe&sessionid=3387897&skin=hudoc-en) .

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The Use of Public Interest Immunity Claims in Criminal Cases

The Earl Grey Memorial Lecture,
University of Newcastle upon Tyne, 29 February 1996.

The Right Hon. Sir Richard Scott

Vice-Chancellor of the Supreme Court

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Summary

In this article, which was originally delivered as a lecture, Sir Richard Scott suggests that the application to criminal trials of Public Interest Immunity principles derived from civil cases and designed for application in civil cases has been a mistake and has acted as an impediment to the evolution of satisfactory principles for dealing with PII claims in criminal trials. Sir Richard goes on to suggest what should be the correct approach to PII claims in criminal trials.

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Introduction

I am honoured to have been asked to give this year's Earl Grey Memorial Lecture and was interested to notice Earl Grey's association with Southern Africa. It was he, I suspect, who gave his name to Greytown, a town in Northern Natal not far from my home in Natal, and who gave his name also to at least two leading South African schools, one in Bloemfontein, the other in East London. So I am

particularly pleased to be giving the Earl Grey Lecture.

I hope you will forgive me for having chosen as the subject of the lecture a legal issue. It is not, however, an arcane legal issue. It is an issue which relates to the conduct of criminal trials and the need to ensure that trials are fair.

There would I think be general agreement that criminal trials are not fair if documents or information to which the prosecution have access but the defence do not, and that if disclosed might enable a defendant to prove his innocence, are withheld from him. It is in this context that Public Interest Immunity claims (hereafter PII claims) must be considered.

May I make clear what I mean by PII claims. They are claims made on public interest grounds to withhold documents or information from being produced or given in evidence in Court proceedings. These claims may be made and are frequently made, in civil cases and from time to time in criminal proceedings. The great seminal cases establishing the principles of public interest immunity law have, however, been civil cases not criminal cases. I want to suggest to you this afternoon that the application to criminal trials of PII principles derived from civil cases and designed for application in civil cases has been a mistake and an impediment to the evolution of satisfactory principles for dealing with PII claims in criminal trials.

I make that suggestion with a certain amount of trepidation. I am not a criminal lawyer. I did no criminal work in practice at the Bar and as a judge I have never presided over a criminal trial or taken part in a criminal appeal. My card of entry, however, is the examination I have had to give over the past three years to the PII claims that were made in connection with the *Matrix Churchill* trial and the *Ordtec* trial. I have been educated by submissions explaining and justifying the practice and procedure that attended those claims put before me by a number of government lawyers, by prosecuting counsel in the two cases and by the Attorney- General.

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The *Matrix Churchill* Trial

In the *Matrix Churchill* trial three defendants, directors of Matrix Churchill Ltd., were charged with export control offences. They were charged with exporting to Iraq machine tools capable of being used and intended to be used for the manufacture of munitions - shells, missiles and the like - while dishonestly concealing from the government licensing authorities that the machine tools were intended for that use. They proposed to mount a two-pronged defence - they said, first, that they had been encouraged by Mr Alan Clark, when he was Minister for Trade in 1988, to conceal any intended military production uses of their machine tools and to emphasise the capability of the machine tools to be used for civil production purposes. They said, second, that in any event Government, or sections of Government, had known that their machine tools were intended for military production and that they had nonetheless been granted export licences. One of the problems of this second line defence is to decide what one means by 'Government'. 'Government' consists of many thousands of individuals and many different sections of Government Departments, agencies and the like. It would obviously be of some importance to the defendants to show that the knowledge they alleged was held by as wide and influential a section of Government as possible. To establish this proposed line of defence they needed, therefore, Government documents either showing that the intended use of their machine tools was known or providing a basis from which that knowledge might reasonably be inferred and which could be used to cross-examine Government witnesses.

Accordingly, the defendants applied for Government documents. Government met their application by making PII claims. Ministers signed certificates stating that if the various documents covered by the certificates were disclosed, grave and unquantifiable damage might be done to the public interest. At a hearing before the trial judge counsel for the Crown argued, as he had been instructed to do, that

the documents ought not to be disclosed. The trial judge read the documents, concluded that they ought to be disclosed and ordered their disclosure. They provided the basis for a substantial cross-examination of Government witnesses, including Mr Alan Clark, to be mounted by defence counsel. The upshot of this, following Mr Clark's agreement in cross-examination that he did not regard the possible use of the machine tools to manufacture conventional weapons as matter of concern, was the collapse of the prosecution. The rest is history.

The documents covered by the unsuccessful PII claims in the Matrix Churchill case fell broadly into two classes. First, there were documents passing between officials and Ministers in the ordinary Government departments, the Department of Trade and Industry, the Ministry of Defence and the Foreign and Commonwealth Office, regarding the licensing decisions on machine tools exports to Iraq that were being made. Second there were documents mainly emanating from intelligence agencies which disclosed information coming from intelligence sources regarding the use or likely use Iraq might make of these machine tools.

The justification for these PII claims was that the making of PII claims of this character in civil cases was well established and that the same principles were applicable in criminal cases.

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The *Osman* case

The proposition that the PII principles applicable to civil cases were applicable also to criminal cases was based on the judgment of Lord Justice Mann in *R* v *Governor of Brixton Prison, Ex parte Osman* [1991] 1 WLR 281. The case arose out of the proposed extradition of Mr Osman to Hong Kong to face charges of conspiracy, bribery, theft and false accounting. He wanted to resist extradition and, sought to rely on certain correspondence passing between the English Magistrates Court and the Home Office and between the Home Office and the Government of Hong Kong. The Crown claimed PII protection for the correspondence. It is important to notice that the PII claim was made not in a criminal trial but in a habeas corpus application. There were, it was held, reasons which had nothing to do with PII why Mr Osman was not entitled to rely on this correspondence. But on the PII point, Mann LJ posed the question (at p 287): "...is public interest immunity claimable in criminal proceedings"?. He answered the question by saying that:-

"...there is no discernible reason why the immunity should not apply in criminal proceedings".

The decision of Mann LJ in *ex parte Osman* has been taken as justifying the proposition that the principles of PII established in the civil cases to which I will in a moment refer are applicable also to criminal trials.

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Are civil PII principles applicable in criminal trials?

Bearing in mind that *ex parte Osman* was not a criminal trial but was a habeas corpus case, I am not sure that this reliance on *ex parte Osman* was ever justified. But, assuming that it was, I want to question the proposition that the PII principles applicable to civil cases are applicable also to criminal trials.

a. Criminal cases

Let me make clear at the outset that there is no doubt and never has been that PII claims of an appropriate character can be and should continue to be made in criminal trials. Documents and

evidence relating to informants provide the classic case in point. Documents disclosing the identity of an informant, or disclosing the channels through which information about the offence has been obtained by the prosecuting authority, will not ordinarily be made available to the accused, nor will questions of witnesses designed to reveal this information be allowed, unless, in either case, the disclosure is necessary to prevent a miscarriage of justice.

This principle was well established at least as long ago as 1890. In *Marks* v *Beyfus* (1890) 25 QBD 494, the judge at a criminal trial refused to order a witness to give the name of informants. He was upheld by the Court of Appeal. Lord Esher MR (at p 498) referred to the "rule clearly established and acted on...that in a public prosecution a witness cannot be asked such questions as will disclose the informer...." Lord Esher went on to make clear the limits to this rule. He said (ibid) that :

> "if...the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."

This limitation is, obviously, of crucial importance. But the point I wish to make is that the propriety of making PII claims in criminal cases has been accepted for a long time. I repeat that there is no doubt that PII claims can be made in criminal trials. The question for consideration is not whether PII claims can be made in criminal cases. They obviously can. The question is, first, what sort of PII claims is it proper to make in criminal cases and second, how should PII claims in criminal cases be dealt with once they are made.

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b. Civil cases

The great civil cases in the House of Lords, *Duncan* v *Cammell Laird* [1942] AC 624, *Conway* v *Rimmer* [1968] AC 910, *Burmah Oil* v *Bank of England* [1980] AC 1090 and *Air Canada* v *Secretary of State for Trade (No 2)* [1983] 2 AC 394, established a number of principles of PII law and practice.

Common to all these cases was that PII claims for protection of documents either on a contents basis or on a class basis could be made. A word of explanation may be necessary. The contents of a document may be such that, if disclosed, damage to the public interest would be likely to follow. Documents revealing the names or working practices of members of the SIS provide an obvious example. PII protection for such documents can be claimed on a contents basis. Many documents, however, have nothing in their contents that can be pointed to as being likely, if disclosed, to cause damage to the public interest. But they may nonetheless be documents that, in the opinion of Ministers, ought not, because of the particular class into which they fall, to be disclosed. If such documents are to be protected from disclosure, the protection must be claimed on a class basis. Viscount Simon, in *Duncan* v *Cammell Laird* gave this classic description of the principle underlying PII claims. He said (at p 686):

> "The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be satisfied, either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which on grounds of public interest, must as a class be withheld from production."

He gave an example of a justifiable class claim (at p 642): "where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service". Lord Reid, in *Conway* v *Rimmer*, said (at p 952) that he did not doubt "that there are certain classes of documents

which ought not to be disclosed whatever their content may be". He instanced "Cabinet minutes and the like".

In *Duncan* v *Cammell Laird*, the House of Lords held that it was not open to the court to go behind a Minister's statement that damage to the public interest would be caused by production of the documents in question. The Minister's statement on the matter was held to be conclusive. On this point, but only on this point, the House of Lords in *Conway* v *Rimmer* disagreed. They held it was open to the Court to require the documents in question to be produced for the Court's inspection and then for the Court itself to decide whether or not the requirements of justice in the case overrode the particular public interest invoked by the Minister in claiming immunity from production of the documents. This decision introduced, therefore, the so-called balancing exercise. Pre-*Conway* v *Rimmer* any balance between the requirements of justice on the one hand and the public interest against disclosure on the other hand would have been struck, if it was struck at all, by the Minister. The Minister's certificate that the public interest required the documents to be withheld from production could not be challenged. But post *Conway* v *Rimmer* the final decision as to where, on balance, the public interest lay was with the Court.

But, as I have already said, these were both civil cases. Such references to criminal cases as may be found in the speeches in the two cases do not suggest that the principles being enunciated were thought to apply also to criminal cases.

In *Duncan* v *Cammell Laird* Viscount Simon said that (at pp 633- 634):

> "The judgment of the House in the present case is limited to civil actions and the practice, as applied to criminal trials, where an individual's life or liberty may be at stake, is not necessarily the same."

That seems a clear enough indication.

Viscount Simon, cited with approval a passage from the judgment of Eyre CJ in *R* v *Hardy* (1794) 24 St Tr 199, a criminal case:

> "...if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person [i.e. the informer] should be disclosed, I should be very unwilling to stop it."

In 1956 the then Lord Chancellor, Lord Kilmuir, in a statement to the House of Lords on said that:

> "We also propose that if medical documents, or indeed other documents, are relevant to the defence in criminal proceedings Crown privilege should not be claimed".

Lord Reid referred to this statement in his speech in *Conway* v *Rimmer* and then, in countering the argument that if the documents were not protected from disclosure "freedom and candour of communication" would be prejudiced, said (at p 942):

> "So we have the curious result that freedom and candour of communication is supposed not to be inhibited by knowledge of the writer that this report may be disclosed in a criminal case but would still be supposed to be inhibited if he thought that his report might be disclosed in a civil case."

This remark seems to me to make it clear that Lord Reid did not regard the Crown privilege being claimed in the *Conway* v *Rimmer* malicious prosecution action as being any bar to disclosure of the documents if relevant to a criminal trial.

Lord Pearce, in *Conway* v *Rimmer*, made a remark to the same effect. He said (at p 987):

> "Moreover if, as at present [the document] may be disclosed in criminal proceedings, then there is already an outside chance of disclosure".

It seems to me clear enough that in 1968, when *Conway* v *Rimmer* was decided, it was accepted that different principles applied in criminal proceedings. I would refer again to *Marks* v *Beyfus* decided in 1890. Lord Esher made it clear that "if disclosure...is necessary or right in order to show the prisoner's innocence" the information about the informer would have to be disclosed. Lord Justice Bowen, in the same case, said that (at p 500):

> "The only exception to such a rule [i.e. the rule against disclosure of an informant's name] would be upon a criminal trial, when the judge if he saw that the strict enforcement of the rule would be likely to cause a miscarriage of justice, might relax it (in favorem innocentiae;) if he did not do so, there would be a risk of innocent people being convicted".

Marks v *Beyfus* was decided nearly eighty years before *Conway* v *Rimmer*. But it is plain that the decision whether the information or documents relating to the informer would have to be disclosed was one that would be taken by the judge presiding over the criminal trial. The notion that a Minister's certificate would be conclusive plainly never applied to criminal trials. *Marks* v *Beyfus* was referred to with express approval by Lord Reid in his judgment in *Conway* v *Rimmer*.

But compare those dicta of Lord Esher and Bowen LJ., describing the approach in criminal cases, with Lord Reid's description of the balancing exercise to be carried out in civil cases. Lord Reid said (at p 940):

> "There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."

He pointed out that (ibid):

> "There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it [but] there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved."

Is the balancing exercise described by Lord Reid in the passages I have just cited, reconcilable with the insistence in *Marks* v *Beyfus* that, if disclosure is necessary to show the innocence of the accused, disclosure must be permitted?

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c. The recent criminal cases

The approach in criminal cases described in *Marks* v *Beyfus* has been repeated in more recent cases.

In *R* v *Hallett* [1986] Crim LR 462, Lord Lane CJ referred to the "rule of exclusion" that barred the disclosure of information that might identify informants and then went on:

> "...it is a rule which excludes evidence as to the identity of informants, unless the judge

> comes to the conclusion that it is necessary to override the rule and to admit the evidence in order to prevent a miscarriage of justice and in order to prevent the possibility that a man may by reason of the exclusion, be deprived of the opportunity of casting doubt on the case against him".

Lord Lane concluded that "if the judge does come to the conclusion that the lack of information as the identity of the informer is going to cause a miscarriage of justice, then he is under a duty to admit the evidence". Is this conclusion consistent with a balancing exercise under which "the nature of the injury which would or might be done to the nation or the public service [may be] of so grave a character that no other interest, public or private can be allowed to prevail over it"? I do not think so.

In *R v Agar* [1990] 2 All ER 442, Lord Justice Mustill (as he then was) said (at p 448):

> "There was a strong, and absent any contrary indication, overwhelming public interest, in keeping secret the source of information: but, as the authorities show, there was an even stronger public interest in allowing a defendant to put forward a tenable case in its best light".

In *R* v *Clowes* [1992] 3 All ER 440, Mr Justice Phillips (as he then was) made the point that I have been endeavouring to make. He said (at p 454):

> "I do not find easy the concept of a balancing exercise between the nature of the public interest [against production of the documents] on the one hand and the degree and potential consequences of the risk of a miscarriage of justice on the other".

It is, of course, inherent in the "balancing exercise" to be carried out in a civil case in which a PII claim has been made that the weight of the public interest factors relied on as justifying the withholding of documents may require that the documents be withheld from the litigant who requires them notwithstanding that they may be crucial to his case. The passage I have cited from Lord Reid's judgment in *Conway* v *Rimmer* makes that clear. But is this ever a possibility in a criminal case? On the authority of *Marks* v *Beyfus*, *R* v *Hallett* and *R* v *Agar*, I would say 'No'.

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d. The criteria for upholding PII claims in civil cases

It is instructive in this context, to notice the basis on which, in civil cases, non disclosure of documents on PII grounds has been upheld.

> (i) "...where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service ... and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration".(Viscount Simon in *Duncan* v *Cammell Laird* at p 642)

Could that have been said if "any private consideration" was that of a defendant in a criminal trial? Surely not.

> (ii) "If ... national security would or might be imperilled by the production and consequent disclosure of certain documents, then the interest of a litigant must give way". (Lord Morris in *Conway* v *Rimmer* at p 955)

Could that have been said if the "litigant" were a defendant in a criminal trial? It could not.

> (iii) "... if the production of a State Paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice" (Lord Morris in *Conway* v *Rimmer* at p 963)

A defendant in a criminal trial is not "a suitor in a Court of justice" but, in any event, the remarks could not possibly have been made with a defendant in a criminal trial in mind.

And, finally,

> (iv) "...it is for the party seeking discovery to establish clearly that the scale falls decisively in favour of [the public interest in the administration of justice] if he is to succeed in his quest. If he fails, even material clearly 'necessary...for disposing fairly of the case or matter must be withheld". (Lord Wilberforce in *Air Canada* at p 442).

Could Lord Wilberforce have expressed this view if the party seeking discovery were a defendant in a criminal case? I am sure he could not.

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The correct approach to PII claims in criminal trials

The passages I have cited make clear that, in a civil case, the public interest in the administration of justice, which underpins, of course, the private interest of the litigant who wants the documents, will sometimes have to give way to the greater weight of the public interest against disclosure? That, as I have said, is inherent in the balancing process.

What has such a balancing process to do with the public interest that a defendant in a criminal trial should have a fair trial and that an innocent man should not be convicted. The suggestion that the public interest would ever have to give way in a balancing exercise is, to my mind, a grotesque one and is, moreover, one that is contradicted by the dicta in the criminal cases to which I have referred.

But, if that is so, what should be the approach to PII claims made in criminal trials?

In answering that question recourse should, I suggest, be had to first principles rather than to principles distilled from the seminal civil cases to which I have referred.

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a. The disclosure cases

A PII objection to the disclosure of a document does not, either in civil cases or in a criminal trial, need to be made except, in relation to a document that is, under the rules of discovery applicable to the proceedings, disclosable. The rules governing disclosure of documents in criminal cases have been authoritatively re-stated in some important recent decisions.

In a 1993 case, *R* v *Melvin* (unreported), Mr Justice Jowitt referred to the following passage from the Court of Appeal judgment in *R* v *Ward* [1993] 1 WLR 619 at 642:

> "The obligation to disclose only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise, or which unexpectedly do arise, in the course of the trial".

Mr Justice Jowitt drew particular attention to the adjective "material" and went on to say this:

> "I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly to raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."

This test of materiality has been expressly approved and adopted in two Court of Appeal cases. In *R* v *Keane* [1994] 1 WLR 746, the Lord Chief Justice, Lord Taylor, said (at p 752) that:

> "The prosecution must identify the documents and information which are material according to the criteria set out above [i.e. Mr Justice Jowitt's criteria]. Having identified what is material, the prosecution should disclose it unless they wish to maintain that public interest immunity or other sensitivity justifies withholding some or all of it."

In *R* v *Brown (Winston)* [1994] 1 WLR 1599 Lord Justice Steyn (as he then was) referred to "The right of every accused to a fair trial" and observed that "in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial". After citing the passage from Mr Justice Jowitt's judgment in *R* v *Melvin* which had been adopted by the Lord Chief Justice in *R* v *Keane* as correctly stating the test of materiality for disclosure purposes, Lord Justice Steyn continued (at p 1606):

> "This is a test which we would also adopt. It might be helpful, however, if we added a few comments under two headings. In the first place the phrase 'an issue in the case' must not be construed in the fairly narrow way in which it is used in a civil case. It must be given a broad interpretation".

The application of Mr Justice Jowitt's criteria, adopted and applied by the Court of Appeal in *R* v *Keane* and *R* v *Brown (Winston)* will identify the documents that, subject to PII claims, must be disclosed to the defence. It is worth reminding oneself of the reason why "material" documents have to be disclosed. It is in order to avoid the possibility that the defendant may, for want of the documents in question, be unable to pursue, or effectively to pursue, or to decide whether to pursue, a particular issue and that a miscarriage of justice may consequently be caused. But the breadth of the disclosure required by Jowitt J's criteria of 'materiality' makes it at least highly likely that among the "material" documents will be found some whose potential to provide assistance to the defence will not be apparent. Some, indeed, may be positively harmful to the defence. Relevance is, after all, a strictly neutral concept. Similarly a PII claim may well cover documents with an apparent potential to assist the defence as well as others whose potential to assist the defence is not apparent.

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b. Disclosure of documents which might assist the defence

As to documents which appear to have the potential to assist the defence, could a situation ever arise in which disclosure could be refused on PII grounds? This is, to my mind, a fundamental but conceptually simple, question. The answer to it, both on authority and on principle should, in my opinion, be a resounding 'No'. In the context of a criminal trial how can there be a more important public interest than that the defendant should have a fair trial and that documents which might assist him to establish his innocence should not be withheld from him. In civil cases where private interests are in competition, the interests of one party may from time to time have to be subordinated to the greater public good. But there surely cannot be any such subordination of the interests of a defendant in a criminal trial. In civil cases, the weight of the public interest factors against disclosure may justify a refusal to order disclosure notwithstanding that without disclosure an otherwise sound case might fail. But, in a criminal trial the balance must always come down in favour of disclosure if there is any real possibility that the withholding of the documents may cause or contribute to a miscarriage

justice. The public interest factors underlying the PII claim cannot ever, I suggest, have a weight sufficient to outweigh that possibility.

In criminal trials, once it has been decided that a document might be of assistance to the defence, that should be the end of the PII claim. If that is so, there is only one issue for decision when a PII claim is made in a criminal trial in respect of "material" documents, namely, is there a real possibility (as opposed to a fanciful one) that the documents might be of assistance to the defence.

The present tenor of authority is that a judge adjudicating on a PII claim at a criminal trial does conduct a balancing exercise. In *R* v *Clowes*, Mr Justice Phillips expressed himself to be doing so (at p 454). But he rejected the PII claims. He said (at p 455):

> "... the likelihood of the [documents] containing additional material evidence is sufficient to justify upholding the witness summonses in the face of the public interest immunity involved".

He was not prepared to run the risk that the withholding of the documents might lead to a miscarriage of justice.

In *R* v *Keane*, the Lord Chief Justice said that "if the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it".

In *R* v *Brown (Winston)*, Lord Justice Steyn said that (at p 1608) "...the judge must always perform a balancing exercise taking into account the public interest and the interests of the defendant", but he went on to cite the passage from Lord Taylor's judgment in *R* v *Keane* that I have just cited.

It does not, perhaps, matter whether or not the process required to be performed by judges in criminal trials when dealing with PII claims is referred to as a balancing exercise. I would not myself so describe it. The reason I would not do so is that the weight of the public interest factors underlying the PII claim cannot, or should not, be allowed to tip the scale. *R* v *Keane* and *R* v *Brown (Winston)* concerned documents which might assist the defence. A document which might be of assistance to the defence would, I think, necessarily be a document that might "prove the defendant's innocence or avoid a miscarriage of justice." The dicta of the Lord Chief Justice in *R* v *Keane* and of Lord Justice Steyn in *R* v *Brown (Winston)* suggest that it is not possible to have public interest factors in favour of non-disclosure whose weight can tip the scale against disclosure of such documents. If that is an accurate assessment, then the only question on a PII claim in a criminal case is whether the documents might be of assistance to the defence. If the posing of that question and the reaching of an answer are to be described as carrying out a balancing exercise, so be it. But it is important to recognise that it is a balancing exercise of a very different character from that performed in civil cases.

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c. Are 'class' claims ever appropriate in criminal trials?

I want now to return to the matter of class claims. I have, I must confess, serious misgivings as to whether PII class claims should any longer be regarded as acceptable in criminal cases. The reason for this is two-fold. On the one hand it seems to me that genuinely sensitive documents can be protected by PII contents claims. All "informant" documents can, I would think, be covered by contents claims. Class claims to cover documents emanating from the intelligence and security agencies have in the past been regarded as an example, par excellence, of documents which should be given PII protection because of the class to which they belong and irrespective of their contents. But evidence given to my Inquiry by Mr David Bickford, the Legal Adviser both to the SIS and to

Security Service was to the effect that class claims were not necessary. He said:

> "To date the Services [i.e. the SIS and the Security Service] have had no real difficulties protecting their sensitive information from disclosure by relying on contents claims."

He added that "if any information held by the Services was relevant to the issues in any criminal trial it [would be], in my view, inconceivable that the Court would weigh the balance in favour of a class claim". I entirely agree.

Later in his evidence, he said:

> "I am concerned that the use of class claims undermines the credibility of the Services. The Services obtain information in the same way as law enforcement agencies (but usually in a more intensive and long term manner). Agents are used, surveillance is deployed, eavesdropping and clandestine searches are made. These matters will not protect something that is relevant to the issues."

In short, in Mr Bickford's view, which I share, any genuinely sensitive material can be protected by contents claims. Seeking PII protection by means of class claims is not necessary for protecting sensitive material.

The second reason why, in my view, PII class claims should not be made in criminal cases is that experience has shown that the existence of class claims has encouraged Government to seek protection for ever expanding categories of documents.

Lord Upjohn in *Conway* v *Rimmer* referred to(at p 993):

> "documents which by their very nature fall in a class which require protection such as, only by way of example, Cabinet papers, Foreign Office dispatches, the security of the State, high level interdepartmental minutes and correspondence and documents pertaining to the general administration of the naval, military and air force services."

Lord Salmon in the *Burmah Oil* case referred to (at p 1121):

> "Classes of documents which are immune from production because their production would imperil the safety of the state or diplomatic relations, and also classes of documents such as Cabinet minutes and others whose immunity from production is considered necessary for the proper functioning of the public service."

Lord Wilberforce said in the *Air Canada* case that (at p 437):

> "the documents now in issue...can claim to bear a higher degree of confidentiality than those involved in *Burmah*: they relate directly to the making of decisions as to government policy in a sensitive area, viz. the economic and financial policy of the government..."

Whether, in the absence of any sensitive contents that would qualify for PII protection on a contents basis, documents in these classes do require PII protection is a matter for debate and not here in point. What is in point is that the documents contemplated as qualifying for PII protection on a class basis are, broadly speaking, documents relating to matters of high policy. And yet, in both the *Matrix Churchill* case and in the *Ordtec* case (at trial, not at the appeal) PII protection was claimed on a class basis for a number of documents that could not possibly have been described as relating to "high policy". The lawyers in the Treasury Solicitor's Department who were responsible for advising on the PII claims took the view that PII class protection should be claimed for any documents

relating to advice given by an official to a Minister, whether relating to formulation of policy or to the taking of an executive decision. In oral evidence given at my Inquiry, one of their lawyers expressed the opinion that:

> "... it is regarded as damaging for the public interest that any of this process [i.e. the process of advising Ministers and decision making] should be exposed...."

He was asked, "Is this approach bred of a desire for convenient administration?"

He answered, "I think so, yes."

He amplified his answer thus:

> "It would be very difficult to distinguish between degrees of policy advice, whether it is of a high or medium level, and the tendency is to regard all advice on policy of significant importance as being within the class. As a result, a cautious approach is followed, and all documents of such nature are claimed to be within the class.
>
> The damage to the public interest, if the class did not exist, would be the exposure of the decision making process."

Is this what the Law Lords who gave the several judgments in the House of Lords cases to which I have referred had in mind in endorsing the making of PII class claims? I do not think so.

Whether judicial authority supports the making of class claims *in civil cases* in respect of government documents of the nature of some of those for which PII protection was sought in the *Matrix Churchill* case, seems to me very doubtful. But even assuming that these PII class claims would have been justifiable in a civil case, they ought not, in any opinion, to have been made at a criminal trial.

I have already observed that, strictly, PII only arises in respect of documents whose relevance to the issues in the case would otherwise require their disclosure. Wide criteria of relevance are now, under the authority of *Keane* and *Brown (Winston)* applied in criminal cases. One of the reasons and justifications for the very wide ambit of disclosure of documents required in criminal cases is, I believe, that the selection of documents that, although relevant to an issue in the case, can safely be withheld from the defence without the risk of a miscarriage of justice is often very difficult. An error in selection, however justifiable it may seem at the time, may later transpire to have been prejudicial to the defence and to the fairness of the trial. So if, in criminal cases, documents are material and prima facie disclosable, they ought, I suggest, to be disclosed unless they have a sensitivity of content that would justify a PII contents claim. Moreover, experience does suggest that if PII class claims continue to be sanctioned in criminal trials, Whitehall departments will inevitably seek to bring within the recognised classes an increasing range of documents. I see no realistic reason to suppose that the instinctive Whitehall reaction to seek to withhold Government documents from public inspection is likely to change.

In my opinion, whatever the justification and authority for PII class claims in civil cases, PII claims in criminal trials should be confined to contents claims. Class claims should not be allowed.

There is a further point which distinguishes PII claims in civil cases from those in criminal trials. In a civil case (including a habeas corpus application of the *ex parte Osman* variety), if an order for disclosure of documents is made the case will continue on foot with the material in question disclosed to the parties. In a criminal case, on the other hand, an order for disclosure will not necessarily lead to the disclosure of the documents. The prosecuting authority, will have the option of discontinuing the prosecution in order to safeguard the material from disclosure. In a civil case

...ween private litigants, the government, the police or other public authority seeking to resist disclosure will, once the PII claim has been rejected have no means of avoiding disclosure. The option of discontinuing the case will not be available.

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Conclusion

In summary, there are substantial differences between the operation of PII in civil cases and the operation of PII in criminal cases. The most significant of these differences is, I suggest, that in criminal cases there is no fine balance to be struck between, on the one hand, the public interest underlying the PII claim and, on the other hand, the public interest in the administration of justice. This balance must always be struck in a civil case and the weight of the former may often tip the scale. In criminal cases the only question is, or should be, whether the documents in question may assist the defendant in proving his innocence. This is not just a difference in the weight to be placed in the scale in favour of disclosure. It involves a quite different approach to the issue of disclosure. The notion that PII law and practice are applicable in the same way both to PII claims in civil cases is, in my view, wrong and has served to hinder and distort a sensible development of the law and practice in this field.

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