THE DUTY TO SEEK OUT, PRESERVE AND DISCLOSE EVIDENCE TO THE DEFENCE

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I. INTRODUCTION

This paper will consider recent developments in respect of the duty to seek out, preserve and disclose evidence to the defence. To date the European Convention on Human Rights Act 2003 does not appear to have had any real impact in this area. That has not been the experience in the U.K. In *Rowe and Davis v. United Kingdom*[1] the Court stated that:

> …the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused… In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1… Moreover in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities…[2]

In *Dowsett v. United Kingdom*[3] the Court, re-iterating its statement in *Rowe and Davis* held that non-disclosure of certain information by the prosecution had rendered the applicant's trial unfair.

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[1] (2000) 30 E.H.R.R. 1.

[2] (2000) 30 E.H.R.R. 1 at para. 61.

[3] [2003] E.C.H.R. 314.

In *O'Callaghan v. Judge Mahon*[4] Hardiman J noted these developments and made the following observation:

> A major issue in civil and criminal procedural law is the extent to which either side must make disclosure to the other. This has led to the development of an impressive body of jurisprudence both in the United Kingdom and in Strasbourg. The latter has significantly influenced the former and will no doubt influence our jurisprudence too, in particular through the concept of *"égalité des armes"*, which might be regarded as the opposite of that state of imbalance and disadvantage described by Ó Dálaigh C.J. as *clocha ceangailte agus madraí scaoilte*.[5]

II. DISCLOSURE: CRIMINAL LAW AND CIVIL LAW CONTRASTED

In criminal law there is a duty on the prosecution to provide full disclosure of all relevant evidence in its possession. The extent of this duty is determined by concepts of constitutional due process as well as by statutory provisions. Thus sections 4B and 4C of the Criminal Procedure Act 1967 (as inserted by s. 9 of the Criminal Justice Act 1999) provide for the furnishing of what is commonly known as the Book of Evidence. Disclosure of relevant material in a criminal trial does not depend on a prior request being made by the defence; it is an ongoing duty which rests on the prosecution.

In civil law there is a process known as discovery. This occurs by a party issuing a letter requesting voluntary discovery from the other side. The letter is written pursuant to the provisions of Order 31 rule 12 of the Rules of the Superior Courts ("RSC") 1986 (as amended and substituted by S.I. No. 233 of 1999). If the request for voluntary discovery is refused a motion seeking discovery can be issued. Non-party discovery is available via Order 31 rule 29 of the RSC 1986. However, it is not easy to obtain and in *Kennedy v. The Law Society*[6] Keane J (as he then was) stated that "an order for third party discovery should not be made lightly".[7]

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[4] Supreme Court, unreported, 9 March, 2005.
[5] Supreme Court, unreported, 9 March, 2005, at p. 31 of the unreported judgment.
[6] Supreme Court, unreported, 28 November 1997.
[7] Supreme Court, unreported, 9 March, 2005, at p. 3 of the unreported judgment.

The criminal duty of disclosure and the civil concept of discovery are two completely distinct procedures and exist for different reasons. To give just one example, in civil law discovery is a mutual process and can be ordered from both sides in the case whereas in criminal law the defence is generally not under any obligation to show its hand in advance of the point in the trial at which the prosecution rests its case.

III. DISCLOSURE IN SUMMARY OFFENCES

There is no right to disclosure in a summary case; it is something which may be ordered in accordance with the principles laid down in the well-known case of *D.P.P. v. Doyle*.[8] The scope of this duty has been teased out in a couple of recent cases on drink driving.

In *Whelan v. Kirby*[9] it was held that the defence must lay a basis on which a request for disclosure is made. Geoghegan J stated in respect of disclosure orders that they "could only be made against the DPP but if as a consequence of non-cooperation by the Medical Bureau or for any other reason the District Court order could not be complied with, it would be open to the District Court to refuse to proceed with the trial".[10] Geoghegan J also observed that "[t]here is jurisdiction in the District Court to make any order that would be necessary for the fulfilment of the constitutional obligation of a fair trial and fair procedures".[11]

The question of the proper scope of disclosure in this area is arguably open to debate again after the case of *McGonnell v. Attorney General*,[12] where the constitutionality of the whole evidential breath test procedure was upheld on the basis that the accused has a right of inspection. At page 92 of his judgment McKechnie J stated that:

> [I]t is in my view an important assurance for an accused person to know of his right to have access to a judicial authority for the purposes of seeking inspection facilities in respect of any given machine. When so deciding, the

[8] [1994] 2 I.R. 286 (S.C.).
[9] [2004] 2 I.L.R.M. 1 (S.C.).
[10] [2004] 2 I.L.R.M. 1 at 13 (S.C.).
[11] [2004] 2 I.L.R.M. 1 at 13 (S.C.).
[12] High Court, unreported, 16 September 2004.

court in question must of course comply with constitutional justice and fair procedures on any such application so made, as it must on the hearing of the section 49 charge itself. In both instances it may vindicate such rights of the defendant in the most appropriate manner available. These observations equally apply to any application in respect of documentation.

IV. THE DECISION IN FLYNN

In *The People (D.P.P.) v. Flynn*[13] non-party discovery was sought in a Circuit Court criminal prosecution. Moriarty J, sitting in the Circuit Criminal Court, refused the application for the following reasons:

i While Ord. 31, r. 29 of the Rules of the Superior Courts 1986 leaves open the possibility of ordering discovery in criminal cases, there was no authority which would support the making of such an order.

ii 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.

iii 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 subject to a greater obligation that could be imposed on the accused.

iv There had been excessive delay in bringing the application.

v. The complainant in a criminal case is bound to supply the DPP with any information relevant to the case, whether favourable to the prosecution or the accused. The judge is obliged to ensure that fair procedures are observed at the trial. If the prosecution cannot obtain evidence disclosure of which is necessary for the purposes of the defence, the accused may be entitled to a direction on the relevant counts.

[13] [1996] 1 I.L.R.M. 317.

V. THE DECISION IN *CONLON*

In *Conlon v. Kelly*[14] the Supreme Court held that the rules of civil procedure do not apply to criminal matters and cannot be transferred from the civil side to the criminal side in order to repair a perceived gap in the latter. This finding was to prove persuasive in the subsequent decision of the Supreme Court that discovery is not available in criminal proceedings (see *The People (D.P.P.) v. Sweeney*, discussed below). The applicant in *Conlon* had two indictments preferred against him. The first was for fraudulent conversion and, after a jury disagreement, he was remanded for retrial. The second indictment was also for fraudulent conversion but in respect of different complaints. Both matters were listed before the Circuit Criminal Court which granted the prosecution leave to consolidate the matters contained in both bills of indictment into a single bill of indictment. The applicant successfully obtained an order of certiorari.

In the Supreme Court Fennelly J (Denham and Geoghegan JJ concurring) held that the Criminal Justice (Administration) Act 1924 did not permit the consolidation of two distinct indictments based on independent returns for trial. It is the 1924 Act that sets out the rules regarding the framing of indictments and their amendment. In particular it permits charges to be joined together in the same indictment if they are founded on the same facts or are part of a series of offences of the same or a similar character. In addition, s. 18 of the Criminal Procedure Act 1967 allows extra counts to be added to an indictment, either in substitution or addition to the counts already there after an accused has been sent forward. Any such extra counts have to be founded on the documents and exhibits considered at the preliminary investigation.

Fennelly J noted that all of these provisions dealt with the indictment as initially framed by the prosecution, rather than its amendment, and concluded that "[t]hey do not confer any power on the court to permit amendment, whether by adding counts or otherwise."[15] He also held that the power to amend a defective indictment conferred by s 6(1) of the Criminal Justice (Administration) Act 1924 only applied where there was a single

[14] [2002] 1 I.R. 10 (S.C.).
[15] [2002] 1 I.R. 10 at 15 (S.C.).

return for trial. Thus, none of the relevant criminal legislation conferred the necessary power to consolidate indictments.

In the alternative the prosecution relied on the general power of consolidation in Order 46, rule 6 of the Rules of the Superior Courts which provides that "[c]auses or matters pending in the High Court may be consolidated by order of the court on the application of any party and whether or not all the parties consent to the order." The definition of "cause" extends, by virtue of Order 125, rule 1, to "any criminal proceedings." For the purposes of deciding the case Fennelly J was prepared to assume that this power extended to the Circuit Court. However he held that it was inapplicable to criminal proceedings:

> The old rules, adapted following the passing of the Judicature Act (Ireland) 1877, did not envisage the consideration of criminal proceedings … It would, in my view, strain the meaning of a simple procedural provision to include within it the power to consolidate and combine two entirely distinct indictments formally and properly preferred in the course of the criminal process. I do not think O.49, r.6 was intended to apply to criminal proceedings.[16]

VI. THE DECISION IN *SWEENEY*

In *The People (D.P.P.) v. Sweeney*[17] the Supreme Court (Geoghegan J; Murphy and Murray JJ concurring) held that discovery was not available in criminal proceedings. The case arose out of an order for non-party discovery made by the Central Criminal Court against the Rape Crisis Centre.

The Supreme Court began by surveying the relevant legislation. Order 31, rule 12 of the Rules of Supreme Court (Ireland) 1905 provided that any party might apply to the court for an order directing any other party "to any cause or matter" to make discovery. The word "cause" had been defined in the Judicature (Ireland) Act 1877 as including "any action, suit or other original proceedings

[16] [2002] 2 I.R. 10 at 15 (S.C.).
[17] [2001] 4 I.R. 102 (S.C.).

between a plaintiff and a defendant, and any criminal proceedings by the Crown." This definition was not to apply if there was "anything in the subject or context repugnant thereto." Geoghegan J observed that "[i]n the 100 years that followed that Act, there was never discovery of documents ordered in criminal proceedings and I think that is clearly because, having regard to the history of the jurisdiction in discovery of documents and the context in which such orders were made, it would have been clear that the rules relating to discovery would not have been intended to include criminal proceedings."[18]

The Central Criminal Court was defined in both the Courts of Justice Act 1924 and the Courts of Justice Act 1926. Section 4 of the Courts of Justice Act 1926 provided that:

> The Central Criminal Court shall have and may exercise every jurisdiction in criminal matters for the time being vested in the High Court, and every person lawfully brought before the Central Criminal Court for trial in exercise of any such jurisdiction may be indicted before and tried and sentenced by that Court wherever it may be sitting in like manner in all respects as if the crime with which such person is charged had been committed in the county or county borough in which the said Court is sitting.

Geoghegan J noted that from 1926 to 1961 discovery of documents in the Central Criminal Court was unknown. The Central Criminal Court was given a different statutory definition in the Courts (Establishment and Constitution) Act, 1961 in that it was provided that the High Court exercising the criminal jurisdiction with which it was invested should be known as the Central Criminal Court. Geoghegan J held that nothing turned on any of these variations in definition and concluded that "… there is nothing in the character of the criminal jurisdiction vested in the present High Court which could lead to any view that the Rules of Court relating to discovery were suddenly to apply to it when they had never applied to its predecessors."[19] Geoghegan J stated that:

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[18] [2001] 4 I.R. 102 at 107 (S.C.).
[19] [2001] 4 I.R. 102 at 108 (S.C.).

> The learned High Court judge, therefore, was not entitled to make the order that he did make because such an order cannot be made in connection with criminal proceedings, but in so far as he did make the order and especially as it related to a non-party, he was purporting to exercise the jurisdiction conferred by the Rules of Court which is a civil jurisdiction.[20]

Geoghegan J supported his decision by noting that discovery is not normally made in civil actions until after the pleadings have closed and the issues have been defined. He observed:

> But none of this can be done in a criminal proceeding. Only the prosecution must show its hand. Subject to some modern statutory exceptions in relation to alibi evidence the defence is entitled to spring surprises and above all is perfectly entitled, pending the trial, to give no indication as to what issues might be raised. In that state of affairs discovery of documents under the Rules of Court is wholly inappropriate and it is another reason why those rules can never have been intended to apply to criminal proceedings.[21]

He noted that it was possible that the question of privilege might arise in the trial if witnesses from the Rape Crisis Centre were called to give evidence, in which case the trial judge would determine the issue, and stated:

> A general consideration of the issue of privilege would certainly support the view that the machinery of discovery as operated in civil proceedings could not be applied to a criminal prosecution. The wide range of documents and communications created in contemplation of criminal proceedings and which justice would require the prosecution to make available to the defence would almost certainly be privileged from

[20] [2001] 4 I.R. 102 at 109 (S.C.).
[21] [2001] 4 I.R. 102 at 109-110 (S.C.).

production in civil proceedings.[22]

Geoghegan J expressly stated that nothing in his judgment should be construed as expressing any view on the jurisdiction to make orders for non-party discovery in applications to the Court of Criminal Appeal under s. 2(1) of the Criminal Procedure Act, 1993. This is the section which provides for appeals on the ground that there has been a miscarriage of justice.

VII. THE DECISION IN *D.H.*

The decision in *Sweeney* was made by a court of three judges. An attempt to overturn it was made in *D.H. v. Judge Groarke*[23] where the Supreme Court was urged to depart from its earlier decision on the ground that it was erroneous in point of law.

The applicant in *D.H.* had been returned for trial in the Circuit Court on charges that on various dates between June 1983 and June 1989 he committed offences of indecent or sexual assault on the complainant. The complainant had had interactions with two social workers at the relevant time. The applicant required the presence of both the social workers at the preliminary examination in the District Court and examined them on oath. They were persons who had made statements. In their depositions they referred to notes which they made of their conversations with the complainant. The applicant issued a notice of motion seeking discovery of such notes from the DPP and the Health Board. The Circuit Court refused the application on the basis that the applicant was not entitled to the material sought from the health board in advance of the trial. The applicant unsuccessfully sought judicial review of this refusal in the High Court.

On appeal, Keane CJ (giving the judgment of a Supreme Court of five judges with Murphy, Murray, Geoghegan and Fennelly JJ

[22] [2001] 4 I.R. 102 at 112 (S.C.). In respect of how the *Sweeney* case came before the Supreme Court at all, s 11(1) of the Criminal Procedure Act 1993 reads: The right of appeal to the Supreme Court, other than an appeal under section 34 of the Criminal Procedure Act, 1967, from a decision of the Central Criminal Court is hereby abolished. The Supreme Court held that since the discovery order made had not been made by the High Court exercising its criminal jurisdiction, then s 11(1) had no relevance. In so far as the High Court had made any purported order, it had made it in pursuance of its civil jurisdiction. This decision meant that the Court did not have to determine whether the bar in s 11(1) only applied to final orders of the Central Criminal Court, or whether it also extended to interlocutory orders.

[23] [2002] 3 I.R. 522 (S.C.).

concurring) observed that, of its nature, the question of third party discovery was an issue which was bound to come before the courts again and it was therefore clearly in the public interest that the law in the matter should be clear beyond doubt. The Chief Justice proceeded to carefully examine the judgment which Geoghegan J had delivered in *Sweeney*. He noted that the reluctance of the Supreme Court to depart from its earlier decisions would be greater where the earlier decision was that of a court of five or a court of seven, but stated:

> However, even where the earlier decision was that of a court of three, I am satisfied that it should not be over ruled - again to cite the language of Henchy J.: – "merely because a later Court inclines to a different conclusion". In the present case, it is not suggested that any relevant statutory provision or authority was overlooked so that the judgment could have been regarded as having been given *per incuriam*. It certainly cannot be said, given the relatively short time which has elapsed since it was decided, that the circumstances in which an application for discovery of this nature comes before the court have altered to such an extent as to require reconsideration of the correctness or otherwise of the decision.[24]

Counsel for the applicant argued that the necessity of observing fair procedures in criminal trials mandated by the Constitution should have led to a different construction of the Rules of the Superior Courts so as to permit the making of discovery orders against bodies such as health boards in cases such as the present. Keane CJ responded by stating that in his judgment in *Sweeney*, Geoghegan J had adverted to the modern developments in case law under which the prosecution are bound to furnish the accused with any documents relevant to the prosecution, even though they do not assist the prosecution case and will not be used by them at the trial. Geoghegan J had drawn a distinction between this and the inappropriate use of the civil machinery of discovery.

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[24] [2002] 3 I.R. 522 at 530 (S.C.).

What is of particular interest in *D.H.* is the strong endorsement that the Chief Justice gave the decision in *Sweeney*:

> I am, in any event, satisfied that the decision in *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102 was correct in point of law. The function of discovery in civil proceedings, whether it be *inter partes* or third party discovery, is to enable both parties to advance their own case or damage their opponent's case. The court in such cases is normally in a position to ascertain from a consideration of the pleadings what the issues are between the parties and, accordingly, what documents will be relevant to those issues and, specifically, whether, if discovered and inspected, they will enable a party to advance his own case or damage that being made by his opponent. In a trial on indictment, such as the present, the issue which the court has to determine is not defined until the accused has been arraigned and has pleaded to the counts laid against him. Even then, he is not required to do more than plead guilty or not guilty. There are some rare statutory exceptions to that, such as the requirement to notify the prosecution in advance of a proposed alibi. But in every other respect, while the prosecution must disclose comprehensively and in detail the case they propose to make against the accused, he is under no such obligation. Discovery, accordingly, in a trial on indictment would be a wholly one-sided process, which was certainly not what was envisaged by the procedure for *inter partes* and third party discovery provided under the Rules of Court. It is clear, accordingly, that, in the case of the Rules of Court dealing with discovery, to treat the word "cause" as extending to criminal proceedings would be clearly repugnant to the context in which it was being used.[25]

[25] [2002] 3 I.R. 522 at 531.

In a *dictum* the Chief Justice stated:

The fact that discovery in the form provided for in the rules for civil litigation is not available in criminal proceedings does not have as a necessary consequence an erosion of the fair procedures to which defendants are entitled. Thus, in the present case, it was open to the solicitor for the applicant to ensure at the deposition stage that any relevant records or notes in the possession of the social workers were produced and, to at least a limited extent, that was done. Moreover, the social workers can be required by the applicant to attend the trial and produce any relevant documents by the issue of a *subpoena duces decum*.[26]

Keane CJ noted that the trial judge had performed a proper balancing test:

> …it is clear from the transcript that [the trial judge] carefully balanced the undoubted public interest in ensuring that such communications to bodies such as health boards remained confidential against the public interest in the administration of justice with its consequent necessity of ensuring that an accused person is not unfairly hindered in the conduct of his defence. He was clearly entitled to form the view that it had not been established that the documents would be of any particular significance in the conduct of the applicant's defence, other than the possibility that they might afford material for testing the credibility of the complainant. Even assuming a discovery jurisdiction existed, that would not, of itself, justify the making of the third party order sought in the present case.[27]

VIII. TWO RECENT DECISIONS

In *Finnerty v. DPP*[28] the applicant sought to use the mechanism of calling a person who is not in the book of evidence on deposition

[26] [2002] 3 I.R. 522 at 531-532.
[27] [2002] 3 I.R. 522 at 532 (S.C.).
[28] High Court, unreported, 10 June 2005.

as a means of obtaining a health board file. Macken J held that the fact that a process akin to discovery is not available in a criminal trial did not give rise to an unfair trial. She held that what the applicant was seeking to do was to engage in an impermissible fishing exercise. It is of interest to note that she rejected the use of a *subpoena duces tecum* as a means of obtaining documents in a criminal trial:

> A subpoena duces tecum is a process of the Court, not of the parties. Its usual purpose is to compel the production of specific documents that are relevant to pending judicial proceedings. It is a long established principle that a subpoena duces tecum is not however a disclosure device, and cannot be said to be capable of being used as a substitute for discovery. In the present case it is in reality being sought to be used as such.[29]

In the recent case of *O'Callaghan v. Judge Mahon*[30] the Supreme Court found that the respondent Tribunal of Inquiry had not afforded the applicant fair procedures. Although the case was a civil one Hardiman J referred to the transcripts of the Damilola Taylor murder trial in England in 2002 and made the following interesting observations:

> The murder of ten year old Damilola Taylor in London in November, 2000, attracted widespread publicity in this country and abroad, as well as in the United Kingdom. It may be that this placed the London police under great pressure to bring charges. In any event three boys were charged with the murder and a most important witness for the Crown was a girl who claimed that, as a twelve-year old, she had been present at the killing of the little boy. She gave most graphic and indeed chilling descriptions of that tragic event which, if true, left no doubt of the guilt of certain of the accused. But the trial judge, having heard her evidence and heard her cross-examined about the gross inconsistencies with her

[29] High Court, unreported, 10 June 2005, at p. 22 of the unreported judgment.
[30] Supreme Court, unreported, 9 March, 2005.

earlier statements, excluded it from the consideration of the jury. The Crown immediately dropped the case against one of the accused and the others were all subsequently acquitted either by direction or by verdict of the jury, on all counts.

What is of interest for the purposes of the present case is that Hooper J. came to his conclusion about the girl's evidence on the basis of what he described as "a very substantial schedule of what the girl had said in various police interviews and in her evidence in court." This was prepared by counsel. The result was a finding by the learned trial judge that "many of her assertions in her accounts of what she saw and what she did before during and after the incident which resulted in Damilola's death are demonstrably wrong or are admitted by her to be false. Where her evidence is capable of being checked, it is either not confirmed or is directly contradicted by other evidence which the jury has heard." The learned judge analysed the schedules carefully and found what he described as "lies", "embellished lies", and "contradictions", the latter being between information given in interviews with the police and information given either in other interviews or, still more significantly, in her evidence in court. These contradictions, significantly, included differing versions of whether she had in fact been present at all at the killing.[31]

He continued:

The Taylor case is of great interest for many reasons. To read the transcript of the learned trial judge's ruling is to be made to marvel at just how easily a witness can be manipulated, sometimes even unconsciously, by experienced interviewers and got to falsify her own position even though, it appears, she started out without

[31] Supreme Court, unreported, 9 March, 2005, at p. 35 of the unreported judgment. In terms of the source of this information Hardiman J said "I forebear to cite the formal title of the case and refer to it instead as *Taylor*. I propose to refer however to the judgment of Mr. Justice Hooper given in the course of finding the evidence of a particular witness inadmissible at the Old Bailey on the 27th February, 2002. The (English) Central Criminal Court number of the transcript is T 2001 03 88."

> any malice towards the persons she impugned. But its interest for present purposes is that the very elaborate analysis undertaken by the trial judge would have been quite impossible if a written or electronic record of the witness's interviews with investigators had not been available to him. Without that record, the myriad inconsistencies which deprived her account of credibility would never have come to light. This, in turn, would have been very likely to lead to a grave miscarriage of justice. *The same result would have been likely had the tapes and recordings of the private interviews been held back from cross-examining counsel. That is a chilling prospect.*[32]

IX. THE DUTY TO SEEK OUT AND PRESERVE EVIDENCE.

There have been a number of well-known cases in recent years which have considered the duty on the Gardaí to seek out and preserve evidence. The rule is that the duty must be interpreted in a fair and reasonable manner.[33]

In *Dunne v. DPP*[34] McGuinness J noted that the duty on the Gardai in this regard "must be interpreted realistically on the facts of each case"[35] and stated that:

> Where a court would be asked to prohibit a trial on the grounds that there was an alleged failure to seek out evidence, it would have to be shown that any such evidence would be clearly relevant, that there was at least a strong probability that the evidence was available, and that it would in reality have a bearing on the guilt or innocence of the accused person.[36]

An example of the realistic approach to such cases is *Connolly v. DPP*[37], which concerned the alleged failure to preserve a car after an alleged incident of joy-riding. Finlay Geoghegan J held that on the

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[32] Supreme Court, unreported, 9 March, 2005, at p. 36 of the unreported judgment (emphasis added).
[33] See e.g. *Braddish v D.P.P.* [2002] 1 ILRM 151 at 159 (S.C.).
[34] [2002] 2 I.L.R.M. 241 (S.C.).
[35] [2002] 2 I.L.R.M. 241 at 245 (S.C.), citing *Braddish*.
[36] [2002] 2 I.L.R.M. 241 at 245 (S.C.).
[37] High Court, unreported, 15 May 2003.

facts of the case alleged against the accused he had been arrested whilst actually in the car and thus the Gardaí were not under any duty to seek fingerprint evidence from the car before returning it to its owner. She noted that "the duty on the Gardaí to seek out evidence must be interpreted realistically on the facts of each case."[38]

In *Z v. DPP*[39] Finlay CJ spoke of:

> *… an onus to establish a real risk of an unfair trial …* necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness must be an unavoidable unfairness of trial.[40]

In *Scully v. DPP*[41] Hardiman J, giving the judgment of the Supreme Court, expressly adopted this test as the appropriate one to use in a missing evidence case.

In *O'Callaghan v. The Judges of the Dublin Metropolitan District Court*[42] the applicant had been caught red-handed in the act of theft and sought to stay her trial on the basis that the Gardaí had not sought out a tape from Shelbourne Park Stadium which might have shown the incident. In refusing the application Kearns J held that "there is an onus of proof on an applicant in judicial review proceedings to place some evidence before the court which would enable it to decide, as a matter of probability, that, because of the absence of some particular piece of evidence, some injustice, prejudice or real risk of an unfair trial which cannot otherwise be avoided will follow if an order for prohibition is not made."[43]

> In *Cole v. A Judge of the Northern Circuit*[44] Macken J stated that "… some real and finite evidence as to the materiality of the evidence must be presented to the Court. The theoretical possibilities presented on behalf of the applicant in this case do not establish that the alleged missing evidence, even assuming it to be missing, is

[38] High Court, unreported, 15 May 2003, at p. 11 of the unreported judgment
[39] [1994] 2 I.R. 476 (S.C.).
[40] [1994] 2 I.R. 476 at 507 (S.C.).
[41] [2005] 2 I.L.R.M. 203 (S.C.).
[42] High Court, unreported, 20 May 2004.
[43] High Court, unreported, 20 May 2004, at p. 11 of the unreported judgment.
[44] High Court, unreported, 17 June 2005.

> material in the sense in which this is used in the jurisprudence".[45] She continued:
> It is no doubt a theoretical possibility that, upon examination, something might be found which, in theory, might be of assistance to the applicant. That is not sufficient, however, to establish that missing evidence would have been material to the defence.[46]

X. DELAY IN SEEKING THE EVIDENCE

A number of cases have drawn attention to the fact that a delay in seeking to have evidence retained is a basis for refusing relief in missing evidence judicial reviews. In *Bowes v. DPP*[47] Hardiman J noted that in respect of one of the applicants who was unsuccessful in obtaining relief:

> …the notion of seeking a technical examination of the vehicle was a very belated one indeed. The nature of the case against him was immediately apparent: there was a quantity of heroin in the boot of a car which he was driving. He had the benefit of legal advice from the day of his arrest but no question of technical examination arose until virtually the eve of the trial.[48]

Delay was not held against the second appellant in that case as there was evidence that she had been in shock after the accident, had developed post-traumatic stress disorder and had attended intensive counselling. Her solicitor had moved expeditiously to seek the vehicle in question. Finally, there was the fact that the motorbike had been broken up for parts after the court had been told that an examination might be necessary.

In *Mitchell v. DPP*[49] Geoghegan J, in the High Court, stated that:

> In these circumstances, I do not think the applicant is

[45] High Court, unreported, 17 June 2005, at p. 18 of the unreported judgment.
[46] High Court, unreported, 17 June 2005, at p. 19 of the unreported judgment.
[47] [2003] 2 I.R. 25 (S.C.).
[48] [2003] 2 I.R. 25 at 38 (S.C.).
[49] [2000] 2 I.L.R.M. 396 (H.C.).

> entitled to prohibition. Even if I were wrong in that regard, I would have to refuse the relief on the basis of the delay of 14 months from the date the applicant was charged to the date the applicant sought the tapes.[50]

In *Connolly v. DPP*,[51] which concerned the alleged failure to preserve a car after an alleged incident of joy-riding, Finlay Geoghegan J held that there had been a two month delay in the accused requesting that the car be retained; as the owner was anxious to recover her car which was her only means of transport it was not practicable to expect the Gardaí to have held onto the car for two months.

In *Scully v. DPP*[52] (which is the most recent Supreme Court decision on missing evidence) Hardiman J, giving the judgment of the Supreme Court, noted that the applicant had known for about nine months before he sought judicial review that he was charged with an offence said to have taken place in the forecourt of a filling station. He took no step to ascertain the position about video surveillance for about seven months. In all of the circumstances of the case Hardiman J concluded that the applicant *"was more interested in tripping up the investigators than in discovery of evidence"*. In respect of when time should begin to run he stated:

> Obviously there might be cases where it would be proper to reckon delay from the date of the offence. If the defendant was immediately charged and it was common case that the defendant was present at the time of the alleged crime but the issue was whether he had participated in it, whether there was a question of self-defence, or something of the kind that might be so.[53]

In *Cole v. A Judge of the Northern Circuit*[54] Macken J stated that "I am not satisfied that on the jurisprudence, it is always the case that a defendant is entitled to await the actual charges, as is contended for".[55]

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[50] [2000] 2 I.L.R.M. 396 at 399 (H.C.).
[51] [2003] 4 I.R. 121 (H.C.).
[52] [2005] 2 I.L.R.M. 203 (S.C.).
[53] [2005] 2 I.L.R.M. 203 at 203 (S.C.).
[54] High Court, unreported, 17 June 2005
[55] High Court, unreported, 17 June 2005 at p. 13 of the unreported judgement

XI. CONCLUSION

In conclusion, the key area of debate in disclosure will continue to be how the defence can access materials in the hands of third parties that they believe may be potentially relevant to the defence of their client. In the area of missing evidence the debate will continue to be centred on the point in time at which the accused's legal advisors are expected to first request the evidence and to what extent they are obliged to establish its relevance in the context of a judicial review.