# BOOK REVIEW

## "DISCOVERY"
## Eoin Dee
## (Thomson Round Hall, 2004)

LAWRENCE DONNELLY*

The mere mention of the word discovery strikes fear into the heart of any young lawyer in the United States. As a civil litigator, and the junior lawyer of my law firm, I often found myself combing through thousands of pages of mostly irrelevant medical records, or in overheated warehouses reviewing boxes and boxes of documents, or in courtrooms making sometimes foolhardy arguments to often exasperated judges as to why certain material was or was not discoverable. Wholly consistent with my experience of law practice in the Commonwealth of Massachusetts, one commentator remarks: "The American system of civil dispute resolution is in crisis. Although the number of lawsuits may or may not be a problem, the length and cost of resolving lawsuits undoubtedly is. Judges, lawyers and clients agree that discovery is the root of the problem. Discovery is riddled with abuse, delay and expense."[1] This is the case despite very liberal rules at both the state and federal levels that, in some instances, mandate automatic disclosure.[2] The contentious nature of what should be a cooperative process results from an unfortunate culture which permeates the American legal profession – particularly civil litigation – and deems litigation "war," discovery "battle" and perceives opposing counsel as "enemies" to be taken down at all costs.[3]

In Ireland, fortunately, discovery has not reached this intransigent state. A solicitor practising in the west of Ireland spoke to me recently about his experience with the discovery process representing both plaintiffs and defendants in civil litigation.[4] In his

---

* Lecturer in Clinical Legal Education, Faculty of Law, National University of Ireland, Galway. B.A., J.D. (USA). Attorney at Law.

[1] Lasso, "Gladiators Be Gone: The New Disclosure Rules Compel a Re-Examination of the Adversary Process," 36 *B.C. L. Rev.* 479, 480-481 (1995).

[2] Lasso, "Gladiators Be Gone: The New Disclosure Rules Compel a Re-Examination of the Adversary Process," 36 *B.C. L. Rev.* at 480.

[3] Lasso, "Gladiators Be Gone: The New Disclosure Rules Compel a Re-Examination of the Adversary Process," 36 *B.C. L. Rev.* at 504.

[4] Interview with John Murphy. Partner, Murphy Ballantyne Solicitors, Sligo.

representation of defendants, broad requests for voluntary discovery from plaintiffs are complied with in the majority of instances. In his representation of plaintiffs, however, similarly broad requests for voluntary discovery are denied in the overwhelming majority of cases, so that motions seeking discovery must be filed with the court. He attributes this discrepancy in levels of voluntary response to two realities. As for the first, a plaintiff is far more likely to wish to give a defendant the documents sought so as to facilitate a speedy resolution of the case. On the flip side, a defendant is unlikely to want to help aid a plaintiff's case in any fashion, especially if there is a "smoking gun" in the materials sought. Given the latter consideration, and because judges are careful to mandate disclosure of relevant materials, but will not allow "fishing expeditions," he strives to draft tight requests for discovery when representing plaintiffs. Despite these issues, he indicates that the discovery process consumes roughly 10%, on average, of his time from the moment litigation commences until it is eventually resolved. In the United States, by contrast, the percentage is far higher, and discovery can often consume well over 50% of the time spent litigating a dispute.[5]

It is from this context, then, that Eoin Dee's brief, but extremely well-documented, work on discovery emerges. One is struck by the volume of cases from this jurisdiction and from the United Kingdom cited at the outset. The cases are listed by the chapter in which each appears and even to the decimalised section of the chapter for fast and easy reference. A user friendly index follows in the book's final pages. This is very clearly a "quasi-handbook" for busy litigators.

The first chapter endeavours to define what discovery is and underscores its importance in defining the issues and assessing the validity of claims and counterclaims in litigation. Chapter Two considers what things may be discovered and, as such, poses three questions: 1) what is a document?; 2) what is a relevant document?; and 3) what constitutes possession, custody or power so that a document is discoverable? In seeking to answer the first question,

---

[5] Lasso, "Gladiators Be Gone: The New Disclosure Rules Compel a Re-Examination of the Adversary Process," 36 *B.C. L. Rev.* at 484-486.

Dee adverts to case law not only on what lawyers and laypeople would consider documents, but also to the ongoing conundrum faced by judges in making this determination about computer records and data. In examining the second, Dee focuses on case law defining "matters in question," what it is that might advance a party's own case or harm his adversary's and the contextual effect of the scope of pleadings on the definition of relevancy. As for the third, Dee outlines case law principally defining what constitutes legal "power" to hand over a document.

Chapter Three focuses on third party discovery (i.e., discovery of documents from those not party to the litigation), first provided for in this jurisdiction in 1986. After a discussion of developments in third party discovery in the United Kingdom, Dee details the five part test for third party discovery outlined by Costello J. in *Holloway v. Belenos Publications*.[6] He then describes case law raising the potential objections to third party discovery, public interest privilege and privacy rights perhaps foremost among them. Chapter Four delineates the manner in which the practitioner should proceed in seeking discovery. The seminal case of *Swords v. Western Proteins,*[7] mandating that a party seeking discovery must be very specific in outlining what is required, why it is required and why it is necessary for disposing of the matter or for saving costs, is considered in detail. Dee notes that this rigorous standard, which opened the door to myriad technical objections to discovery requests, was scaled back significantly by the Supreme Court in *Taylor v. Clonmel Health Limited*.[8] Dee concludes the chapter by recognising that this has "introduced a certain element of uncertainty" and describing a few post-*Taylor* cases.

Chapter Five sets out what a party in litigation can do when voluntary discovery is sought and what a party must do if, subsequently, her adversary has filed a motion and obtained an order from the court for discovery. Dee notes the dire consequences resulting from failure to comply with a court order for discovery. Chapter Five also details the manner in which interrogatories, written questions seeking written answers relating to "matters in

---

[6] Unreported, High Court, April 3, 1987.
[7] Unreported, High Court, November 29, 2000.
[8] Unreported, Supreme Court, February 11, 2004.

question," can "allow for clarification of the relevant issues" or lead to the "disclosure of evidence which might otherwise be unavailable." Dee outlines the potential objections to interrogatories that might be posed and concludes by mentioning the age old common law requirement that interrogatories must be confined to the pleadings.[9]

Chapter Six discusses the case law on the concept of legal professional privilege, the primary objection to requests for discovery. After defining the origins of the privilege in the United Kingdom, Dee notes that, in Ireland, "proceedings must be in train or contemplated in order to trigger the concept of legal professional privilege." Consequently, he considers the nuances of Irish case law seeking to define when proceedings are "contemplated." He next highlights the distinction drawn in case law between legal advice and legal assistance, recent developments in the law of legal professional privilege and, lastly, the as of yet unresolved area of client identity privilege. A succinct seventh chapter focuses on the recent (1998) introduction of the process of discovery in the District Court. Dee details the scope and methodology of discovery in this forum which seems to largely mirror the process in the High and Circuit Courts, though perhaps a bit less formalised.

Chapter Eight discusses, at some length, the Freedom of Information Act 1997 (FOIA) and its impact on the discovery process. As Dee observes, FOIA confers a wide range of rights on the Irish citizenry, entitling them, at least in theory, to largely unfettered access to a breadth of materials, albeit with a few notable exceptions. Dee also mentions the significant powers allocated in the Act to the Information Commissioner who is charged with ensuring that FOIA operates as it was intended. Dee then poses the crucial question: does FOIA supplement or supplant discovery? For his part, Dee opines that "the thrust and the spirit of the Act is not to disallow access to records simply due to the fact that the records, or information therein is required for the purposes of litigation before the courts." His subsequent consideration of case law from other jurisdictions, however, illustrates that this has not always

[9] *Marriot v. Chamberlain* [1886] Q.B.D. Vol. XVII 154.

proven to be the case for the purpose of obtaining one's own medical records. Dee also notes that a party's request for discovery may be less well received by a court where the information is easily otherwise obtained via a FOIA request. Dee next ponders FOIA's impact on third party discovery. At least one decision would seem to indicate that third party discovery will not be available where documents can be obtained pursuant to FOIA.[10] What's more, as Dee notes, when proceeding under FOIA, "unlike documents obtained on discovery, there is no restriction in terms of the purpose to which the documents can be put." Dee then details the procedures for seeking access to documents under FOIA and for appealing to the High Court in the event an initial request is denied by the relevant individual. He concludes the chapter with a sampling of High Court decisions on this issue, all of which are notable for their emphasis on the desires for accountability and transparency underpinning FOIA, and a brief mention of the considerable powers for seeking information allocated to the new Personal Injuries Assessment Board.

Chapter Nine considers the extent to which organs of government can legitimately object to requests for discovery based on the executive privilege. Dee emphasises the Supreme Court's decision in *Murphy v. Dublin Corporation,*[11] which abandoned the complete immunity from discovery requests previously enjoyed by State bodies. He describes subsequent cases in which courts often ordered organs of the State to produce materials sought in discovery. Despite the *Murphy* decision, Dee notes that governmental bodies still "appear extremely loathe to disclose documents." The chapter concludes by listing the four main categories, and related cases, where the courts have determined there to be a public interest in non-disclosure: national security, international relations, proper functioning of the public service and prevention and detection of crime.

The final chapter highlights the "practises and norms regarding medical examinations of plaintiffs in personal injury actions." Central to this discussion is the conflict that inevitably

---

[10] *Chambers v. Times Newspapers Ltd.* [1999] I.L.R.M. 504.
[11] [1972] I.R. 215.

emerges, and is not capable of "one size fits all" resolution, between the defendant's right to fully defend itself by accessing a plaintiff's medical records and that plaintiff's right to privacy. The issue surfaced again in *McGrory v. Electricity Supply Board*,[12] where Keane C.J. ruled that a court could stay proceedings if a plaintiff refuses to submit to a medical examination or to disclose his medical records or to allow a defendant to interview his treating doctors. A lengthy series of useful Appendices follows Chapter Ten and comprises various Superior and District Court rules on discovery, standard discovery forms, the text of the Freedom of Information Act 1997 and portions of relevant decisions.

This book eschews more high-browed considerations of the reasons for the increase in litigation in Ireland in recent years, and the consequential expansion in discovery, nor does it provide any fundamental recommendations for reform in the area. But these considerations are beyond its ambit. As noted *supra*, it is geared toward the busy practitioner who doesn't have time for such academic considerations, but who makes arguments about the discovery process on virtually a daily basis and needs fast access to legal authorities to support these arguments. As such, for the practitioner and, indeed, for the judge called upon to resolve discovery disputes, Eoin Dee's book is an invaluable resource. As Peart J. puts it in his Foreword, "I have little doubt that it will become an oft-referred-to textbook before many a judge on a Monday morning, and before the Master of the High Court on the remaining days of most weeks – and rightly so!" If only I'd had its equivalent when going into "battle" in the courts of the Commonwealth of Massachusetts!

[12] Unreported, Supreme Court, July 24, 2003.