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Witness Statements as Evidence: Part 3 of the Criminal Justice Act 200

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Introduction

Even in a time when two substantial reforming pieces criminal justice legislation have been enacted in less than ten months, it is not surprising that the provisions of Part III of the Criminal Justice Act, 2006 (the "2006 Act") should be of enduring and lively interest to practitioners of the criminal law. The legislative changes effected by those provisions are radical. In short, it is now possible that a person charged with a serious criminal offence might be convicted of that offence without sworn evidence of their guilt having been adduced, the prosecution instead relying on an unsworn statement made out of court by a person who denies on oath that he made it.

The purpose of this paper is to review briefly developments leading to the enactment of this legislation, to examine some early indications of how this new regime might operate in practice, and to reflect on some issues that may have to be resolved.

The Legal Context

The modern common law has always shown a distinct preference for the evidence of live witnesses given on oath before the trier of fact. The mistrust of other forms of evidence manifests itself clearly in the rule against hearsay in all its applications, whether to oral statements or documents, and in the rule against narrative. These restrictions on the admissibility of anything other than direct oral evidence have preserved the importance of cross-examination, "the greatest legal engine ever invented for the discovery of truth"[1], as a central feature in the criminal trial in common law systems. An accused is, of course, entitled to notice in advance of his trial of what the oral (and other) evidence against him will be. In addition, under the old system of preliminary examination, the prosecution witnesses gave evidence on oath by way of deposition prior to the accused being sent forward for trial, and the defence had an opportunity to cross-examine those witnesses at an early stage in the proceedings[2]. The Criminal Procedure Act, 1967, as part of an extensive re-structuring of our code of criminal procedure, abolished the system of routine deposition of witnesses, and replaced it with a system involving service on the accused, prior to his being sent forward for trial, of written statements of the intended evidence of prosecution witnesses[3].

The move away from the deposition of witnesses at a preliminary stage of criminal proceedings towards the taking and service of written statements of the intended evidence of prosecution witnesses had, and still has, an obvious attraction from the perspective of efficiency, both in the use of court time and in the deployment of Garda resources. It must also be admitted, however, that this gain in efficiency had important procedural implications. Two of those implications are especially relevant in the present context. First, the defence was denied an opportunity, as a matter of routine procedure, to challenge

[1] Wigmore, *Evidence*, 3rd ed. V §1367, quoted in Glanville Williams, *The Proof of Guilt* (3rd ed. Stevens & Sons, London, 1963) p.79.
[2] See Sandes, *Criminal Law and Procedure in the Republic of Ireland* (3rd ed., Sweet & Maxwell, London, 1951), pp.63-64.
[3] Criminal Procedure Act, 1967, Part II, in particular, section 6.

the evidence of the prosecution witnesses at an early stage[4]. Secondly, a system involving the giving of evidence on oath publicly in the District Court by prosecution witnesses was replaced by a system of private communication between the intended witnesses and the investigating Gardaí in the absence of any oath or affirmation or statutory declaration.[5]

In those circumstances, it necessarily remained a matter of some uncertainty whether any one or more of the prosecution witnesses would give evidence in accordance with their statement of intended evidence at the trial. Usually, of course, they did. If not, the appropriate course was for the prosecution to apply to have the witness treated as hostile[6]. If that application was successful, the relevant part of the witness's statement could be put to him as evidence that he had made a previous contradictory statement, as evidence impugning his credibility, although it would not be evidence of the fact contained in the previous statement[7].

Reform of the Law

The obvious difficulty, from a prosecutor's perspective, with the law as stated in *Taylor's* case, is that it is of little use where a prosecution depends substantially on the evidence of one or more witnesses who prove unwilling to give evidence in accordance with their statements. Indeed, the impetus for the reform of this aspect of the law of evidence in this jurisdiction was provided by one particular case in which just this scenario materialised. Addressing the Dáil at the Second Stage of the passage of the Criminal Justice Bill, 2004 in relation to Part III, the Minister for Justice, Equality and Law Reform, Michael McDowell TD said:

> "Tugadh chun suntais an gá do fhorálacha den chineál seo tar éis cliseadh trial dúnmharaithe Keane, as Luimneach, nuair a rinne na finnéithe a thug ráitis cheana iad a shéanadh agus dhiúltaigh siad fianaise a thabhairt i gcoinne an chúisí sa chúirt."[8]

He went on to say that the intended amendments drew on developments in other common law jurisdictions, especially Canada. Essentially, the approach adopted to the issue in Canada was to re-examine the issue of the substantive admissibility of prior statements of witnesses with an open mind as to whether the justification for excluding such evidence on the grounds that it was inadmissible hearsay continued to have any force.

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[4] Of course the right to have a witness called on deposition prior to sending forward was preserved in the 1967 Act – see section 7 subsections (2) and (3). Such deposition was no longer, however, a matter of routine practice; it required an exceptional application. Thus, Ryan and Magee note that "[a]lthough depositions are not obsolete today they have become the exception rather than the rule." Ryan and Magee, *The Irish Criminal Process*, (Mercier, Dublin & Cork, 1983) p.230.

[5] These features of the system of criminal procedure introduced in 1967 have been amplified by the amendments to the Criminal Procedure Act, 1967 contained in the Criminal Justice Act, 1999, Part III. The abolition of preliminary examination removes any opportunity to challenge prosecution witnesses until after the accused has been sent forward for trial and an application can be made and heard to return to the District Court for depositions. The new procedure may be more efficient in that it discourages the taking of evidence on deposition, primarily by removing the ability to do so with any convenience. Whether it could be said to be more efficient in those cases where depositions are required is open to doubt.

[6] Criminal Procedure Act, 1865, section 3.

[7] *The People (Attorney-General) v. Taylor* [1974] IR 97

[8] *Dáil Debates* 15th February, 2005 (Vol 597, No. 5). It should be noted that the 2006 Act was initiated as the Criminal Justice Bill, 2004, but was significantly amended prior to enactment.

The leading Canadian authority is the decision of the Supreme Court of Canada in *R v. B. (K.G.)*[9]. Three friends of the accused had made statements separately, which were recorded on videotape by the police with their consent, to the effect that the accused had made certain self-incriminatory remarks after a fight in which a man had been stabbed to death. At trial they said that there was no truth in their statements, and that they had lied to the police to divert investigative attention away from themselves. The trial judge applied the common law rule that their earlier statements went only to their credibility. The Supreme Court proceeded, however, on the basis that there was no reason to consider that the category of exceptions to the rule against hearsay was closed[10]. Although there were certain dangers associated with the admission of hearsay evidence, if such evidence were necessary and reliable it might well be admitted. In assessing reliability, it was necessary to recognize the changed means and methods of proof in modern society.

The openness of the Canadian courts to the admission into evidence of new categories of hearsay statement should be seen as part of a more general trend involving the re-examination and reform of substantial elements of the common law of evidence, in particular the rule against hearsay, of which Part III of the 2006 Act is but one example. Nor, let it be said, is it by any means the most radical example. Chapter 2 of Part 11 of the UK Criminal Justice Act 2003, for example, entirely re-writes the law in relation to hearsay evidence in criminal trials in that jurisdiction. In addition to making admissible hearsay evidence of statements made by specific categories of persons (e.g. the dead, those unfit to be a witness because of their bodily or mental condition, and persons outside the United Kingdom), the Act authorises the admission of hearsay evidence where "the court is satisfied that it is in the interests of justice for it to be admissible"[11]. That Act also permits the admission in evidence of previous inconsistent statements of witnesses, in rather more curt a manner than does the 2006 Act[12].

Notwithstanding this reforming trend, it is salutary to remember the dangers associated with the admission of hearsay statements before going on to consider the provisions of the 2006 Act in more detail. The recently published report of the Balance in the Criminal Law Review Group puts the matter as clearly and succinctly as possible.

> "The fundamental reason for the rule is that if out of court statements made by persons who were not required to attend to give evidence were freely admissible in evidence, the path would be clear for those who wished to invent and fabricate evidence. This would be especially true in criminal cases. If the rule were to be generally relaxed, it would, for example, be possible for an accused to tender evidence of alleged

[9] [1993] 1 SCR 740

[10] An approach consistent with the previous Canadian approach to the rule against hearsay generally. See *R v. Khan* [1990] 2 SCR 531, where McLachlin J. said "The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions." It might also be noted that the Supreme Court of Canada in *R. v. B. (K.G.)* had grounds for confidence in this approach in light of the fact that all three witnesses had pleaded guilty to perjury as a result of their testimony at the trial prior to the Supreme Court hearing.

[11] UK Criminal Justice Act 2003, section 114(1)(d)

[12] UK Criminal Justice Act 2003, section 119.

admissions to the crime made by third parties who were not before the court for cross-examination. As Lord Bridge said in *R. v. Blastland*[13] – where this very point was at issue –

> 'To admit in criminal trials statements confessing to the crime for which the defendant is being tried made by third parties not called as witnesses would be to create a very significant and, many might think, a dangerous new exception.'[14],[15]

Section 16 of the 2006 Act

The key provision of Part III of the 2006 Act is section 16, effectively the operative section of the Part, which provides as follows:

(1) Where a person has been sent forward for trial for an arrestable offence, a statement relevant to the proceedings made by a witness (in this section referred to as "the statement") may, with the leave of the court, be admitted in accordance with this section as evidence of any fact mentioned in it if the witness, although available for cross-examination—
- (*a*) refuses to give evidence,
- (*b*) denies making the statement, or
- (*c*) gives evidence which is materially inconsistent with it.

(2) The statement may be so admitted if—
- (*a*) the witness confirms, or it is proved, that he or she made it,
- (*b*) the court is satisfied—
  - (i) that direct oral evidence of the fact concerned wouldbe admissible in the proceedings,
  - (ii) that it was made voluntarily, and
  - (iii) that it is reliable,

  and
- (*c*) either—
  - (i) the statement was given on oath or affirmation or contains a statutory declaration by the witness to the effect that the statement is true to the best of his or her knowledge or belief, or
  - (ii) the court is otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth.

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

(4) The statement shall not be admitted in evidence under this section if the court is of opinion—
- (a) having had regard to all the circumstances, including any risk that its admission would be unfair to the accused or, if there are more than one accused, to any of them, that in the interests of justice it ought not to be so admitted, or
- (b) that its admission is unnecessary, having regard to other evidence given in the proceedings.

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[13] [1986] AC 41

[14] [1986] AC 41 at 52-53

[15] Balance in the Criminal Law Review Group, Final Report, 15th March, 2007, p. 229.

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

(6) This section is without prejudice to sections 3 to 6 of the Criminal Procedure Act 1865 and section 21 (proof by written statement) of the Act of 1984.[16]

Application of section 16 of the 2006 Act

Prompted by the experience of a particular prosecution, in a case of what is now commonly referred to as "gangland crime", where witnesses did not give evidence in accordance with statements made to the Gardaí, section 16 permits such statements to be admitted in evidence if certain conditions are met. The necessity for such a provision is thought to be confined to a small number of cases. The Director's written submission to the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights on their review of the criminal justice system states that such a reform would be "likely to be of value in only a limited class of cases"[17].

It must be noted, however, that section 16 is capable at least of a very broad application. It is not limited to the case of a witness who does not give evidence in accordance with a statement he made to Gardaí investigating the particular offence prosecuted in the trial in which he is called. Neither is the application of the section intended on its face to be confined to prosecutions for certain offences only. During the course of a presentation by the Human Rights Commission to the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights in relation to the Criminal Justice Bill 2004, Professor William Binchy said:

> "Some witnesses . . . may be reluctant [to give evidence] out of fear and intimidation that they will suffer some extrajudicial penalty by giving evidence. I do not dispute such cases are difficult for the courts. However, there are other cases where people want to privatise their relationships with the accused. They do not respect law and order and are not willing to give statements."[18]

This notion of privatisation of relationships sheds an interesting light on the scope of Part III. It is an occasional feature of criminal prosecutions that a prosecution witness, including where that witness is a victim of the offence alleged, expresses a wish to "withdraw" their statement. That wish may be genuine in the sense that the victim believes that he has reached a private resolution of his dispute with the accused. Perhaps they were previously known to each other and have been reconciled; perhaps money has changed hands and the victim places a higher value on his being personally compensated than on society's interest in seeing offenders prosecuted and punished in accordance with law. In other cases that wish may arise out of a lingering fear of the accused, whether resulting from active intimidation, reputation, or past experience. Cases of domestic violence provide a classic example of the latter situation.

[16] A one-page summary of the section is to be found as an appendix to this paper, which it is hoped may set out the requirements of the section in a more user-friendly format.

[17] *Review of the Criminal Justice System arising from Public Concern at Recent Developments, Submission of the Director of Public Prosecutions*, (Dublin, 8th December, 2003), para. 22

[18] Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights, 2nd March 2005.

As long as a victim's testimony was necessary to prosecute a particular offender, the victim retained, until the enactment of Part III of the 2006 Act, an effective veto over the criminal trial, subject to the law in relation to contempt and perjury. That is no longer the case. That Part may therefore be seen not merely as a means of dealing with intimidation of witnesses in "gangland" prosecutions, but more broadly as a re-assertion of the primacy of the public interest in the prosecution of crime, regardless of what private accommodation or arrangements have been made between offenders and their victims[19]. There is some anecdotal evidence to suggest that an indication that the prosecution intends to invoke section 16 may result in a guilty plea in circumstances where an accused might previously have been inclined to go to trial to see if the witness would swear up.

Meaning of "Statement"

A significant feature of section 16 is that it is not confined to statements by witnesses made to the Gardaí during the course of their investigation of the offence charged. According to section 15,

> "statement" means a statement the making of which is duly proved and includes—
> (*a*) any representation of fact, whether in words or otherwise,
> (*b*) a statement which has been videorecorded or audiorecorded, and
> (*c*) part of a statement;

The 2006 Act makes provision for the administration of an oath or affirmation and the taking and receipt of a statutory declaration by a member of An Garda Síochána[20]. It also makes provision for the taking and receipt of a statutory declaration by "competent persons", i.e. employees of a public authority, a phrase very widely defined[21], where a person makes a statement to such employee in the course of the performance of the employee's official duties. It is, thus, clearly anticipated that statements made in circumstances other than a criminal investigation might be admitted in evidence and might have the authority of a statutory declaration in support of an application to admit such evidence. It is open to question whether all public employees who are covered by section 17 would be in a position to ensure that the declarant understood the importance of telling the truth in relation to the statement made in the declaration, in the way that he would understand the importance of telling the truth when summoned to give evidence on oath in a criminal trial[22]. If the declarant does not have that understanding, it must, in principle, be undesirable to admit such a statement in evidence in such a trial.

Although special measures are thus put in place by the Act to ensure that a greater degree of trustworthiness can be attached to statements made to Gardaí and "competent persons", the operative part of section 16 is not confined to such statements. It is, therefore, conceivable that Part III could be invoked even in respect of statements made entirely

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[19] Because "public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity" - Morrison (ed.), *Blackstone's Commentaries on the Laws of England* (Cavendish, London, 2001) vol IV, p. 5.

[20] Section 17

[21] Section 18

[22] The Human Rights Commission expressed the following view in relation to the provision. "Unlike a witness statement made to the Garda Síochána, a statement made to a competent person in the course of their official duties will carry a far lower guarantee of trustworthiness. For example, in general it will not be practicable for a stautory body to video-record statements made to persons in the course of their official duties. Officials working for a public authority may not be equipped to try to assess the veracity and reliability of witnesses." Human Rights Commission, *Observations on the Criminal Justice Bill 2004*, 3rd November, 2004, p. 13.

informally and, if that is so, the 2006 Act must be seen as effecting a much more substantial amendment of the rule against hearsay than it appears at first sight to do. There is authority for the proposition that a witness can be treated as hostile on the basis of an oral statement made informally that contradicted a formal written statement and the testimony of the witness[23]. It remains to be seen whether such a statement would be admitted as evidence in accordance with section 16.

Undoubtedly, issues of reliability would arise in relation to such a statement. None of the more formal requirements, such as an oath, affirmation or declaration, or video-recording facilities would be likely to be present. As against that, however, there may be other circumstances, such as the immediacy of the statement to the events with which it is concerned and the consequent freshness of the witness's recollection at that time, which might incline a court to the view that such a statement was indeed reliable. It should be noted that none of the formal precautions that might assure a court of the veracity and reliability of a statement (such as the administration of an oath, the taking of a statutory declaration or the videotaping of the statement) is actually required by the legislation. If the court is "otherwise satisfied that when the statement was made the witness understood the requirement to tell the truth" and "there is other sufficient evidence in support of its reliability", the provision is capable of applying.

It remains to be seen what exactly the phrase "the requirement to tell the truth" means. The idea of a requirement to tell the truth may suggest an occasion of some formality, in other words that the occasion upon which the statement is made is one in which a formal requirement to tell the truth, such as that created by the oath, is present. On the other hand, section 16(1)(c)(ii) makes it clear that the understanding of a requirement to tell the truth is an alternative to the administration of an oath or affirmation or the taking and receipt of a statutory declaration. In Canada, the courts have emphasised the importance of the statement having been made on an occasion when the witness would have been liable to criminal prosecution for making a deliberately false statement and, preferably, with the witness having been warned of that possibility[24].

The absence of any particular formal requirements at the time the statement is made, as a necessary condition for its admission in evidence, is capable of giving the section a dangerously wide application. It would, of course, be hoped that wisdom of judicial discretion would serve to supply the limits that the Oireachtas has failed to set[25]. Equally, however, it may be said that there is an important role for prosecutorial discretion, so as to ensure that the section is not invoked in cases where, although an argument might be made that the formal statutory requirements had been met, the admission of the statement would nonetheless gives rise to the danger of injustice. There must be a particularly forceful argument for the exercise of prosecutorial restraint in circumstances where there is other evidence probative of the guilt of the accused available to the prosecution. Such an argument would find support in the wording of the statute, insofar as it provides that a

[23] *Prefas and Pryce* (1988) 86 Crim.App.R. 111, where a witness was treated as hostile on the basis of an oral statement to a police officer and a legal officer in informal circumstances to the effect that he had in fact identified a person in an identification parade, notwithstanding his statement at the time of the parade that he could not. He told them that he had said at the time of the parade that he could not make an identification because of fear for his family's safety.

[24] See, below, the discussion of reliability.

[25] Although the Oireachtas did leave a degree of latitude to the trial judge in the court's residual discretion to exclude a statement in the interests of justice – section 16(4)(a).

statement shall not be admitted in evidence if the court is of the opinion that its admission is unnecessary, having regard to the other evidence given in the proceedings[26]. On the other hand, of course, it might be argued that if the statement is consistent with other evidence it is all the more reliable.

Invoking Section 16

Having reviewed some of the more general issues that Part III of the 2006 Act raises, it might be useful to turn to the more practical issues that arise if and when the section is invoked at trial[27].

How is a prosecutor to proceed when the circumstances envisaged in section 16 occur? The first thing to note is that, of the three scenarios contemplated by section 16(1), the second, i.e. that the witness "denies making the statement", is essentially a secondary condition, because the question whether or not the witness made the statement will normally only arise if the witness first either refuses to give evidence or gives evidence that is materially inconsistent with the statement. In principle, there would appear to be no difficulty in how to proceed in those circumstances, because a witness who refuses to give evidence or who gives evidence that is materially inconsistent with a previous statement to the party that has called him, will most likely be found to be an adverse or hostile witness[28].

The proper practice in this jurisdiction in such circumstances is clearly stated in *The People (Attorney-General) v. Taylor*[29] by Walsh J. as follows:

> "The proper procedure, if it is desired to have a witness treated as hostile, is to make the application to the judge and put before him the material upon which it is sought to have the witness declared to be a hostile witness. This, of course, should be done in the absence of the jury and, if the judge rules that the witness may be treated as hostile, then the witness may be cross-examined. That is something quite different and distinct from the rules and procedure which govern the admissibility of written statements in cross-examination. This particular witness had been allowed to be treated as hostile and, when the jury were recalled to court, the proper procedure for the prosecution was to have put to the witness that she had on another occasion made a statement which differed materially from or contradicted the one she was making in the witness-box. If she were to deny that, then the proper procedure would have been to have her stand down from the box, and to prove in fact that she did in fact make a statement by putting into the box the person who took the statement, proving it in the ordinary way

[26] Section 16(4)(b).

[27] Notwithstanding the possible wider application of the section, as discussed above, this paper focuses hereafter primarily on the classic case of the uncooperative witness, who made a formal written statement to investigating Gardaí and who either refuses to give evidence, denies making the statement or gives evidence that is materially inconsistent with the statement. There are, as yet, no reported decisions on the application of Part III. The author is, however, indebted to a number of colleagues who have acted in cases where the section was invoked, and who have shared their understanding of the process, as it has emerged. In each of those cases, Part III was invoked in the "classic case".

[28] Assuming, of course, that the refusal or inconsistency arise from an unwillingness to tell the truth and not mere forgetfulness (see May, *Criminal Evidence* (5th ed., Sweet & Maxwell, London, 2004), p. 607.

[29] [1974] IR 97

> without revealing the contents of the statement at that stage. The earlier witness should then have been put back in the box and the statement put to her for identification, and then her attention should have been directed to the passage in which the alleged contradiction or material variation appears. If she had agreed that there was such a contradiction or material variation, that should have been the end of the matter in so far as the question of impugning her credibility was concerned because there would then have been before the jury an admission from the witness to the effect that she had made contrary statements on the same matter. The statement might then be put in evidence, though that would not be strictly necessary at that stage when the admission had been made. If she had persisted in denying the contradiction, then the statement, having already been proved, would have gone in as evidence of the fact that the witness had made a contrary statement."[30]

Taking that procedure as the starting point, there are nonetheless variations necessarily required by the terms of section 16. Whereas the hostile witness procedure depends upon a finding by the trial judge of hostility on the part of the witness and the existence of material that might be put to a witness to impugn his credibility, for section 16 to be invoked much more needs to be established. The admission in evidence of the fact contained in the previous statement requires the leave of the court and, before doing so, the court must be satisfied of a variety of matters[31]. One approach, therefore, is, at the outset and in the absence of the jury, not merely to put before the trial judge the relevant material, but also to seek a ruling on the admissibility of the statement under section 16.

There is an alternative approach. In *R. v. Conway*[32], a successful application was made to cross-examine a witness giving evidence inconsistent with a prior statement.[33] The application having been successful, the witness was then cross-examined on his statement, line by line, in the presence of the jury. Only after that cross-examination did a second *voir dire* take place, during which the issue of reliability of the previous statement was considered. The advantage of such an approach is that the jury gets an opportunity to see the witness deal with the issues raised by the statement when both the witness and counsel are fresh to the issues. The disadvantages, of course, are the repeated interruptions of the flow of the evidence before the jury and the fact that the reliability issue will still have to be dealt with in the absence of the jury and again, a second time, in their presence, assuming the application is successful. It may well be, therefore, that it is better simply to deal with the matter in full on a single *voir dire* so that everyone concerned will know on what basis the matter is to proceed before the jury.

It should, of course, be noted that the hostile witness procedure in its traditional form is still available and, if other probative evidence is available to the prosecution, it may be appropriate to proceed on that basis, rather than attempting to have the statement admitted

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[30] [1974] IR 97 at 99-100

[31] See the appendix to this paper.

[32] (1997), 36 O.R. (3d) 579, (1997), 121 C.C.C. (3d) 397. Discussed at more length below in relation to the question of availability for cross-examination.

[33] Pursuant to section 9(2) of the Canada Evidence Act. Section 9(1) of that statute is in substantially similar terms to section 3 of the Criminal Procedure Act, 1865. Subsection (2) allows cross-examination to proceed without a ruling that the witness is hostile if the inconsistent statement is in writing, reduced to writing, or recorded on audio tape, video tape or otherwise.

as evidence, especially if the statement is not video-recorded or made on oath or affirmation and does not contain a statutory declaration.

Leaving aside the question of relevance and the requirement that direct oral evidence of the fact would be admissible, which give rise to no special considerations in the context of Part III, the first issue will be proof of the making of the statement. This might be put to the witness in the absence of the jury. If the witness denies the making of the statement, or admits it, but says that the statement was involuntary or unreliable, the next step will naturally be to call evidence of the making of the statement and, in so doing, to address each of the issues that arises under the section, again in the absence of the jury. Before turning to those issues, one preliminary requirement of the section is that the witness be available for cross-examination.

Available for Cross-examination

It is interesting to note that in some of the Canadian authorities there are *dicta* that suggest that cross-examination is but one of a number of alternative methods of being assured of the reliability of a statement. For example, in *R. v. Smith*[34], Lamer C.J., having quoted a passage from *Wigmore* in which it was argued that "there are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished", said:

> "Well before the decision of this Court in *Khan*[35], therefore, it was understood that the circumstances under which the declarant makes a statement may be such as to guarantee its reliability, irrespective of the availability of cross-examination."

This limited view of the importance of cross-examination, as merely one of a number of means of objectively assessing the reliability of a statement, sits uneasily with the prevailing view in this jurisdiction that cross-examination is an essential element of a trial in due course of law in accordance with Article 38.1 of the Constitution and is also protected by Article 40.3 as part of the guarantee of procedural fairness[36]. That said, however, the concept of some restriction of the right to cross-examine is not unfamiliar to Irish law. Even in the leading decision on the right to cross-examine, Ó Dálaigh C.J. said

> "In a criminal trial, evidence must be given orally; a statute may authorise otherwise . . ."[37]

A procedure which permits one side in a trial to give evidence other than oral evidence incorporating the safeguard of a right to cross-examine presents an obvious danger, however. The remarks of Henchy J. in *Kiely v. Minister for Social Welfare*[38] bear repetition at length.

> "Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. *Audi alteram partem* means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free

[34] [1992] 2 S.C.R. 915
[35] [1990] 2 S.C.R. 531. See above, fn 10.
[36] See *Re Haughey* [1971] IR 217 and *Maguire v. Ardagh* [2002] 1 IR 385
[37] *Re Haughey* [1971] IR 217 at 261
[38] [1977] 1 I.R. 267

> from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination. The dispensation of justice, in order to achieve its ends, must be even-handed in form as well as in content. Any lawyer of experience could readily recall cases where injustice would certainly have been done if a party or a witness who had committed his evidence to writing had been allowed to stay away from the hearing, and the opposing party had been confined to controverting him simply by adducing his own evidence. In such cases it would be cold comfort to the party who had been thus unjustly vanquished to be told that the tribunal's conduct was beyond review because it had acted on logically probative evidence and had not stooped to the level of spinning a coin or consulting an astrologer. Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice."[39] [Emphasis added.]

Section 16 is not a procedure designed to tilt the scales of justice entirely in favour of the prosecution, but there is little doubt, particularly having regard to the provisions regarding oaths, affirmations and statutory declarations, that it is the prosecution that will more often avail of it.

That the witness who made the previous statement should be available for cross-examination is therefore imperative. An issue that has arisen is whether the mere presence of a witness amounts to availability for cross-examination. If a witness says that he remembers nothing, either of the making of the alleged statement, or of the facts recounted in it, the evidence contained in the statement is, in a sense, "effectively unquestionable evidence", as Henchy J. put it. A number of judges of Dublin Circuit Criminal Court have indicated that they are willing to consider a witness's avowed lack of recollection as a refusal to give evidence in an appropriate case[40]. While that approach is clearly open, and might well be the proper approach in a particular case, it doesn't remove the difficulty that availability for cross-examination is a separate requirement of the statute.

The Court of Appeal for Ontario examined this issue in *R. v. Conway*[41]. The two accused pleaded guilty to manslaughter but were convicted following a trial of the more serious offence of second degree murder. The conviction depended entirely on the admission in evidence of a statement made to police by a witness. At trial, the witness said he had no recollection of making the statement and knew nothing of the relevant facts contained in it. He had also made another, earlier statement to the police, which they did not believe; he had no recollection of this statement either. The second statement was not made on oath, nor was it video-recorded. The day after it was made, the police brought a justice of the peace to the station to administer an oath and had video-recording facilities in place, but the witness refused to co-operate. Labrosse J.A. said:

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[39] [1977] 1 I.R. 267 at 281

[40] In one case, this statement was strictly *obiter*, but in another it formed the basis of a ruling that the witness in question had refused to give evidence. As it turned out, that ruling, coupled with a firm warning as to the court's powers in relation to contempt, served as an adequate mnemonic for the witness.

[41] (1997), 36 O.R. (3d) 579 • (1997), 121 C.C.C. (3d) 397

> "In a case such as the present one, where the other guarantees of trustworthiness are absent and an effective cross-examination was seriously curtailed, the barrier to admissibility has to be far greater. . . . The nature of the recantation . . . may limit the effectiveness of the cross-examination on the previous statement. . . . In the present circumstances, the cross-examination was rendered virtually ineffectual by the witness' testimony that he did not remember having made the inculpatory assertions recorded in the statement. . . . Certainly, such a fruitless cross-examination does little to ensure that the reliability criterion for admissibility is met."

In our statutory regime, as stated above, cross-examination is not merely an indicator of reliability; it is a stand-alone requirement. In those circumstances, there must be some force in the argument that, where the nature of the recantation is an avowed lack of recollection of the making of the statement, the witness is not in any real sense available for cross-examination[42].

That is not to say that the utterance of a mere formula of forgetfulness will render section 16 entirely redundant. In a particular case the circumstances of the offence may be so striking that the avowed lack of recollection is inherently incredible, and there may be a videotape showing the witness giving a lucid and detailed account of the relevant facts. If those circumstances were accompanied by evidence that the accused was complicit in the supposed forgetfulness of the witness, for example where there was evidence of intimidation or the payment of money, there might be a strong case for admitting the statement. The issue, however, is likely to prove a difficult one[43].

Voluntariness

The issue of voluntariness is one with which courts and practitioners in this jurisdiction will be well familiar, at least in the context of confessions, and the leading authority is the decision of the Supreme Court in *The People (DPP) v. Shaw*[44]. Declan McGrath has observed elsewhere[45] that, notwithstanding the apparent familiarity of the issue, some caution is required, for two reasons. First, concerns in relation to the protection of the right to silence, which are a feature of the law in relation to confessions, do not arise in the context of witness statements. Secondly, the factual circumstances in which a witness statement is made are likely to be quite different to the circumstances in which an accused person is alleged to have confessed. It remains to be seen what significance those matters will have.

Reliability

The views of the Supreme Court of Canada in relation to reliability are of particular interest, because they have so closely informed the approach of the Oireachtas to the same issue, as set out in Part III of the 2006 Act. In *R.v. B. (K.G.)*[46], Lamer C.J. said as follows.

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[42] It appears that in one case in which section 16 was invoked in Dublin Circuit Criminal Court, the application foundered for precisely this reason.

[43] See the very helpful discussion in Coonan, *Admitting "Statements" in Evidence Pursuant to Section 16 of the Criminal Justice Act, 2006* (2007) 12 BR 53

[44] [1982] IR 1

[45] McGrath, *The Evidential Implications of the Criminal Justice Act 2006*, a paper delivered at the Thomson Round Hall Criminal Law Conference 2007, Dublin, 24th March 2007.

[46] [1993] 1 SCR 740

> "The reliability of prior inconsistent statements is clearly a key concern for law reformers and courts which have reformed the orthodox rule, and, as I have outlined, this concern is centred on the hearsay dangers: the absence of an oath, presence, and contemporaneous cross-examination. The reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered. In other words, the focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial, and so additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.
>
> "In my opinion, and as my discussion of these dangers above indicates, only the first two of these dangers present real concerns in this context, and if these two dangers are addressed, a sufficient degree of reliability has been established to allow the trier of fact to weigh the statement against evidence tendered at trial by the same witness. The ultimate reliability of the statement and the weight to be attached to it remain, as with all evidence, determinations for the trier of fact. What the reliability component of the principled approach to hearsay exceptions addresses is a threshold of reliability, rather than ultimate or certain reliability.
>
> "The history of the common law exceptions to the hearsay rule suggests that for a hearsay statement to be received, there must be some other fact or circumstance which compensates for, or stands in the stead of the oath, presence and cross-examination. Where the safeguards associated with non-hearsay evidence are absent, there must be some substitute factor to demonstrate sufficient reliability to make it safe to admit the evidence."

The majority in *B. (K.G.)* identified the following "substitute" indicia of trustworthiness that would be sufficient circumstantial guarantees of reliability to allow the jury to make substantive use of the statement:

> (1) if the statement is made under oath, solemn affirmation or solemn declaration following the administration of an explicit warning to the witness as to the existence of severe criminal sanctions for the making of a false statement;
> (2) if the statement is videotaped in its entirety; and
> (3) if the opposing party, whether the [prosecution] or the defence, has a full opportunity to cross-examine the witness at trial respecting the statement.

This, however, was not intended as a definitive exposition of the necessary features of a reliable statement and it was expressly contemplated by the court that,

> "[a]lternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires."

That approach to the issue of reliability is broadly reflected in section 16, although it must be said that the structure of section 16 lacks something of the tidiness of the Canadian law. Thus, for example, it appears that section 16 treats the issue whether the witness understood the requirement to tell the truth[47] as a separate and distinct issue, rather than an aspect of the issue of reliability[48]. As previously noted, nowhere is it stated what the requirement to tell the truth actually means. Thus it is not clear whether it is necessary that the witness should be liable to prosecution in respect of a deliberately false statement on the previous occasion and, if so, whether he should have been so warned. The fact that the previous statement contains a statutory declaration is clearly intended to be treated as an indication that the witness understood the requirement to tell the truth, but it is not included in the list of features to which the court should have regard in deciding whether the statement is reliable[49].

It should be noted that a minority of the Supreme Court of Canada (L'Heureux-Dubé and Cory JJ.), while in agreement with the change in the rule against the substantive use of prior statements, considered the approach of the majority to the indicia of reliability to be too strict. Speaking for the minority, Cory J. said that the first component of the rule requiring videotaping, a mandatory warning as to criminal liability for falsehood, and the administration of the oath was too restrictive. He suggested instead that, upon the *voir dire*, the trial judge should be satisfied beyond reasonable doubt that the following conditions have been fulfilled:

> (1) That the statement was made in circumstances, which viewed objectively would bring home to the witness the importance of telling the truth.
> (2) That the statement is reliable in that it has been fully and accurately transcribed or recorded.
> (3) That the statement was made in circumstances that the witness would be liable to criminal prosecution for giving a deliberately false statement.[50]

In the insistence on proof to the criminal standard (as opposed to a threshold level of reliability) and in the more flexible approach to the question of reliability, the views of the minority are, it is submitted, more clearly reflected in section 16 than those of the majority.

Transitional Issues

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[47] Section 16(2)(c)
[48] Section 16(2)(b)(iii)
[49] Section 16(3)
[50] These were the conditions specifically related to reliability. Cory J. also stated that the court should be satisfied beyond reasonable doubt that the statement was made voluntarily and that the evidence contained in the statement was such that it would be admissible if given in open court.

There is an element of unreality to engaging in a detailed discussion of the factors that might be relevant to a consideration of the reliability of previous statements at a time when the specific factors identified in Part III of the 2006 Act are not yet fully operational, if at all. There will be few practitioners who have yet seen a videotape of a witness making a statement to Gardaí or seen a statement made on oath or affirmation or which contains a statutory declaration.

In the latter regard, it may be of some value to note that the declaration usually contained in statements taken by Gardaí (and, indeed, included in the printed form used for that purpose), would not appear to be a statutory declaration for the purpose of Part III of the 2006 Act. The phrase "statutory declaration" means "a declaration made under the Statutory Declarations Act 1938"[51]. Such a declaration must meet certain formal requirements[52] and, until the enactment of section 17 of the 2006 Act, it would appear that a member of An Garda Síochána had no power to take and receive a statutory declaration properly so called during the course of an investigation[53].

Perhaps more importantly, even in cases where there was not a videotape of the entirety of the previous statement of the witness, the minority in the Supreme Court of Canada in *R.v. B. (K.G.)*[54] emphasised the importance of a complete and reliable transcript of the statement. Statements taken by an investigating Garda do not contain a verbatim account of the complete conversation between investigator and witness. Instead, the statement is usually an edited version of those remarks by the witness that appeared at the time to be of relevance to the investigation, and might have been obtained, at least partly, by using leading questions. It is open to doubt whether any court could confidently conclude that such a statement is a sufficiently complete and reliable account of the statement and the process by which it was elicited, to enable it to be admitted as evidence of its content. However, until routine video-recording of witness statements occurs, this is what prosecutors will have to ask courts to accept.

Addressing the Dáil Select Committee on Justice, Equality, Defence and Women's Rights at the Committee Stage of the Criminal Justice Bill, 2004, Minister McDowell said:

> "The [Garda] Commissioner has requested my Department to spend considerably more money on providing backup equipment in other rooms, even in stations where there is audio-visual equipment because sometimes the fact that one has to queue up to use a machine in a particular room in a station means that carrying out parallel inquiries is all the more difficult. In that context, as the committee is aware, we are going towards the point of making some statements provable, even though they may later be withdrawn or resiled from in court.
>
> "This may be a reason for providing extra recording facilities because it may be that witness statements will have to be recorded formally to avail of that right and to put them in a proper form where a jury would be content to say that it was an account on which they could rely even if it was later disowned. I hope that will be a tiny minority of cases."

[51] Section 21(1) of the Interpretation Act, 2005 and Part I of the Schedule therto.
[52] Section 2(1) of the Statutory Declarations Act, 1938 and the Schedule thereto.
[53] Section 1 of the Statutory Declarations Act, 1938. Although a member of An Garda Síochána could take and receive a statutory declaration in certain circumstances specifically provided for by statute, e.g. section 21 of the Housing (Miscellaneous Provisions) Act, 1992.
[54] [1993] 1 SCR 740

The practice to date, as well as the views of the Director (noted above), confirm the expectation of the Minister that Part III of the 2006 Act would be invoked only in a tiny minority of cases. The difficulty, however, is in knowing at the time of the investigation which cases will fall into that tiny minority. Without knowing that, video-recording of witness statements will have to become much more common, and no doubt that will require the spending of considerable amounts of money. Until that is done, there must be some doubt as to how valuable Part III can be. It may be of interest to note that in *R v. Conway*[55], the Court of Appeal for Ontario was distinctly unimpressed by the absence of any police policy to have available a justice of the peace or a video-recorder twenty-one months after the decision of the Supreme Court of Canada in *R.v. B. (K.G.)*[56].

The clock is ticking since the enactment of Part III and routine video-recording and/or swearing of witness statements is not yet a reality. Nor, it appears, have regulations yet been made for the recording of witness statements[57]. As to whether all Gardaí and "competent persons" have received adequate training and instruction to enable them to take and receive statutory declarations or alternatively to administer the oath or affirmation[58] and to explain to the person making the statement the importance of telling the truth, it is for others to say. Until these practical measures are put in place, it remains to be seen whether the Irish courts will prove any more tolerant of attempts to adduce in evidence the content of prior statements of witnesses than was the Court of Appeal for Ontario.

Consequences of a successful application under Part III of the 2006 Act

One of the more notable features of Part III of the 2006 Act is that, although it deals at length with the requirements for admitting the previous statement as evidence of any fact mentioned in it, it does not deal at all with the consequences of such admission. There are three aspects of trial procedure that are of particular interest, i.e. cross-examination, the use of the statement as an exhibit and the trial judge's charge to the jury.

Cross-Examination

The concern in the statute that the witness be available for cross-examination is, in the context of the enactment, probably best understood as a requirement that the defence be in a position to challenge the witness as to the previous statement. That, however, is not the end of the matter. Particularly in the case of a witness who gives evidence that is materially inconsistent with the statement, the prosecution will clearly have an interest in cross-examining the witness, notwithstanding that it is the prosecution that called him. That is consistent with the familiar procedure in *Taylor's* case for dealing with a hostile witness, as outlined above.

However, in the case of a successful application under Part III, *Taylor's* case is not an entirely adequate guide. It is clear that *Taylor* places a limit on how far the cross-examination should go: i.e. once the inconsistency between the previous statement and the evidence of the witness has been established, that is the end of the matter. That, of course, makes perfectly good sense, because the purpose of the cross-examination is to impugn the credibility of the witness by establishing inconsistency. Where, however, the statement is admitted as evidence of a fact mentioned in it, in principle, cross-examination

[55] (1997) 36 O.R. (3d) 579, (1997) 121 C.C.C. (3d) 397
[56] [1993] 1 SCR 740
[57] As envisaged by section 19 of the 2006 Act.
[58] In the case of Gardaí – section 17(3) of the 2006 Act.

by the prosecution should have a larger purpose, i.e. to establish that the statement is true and the testimony of the witness false. Is this permissible?

It has been argued in one of the cases in which section 16 was invoked successfully before Dublin Circuit Criminal Court that the prosecution was not entitled to proceed to cross-examine the witness, on the basis that the section was an entire statement of the relevant procedure and that it made no provision for cross-examination. Furthermore, it was argued that the hostile witness procedure and section 16 were distinct procedures and that the prosecution had to choose between them. If these arguments were accepted, it would follow that, if the statement were admitted pursuant to section 16, the jury would simply be left with the two alternative versions of evidence from the same witness (one contained in the statement, the other given in court) without the prosecution being able to probe the witness as to the veracity of the version contained in the statement. That submission was not accepted by the court and the witness was cross-examined, albeit essentially simply by putting the statement to the witness line by line.

Was this the correct approach? To answer that question, it may be necessary to reflect on the hostile witness procedure itself. *Taylor's* case was not new law; rather it was a statement of the correct procedure to be adopted when applying the law as stated in section 3 of the Criminal Procedure Act, 1865[59]. That enactment itself was partially declaratory of the existing common law (by prohibiting a party impeaching the credit of his own witness by general evidence of bad character and by enabling the party to contradict the adverse witness by other evidence) and partly reforming, or at least clarifying (by enabling proof of the prior inconsistent statement)[60]. The proof of the inconsistent statement was confined to the fact of its having been made and the fact of the inconsistency. It is really only this latter aspect of the issue that is addressed by Part III of the 2006 Act, which, of course, permits the statement to be admitted as evidence of a fact mentioned therein. It is not clear, it is submitted, that there is any good reason why this limited amendment of the rules of evidence should be seen as preventing a party cross-examining an adverse witness.

Such cross-examination was permitted at common law. In *Clarke v Saffery*[61], Best C.J. remarked:

> "If a witness, by his conduct in the box, shews himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination . . ."

Similarly in *Bastin v. Carew*[62], Abbott L.C.J. said that

[59] Although the statute was not referred to in the judgment of the Court, it is clear from the official report that it was cited in argument.
[60] See *Greenough v. Eccles* (1859) 5 C.B. (N.S.) 786, 141 E.R. 315, where Williams J. said the following of the common law prior to the enactment of section 22 of the Common Law Procedure Act, 1854, which is substantially similar in terms to section 3 of the Criminal Procedure Act 1865: "the law was clear that you could not discredit your own witness by general evidence of bad character, but you might nevertheless contradict him by other evidence relevant to the issue. Whether you could discredit him by proving that he had made inconsistent statements, was to some extent an unsettled point."
[61] (1824) Ry. & Mood. 126
[62] (1824) Ry. & Mood. 127

> "in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice."

Having reviewed those two authorities, the Court of Appeal in England decided in *R. v. Thompson*[63] that

> "there is no reason to suppose that the subsequent statutory intervention into this subject [i.e. section 3 of the Criminal Procedure Act, 1865] has in any way destroyed or removed the basic common law right of the judge in his discretion to allow cross-examination when a witness proves to be hostile."

It is submitted that it may equally well be said that there is no reason to suppose that the legislative intervention contained in Part III of the 2006 Act destroyed or removed the discretion of a trial judge to permit cross-examination of a hostile witness. Moreover, where a witness has made a previous statement which can be admitted in evidence pursuant to Part III, it is submitted that the purposes of justice would not be served by preventing the prosecution cross-examining the witness to establish the truth of the earlier statement.

The use of the prior statement as an exhibit

Assuming the previous statement of the witness to have been recorded in writing or in other permanent form, should it go in to the jury when deliberating? As it is evidence of a fact in issue in the case, it might well be given to them. On the other hand, there is a danger that a jury might give undue weight to the written document handed in to them at the expense of evidence given orally, which, in principle, is better evidence. If so, it would clearly be preferable not to give a copy of the statement to the jury. Unfortunately, Part III gives no guidance as to which is the better course. Some assistance may be obtained from an examination of the position in the UK.

The UK Criminal Justice Act, 2003 provides that if on a trial a statement made in a document is admitted in evidence under section 119 (which corresponds broadly to section 16 of the 2006 Act) and the document or a copy is produced as an exhibit,

> "(2) The exhibit must not accompany the jury when they retire to consider their verdict unless —
>
> (a) the court considers it appropriate, or
> (b) all the parties to the proceedings agree that it should accompany the jury."

Clearly, the expectation under the English legislation is that the exhibit will not normally go to the jury when they are deliberating. This issue was considered recently by the Court of Appeal (Criminal Division) for England and Wales in *R. v. Hulme*[64]. A witness to an altercation in which the victim suffered grievous bodily harm had made a statement describing the altercation in some detail, giving a description of the aggressor, reporting threatening remarks made to the victim and bystanders after the altercation, and describing the aggressor going into the garden of the house where the accused lived after the altercation. When giving evidence, she was "not sure" of most of the important details contained in her statement. She was allowed to be treated as hostile and she admitted that

[63] (1976) 64 Cr.App.Rep. 96
[64] [2006] EWCA Crim 2899, 6th November, 2006.

the majority of her statement was true but said that she could not be sure about the particulars of the assault. She said that certain matters she had mentioned had been omitted from the statement, that certain words had been used of which she was unaware and that certain minor details had been added by the police officer taking her statement, although she accepted that she had made one correction before signing the document. In further cross-examination she said that she had felt pressured to give a statement, that she had been very tired, that the officer had read the statement through very quickly before she signed it, and that she did not fully understand the declaration of truth.

It was accepted by both sides that the statement was properly admitted in evidence in light of the witness's admission that she had made inconsistent statements, in accordance with section 119 of the UK Criminal Justice Act 2003. The trial judge ruled that it was appropriate for the exhibit to accompany the jury "in order to make sense of the case and to make sense of an evaluation of [the witness's] evidence". The trial judge indicated that "very robust directions" would be given to the jury with regard to the nature of the evidence. According to the Court of Appeal,

> "In our judgment the judge was wrong to allow the witness statement to accompany the jury when they retired to consider their verdict. The reason given by the judge that the document was needed in order to make sense of the case and for the evaluation of [the witness's] evidence was in our view an insufficient reason to justify the course adopted. The jury would have been in a position to make sense of the case and to evaluate the evidence if the matter had been dealt with in the normal way by a reminder in the summing-up of the contents of the witness statement and of what [the witness] had said about that document and the circumstances in which it was made. There was no special feature of the document that made it necessary for the jury to have the document itself before them. The jury could have been reminded orally of the one manuscript correction admittedly made before [the witness] signed the document -- a matter relied on by the [prosecution] as showing that she had exercised some care before signing the document. The jury did not need the document itself for that purpose.
>
> "The reason why we think that the matter should have been dealt with in that way rather than by giving them a copy of the document itself is the undoubted risk that the jury would place disproportionate weight on the contents of the document, as compared with the oral evidence, for the reason that they had the document there in front of them. That is why it is generally inappropriate for the jury to take with them written material of an analogous nature such as a transcript of evidence given by way of a video recording of an interview with a witness. The judge does not appear to have taken that factor into account in her balancing exercise."[65]

It is submitted that this approach to the issue is one which should recommend itself to the courts of this jurisdiction.

[65] [2006] EWCA Crim 2899, paras. 24-25

The Judge's Charge

The suggestion in *Hulme* that the admission of a statement in evidence required "very robust directions" to the jury in relation to such evidence leads naturally to a consideration of the manner in which a trial judge in this jurisdiction should direct a jury that has such evidence before it. It need hardly be said that a full understanding of the dangers associated with hearsay evidence cannot fairly be expected of the average juror. The subject is one, therefore, that calls for clear guidance.

It would be reasonable to expect that such guidance would be similar in structure to the *Casey*[66] warning required in the case of identification evidence. It should explain in general terms the dangers associated with hearsay evidence and, perhaps, dwell upon the historic reluctance of the common law to tolerate such evidence and the reasons for that reluctance, before going on to draw the attention of the jury to the features of the evidence in the specific case that might be of assistance to them in evaluating the statement. Naturally, in enumerating those features it would be expected that the trial judge would place particular emphasis on the features identified in the 2006 Act, but there might well be others. Obviously, if the exhibit did go in to the jury, that would call for specific directions. In *Hulme*, the following guidance was given:

> "Even if it had been appropriate for the jury to take the document with them, the situation was one that plainly called for robust directions by the judge, as she envisaged. The judge gave an appropriate general direction concerning [the witness's] status as a hostile witness and the need carefully to consider whether reliance could be placed on her oral evidence or on what she said in her witness statement, or whether the conflict was so great that they should not rely on her evidence at all. But if the document was there before the jury, more was needed than those general directions. It was necessary for the judge to impress on the jury the reason why they were being given the document and the importance of not attaching disproportionate weight to it simply because they had it before them, whereas they had to rely on their recollection of the oral evidence and of the judge's summing up of that evidence. No directions along those lines were given. It may be that the judge also ought to have done more to draw the jury's attention to differences between the oral evidence and the witness statement . . ." [67]

The views of the Privy Council in *Grant v. The Queen (Jamaica)*[68] might also offer some useful guidance, although it should be noted that the decision concerned the statement of an absent witness that was admitted in evidence:

> "The trial judge must give the jury a careful direction on the correct approach to hearsay evidence. The importance of such a direction has often been highlighted. . . . It is not correct to say that a statement admitted under [the relevant section of the Jamaican Evidence Act, 1843] is not evidence, since it is. It is necessary to remind the jury, however obvious it may be to them, that such a statement has not been verified on oath nor the author tested by cross-examination. But the

[66] *The People (A.G.) v. Casey (No. 2)* [1963] IR 33
[67] [2006] EWCA Crim 2899, para. 27
[68] [2006] UKPC 2, 16th January, 2006.

> direction should not stop there: the judge should point out the potential risk of relying on a statement by a person whom the jury have not been able to assess and who has not been tested by cross-examination, and should invite the jury to scrutinise the evidence with particular care. It is proper, but not perhaps very helpful, to direct the jury to give the statement such weight as they think fit: presented with an apparently plausible statement, undented by cross-examination, by an author whose reliability and honesty the jury have no extraneous reason to doubt, the jury may well be inclined to give it greater weight than the oral evidence they have heard. It is desirable to direct the jury to consider the statement in the context of all the other evidence, but again the direction should not stop there. If there are discrepancies between the statement and the oral evidence of other witnesses, the judge (and not only defence counsel) should direct the jury's attention specifically to them. It does not of course follow that the omission of some of these directions will necessarily render a trial unfair, but because the judge's directions are a valuable safeguard of the defendant's interests, it may."[69]

It should also be noted that express guidance, albeit in quite general terms, is provided by section 16 for estimating the weight to be attached to the statement[70]. Regard is to be had to all the circumstances from which an inference can be drawn as to the accuracy or otherwise of the statement.

Conclusion

The collapse of a trial for a serious offence, where the statements made to Gardaí disclose a strong case against the accused, because the witnesses who made those statements refuse to give evidence, deny making the statements or give inconsistent evidence, would be a matter of proper public concern. It is legitimate to consider allowing the admission of those statements in evidence, provided they can be shown to be reliable, and there is no doubt that advances in modern technology can assist very significantly in any assessment of their reliability. Such a step represents, however, a departure from the standard of care in the admission of evidence which the common law has for a long time and for good reason seen fit to apply.

The new law exhibits a clear understanding of the need to be satisfied of a number of important matters before so departing. Unfortunately, the abolition of the system of preliminary examination, involving the questioning and possible cross-examination of witnesses on oath at an early stage of the proceedings, removed one way of being assured of the reliability of prior statements. Alternative practical methods of assuring a court that a prior statement is reliable are not yet routinely operated in this jurisdiction. Until that happens, there must be some doubt about how useful the legislation can be. Equally, there is no doubt that, as resort to the section increases, there are a number of significant legal and practical issues which the superior courts will have to decide.

19th May 2007

[69] [2006] UKPC 2, para. 21(4).
[70] Section 16(5)

APPENDIX **Summary of Section 16 of the Criminal Justice Act, 2006**

1. The statement of the witness must be relevant to the proceedings. [s.16(1)]
2. The witness must be available for cross-examination. [s.16(1)]
3. The witness must either
    a. refuse to give evidence [s.16(1)(a)]
    b. deny making the statement [s.16(1)(b)], or
    c. give evidence materially inconsistent with it [s.16(1)(c)].
4. The witness must confirm or it must be proved that he made the statement. [s.16(2)(a)]
5. Direct oral evidence of the fact mentioned in the statement would be admissible. [s.16(2)(b)(i)]
6. The statement must have been made voluntarily. [s.16(2)(b)(ii)]
7. The statement must be reliable (as to which, see below). [s. 16(2)(b)(iiii)]
8. The statement must be made under oath or affirmation or contain a statutory declaration of truth or the Court must otherwise be satisfied that, when the statement was made, the witness understood the requirement to tell the truth. [s.16(2)(c)]

In assessing reliability, the Court must have regard to:

1. Whether the statement was made on oath or affirmation or was video-recorded. [s.16(3)(a)]
2. If not, whether, by reason of the circumstances in which the statement was made, there is other sufficient evidence in support of its reliability. [s.16(3)(b)]
3. Any explanation offered by the witness for his refusal to give evidence or the inconsistency of his evidence with the statement or any evidence in relation to the denial that he made the statement. [s.16(3)(b)(i) and (ii)]

The Court must not admit the statement if it is of the opinion:

1. In all the circumstances, including the risk of unfairness to the accused or any of them, that it is in the interests of justice that the statement not be admitted [s.16(4)(a)], or
2. That the admission of the statement is unnecessary having regard to other evidence given in the proceedings. [s.16(4)(b)]

In estimating the weight, if any, to be attached to the statement, regard is to be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise. [s.16(5)]

The section is without prejudice to sections 3 to 6 of the Criminal Procedure Act 1865 and section 21 (proof by written statement) of the Criminal Justice Act 1984. [s.16(5)]