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CRIMINAL PROCEDURE AND MENTAL HEALTH

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**Submitted for the Degree of Ph.D. at the University of Dublin,
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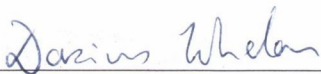
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SUMMARY

This thesis is a critical evaluation of criminal procedure and mental health in Ireland, concentrating in particular on fitness to plead, insanity acquittals, transfers from ordinary mental hospitals to the Central Mental Hospital and transfers from prisons to mental hospitals. Throughout the thesis, constitutional and human rights considerations are emphasised.

A broadening of the existing definition of fitness to plead is suggested, to cover defendants' analytic capacity as well as their cognitive abilities. A 'trial of the facts' procedure is proposed to ensure that the strength of the prosecution's case is tested before it is possible to detain a person. However, proposals to allow postponement of the issue of fitness until the prosecution case has ended would conflict with the right to a fair trial. The question of fitness to plead in the District Court needs to be clarified in legislation.

Cases on transfers from ordinary mental hospitals to the Central Mental Hospital are analysed in detail. It is noted that even though s.207 of the Mental Treatment Act 1945 was found to be unconstitutional in the *R.T.* case in 1995, the section remains on the statute book for technical reasons and a number of patients held under it have not been released.

The constitutionality of automatic detention after an insanity acquittal is questioned, as the system appears to authorise preventative detention. In discussing the controversial

Gallagher, Ellis and Neilan cases on the respective roles of the courts and the executive in releasing insanity acquittees, it is argued that the decision on release ought to be a matter for the courts, primarily because the patient's liberty is in issue. The use of the insanity defence in the District Court is also considered, as are issues such as the burden of proof, appeals and insanity in contempt of court cases.

The law concerning transfers from prisons to mental hospitals is then discussed under two main categories - transfers of people not under sentence, and transfers of people who are under sentence.

The main conclusion drawn in this thesis is that the Irish courts have dealt with the area of criminal procedure and mental health in an incoherent and unconvincing manner, and have failed to develop the rights of mental patients in the area, in spite of numerous opportunities which have been presented to them. The courts have avoided legitimate issues raised by patients, and chosen to interpret the separation of powers in this area in a manner which serves to avoid responsibility for 'hard' decisions concerning release of patients. There is also an urgent need for comprehensive legislative reform of these issues to be enacted. If a legal system is to be judged on the way in which it treats its weakest citizens, the treatment of mental patients has serious implications for Ireland's claims to be a modern, democratic society.

TABLE OF CONTENTS

	Page
Declarations	ii
Summary	iii
Table of Contents	v
Acknowledgements	vi
Terminology	vii
Table of Abbreviations	viii
Table of Cases	x
Chapter 1: Introduction	1
Chapter 2: Fitness to Plead	10
Chapter 3: Transfers from Ordinary Mental Hospitals to the Central Mental Hospital	101
Chapter 4: Insanity Acquittals	164
Chapter 5: Transfers from Prisons to Mental Hospitals	278
Chapter 6: Conclusion	316
Bibliography	334

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Darius Whelan,
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TERMINOLOGY

'District Justice'	This title is used in discussing cases up to 1991, after which the term 'Judge of the District Court' is used
'Fitness to Plead'	See discussion of this term in chapter 2 below
'Habeas Corpus'	Normally refers to an application under Article 40.4 of the Constitution
'Insanity'	As this term continues to be used in Irish law and has a specialist meaning, it has not been replaced in the text by a more neutral term.
'Mental Disorder'	This term is used in a broad sense to cover mental illness, mental disorder and personality disorder.
'Minister for Health'	Refers to Minister for Health up to 1997 and to Minister for Health and Children from 1997 to date
'Minister for Justice'	Refers to Minister for Justice up to 1997 and to Minister for Justice, Equality and Law Reform from 1997 to date

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Casey & Craven	Patricia Casey & Ciaran Craven, <i>Psychiatry & the Law</i> (Oak Tree Press, Dublin, 1999)
Fianna Fáil Bill Green Paper	Criminal Justice (Mental Disorder) Bill 1996, No. 20 of 1996 Department of Health, <i>Green Paper on Mental Health</i> (Pl.8918, Stationery Office, Dublin, 1992)
Henchy Committee	<i>Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons: Treatment and Care of Persons Suffering from Mental Disorder Who Appear Before the Courts on Criminal Charges</i> [Chair: Henchy J.] (Prl. 8275, J85/1, Stationery Office, Dublin, 1978)
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Mackay	R.D. Mackay, <i>Mental Condition Defences in the Criminal Law</i> (Clarendon Press, Oxford, 1995)
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White Paper	Department of Health, <i>White Paper: A New Mental Health Act</i> (Pn.1824, Stationery Office, Dublin, 1995)

Case Law

Very well-known and well-established abbreviations are not listed here

CCA	Court of Criminal Appeal
CCC	Central Criminal Court
Frewen	Frewen (ed.), Judgments of the Court of Criminal Appeal
HC	High Court
SC	Supreme Court
Special CC	Special Criminal Court

Other

CMH	Central Mental Hospital
FOI	Freedom of Information
GBINR	Guilty but insane so as not to be responsible
MTA 1945	Mental Treatment Act 1945
PD	Personality Disorder

Note - Standard periodical abbreviations are used throughout.

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CHAPTER 1

INTRODUCTION

All criminal justice systems are confronted with the question of how to deal with people who may have committed a criminal act but who have a mental illness, mental disorder or personality disorder. This question may arise at various stages, for example when the person is charged, found to have committed the act or requires psychiatric treatment after conviction. This thesis is a critical evaluation of criminal procedure and mental health in Ireland, concentrating in particular on four issues: fitness to plead, the “insanity” verdict under the Trial of Lunatics Act 1883, transfers from ordinary mental hospitals to the Central Mental Hospital and transfers from prisons to mental hospitals.

The term ‘criminal procedure’ has been used in the title to indicate that this thesis does not deal primarily with criminal law as such, for example the question of the definition of the defence of insanity. But it is important to stress that it is the *law* of criminal procedure which is primarily being analysed.¹ A broad approach to criminal procedure is adopted, considering issues of principle, constitutional rights and human rights as well as providing details of legislation and case law. In addition, the term ‘criminal procedure’ is extended to cover legal procedures which apply to people who have been acquitted of crimes, such as insanity acquittees, and people who have been

¹ The law of criminal procedure primarily involves reference to the Constitution, legislation and case-law, while criminal procedure in general would also involve studies of behaviour of decision-makers, defendants and lawyers.

convicted and imprisoned.

Criminal procedure and the criminal process are vast areas, and people with mental illness may come into contact with the system at any stage of the process. Because a broad approach to criminal procedure is adopted, which requires lengthy discussion from various angles of the points raised, this thesis concentrates on the four issues referred to earlier and does not deal with others. These issues are central to criminal procedure and mental health and provide a sound representative basis from which conclusions may be reached on criminal procedure and mental health in general. The research and discussion of these four areas will hopefully contribute to future work in the field by this writer and others.

The central argument of this thesis is that the Irish courts have dealt with the area of criminal procedure and mental health in an incoherent and unconvincing manner, and have failed to develop the rights of mental patients in the area, in spite of numerous opportunities which have been presented to them. The courts have avoided legitimate issues raised by patients, and chosen to interpret the separation of powers in this area in a manner which serves to avoid responsibility for 'hard' decisions concerning release of patients. The failure of successive governments to introduce long-overdue legislative reforms will be criticised, and existing proposals for reform will be assessed.

In this Introduction, issues of principle and the importance of constitutional and human rights are briefly introduced. Chapters Two to Five cover each of the selected issues in turn, i.e. fitness to plead, transfers from ordinary mental hospitals to the

Central Mental Hospital, insanity acquittals and transfers from prisons to mental hospitals.² Finally, the Conclusion in Chapter Six summarises the findings of this thesis and develops more fully the arguments stated above.

Issues of Principle

It is generally agreed that a person with mental illness or disorder should not be dealt with in the ordinary way by the criminal law.³ One rationale for this is that the person's mental condition interferes with his or her ability to act autonomously and "rationally."⁴ Others are that such a person cannot be "deterred" by punishment⁵, that punishing such a person would not be consistent with the concept of retribution or "just desserts,"⁶ and that the law in this area serves a therapeutic function.⁷

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- 2 The order of the chapters reflects the chronology of criminal procedure. In Ireland, the majority of transfers from ordinary mental hospitals to the Central Mental Hospital up to 1995 took place on a *prima facie* finding of unfitness to plead and most of the case law concerned this type of transfer. It is therefore logical to locate the chapter on these transfers after the chapter on fitness to plead and before the chapter on insanity acquittals.
 - 3 This is accepted even by those who argue in favour of determinism as opposed to free will - see Michael Moore, *Law and Psychiatry - Rethinking the Relationship* (Cambridge University Press, 1984), pp.351-365; Mackay p.76. For a summary of "hard" determinism, see Lawrie Reznek, *Evil or Ill?: Justifying the Insanity Defence* (Routledge, London, 1997), pp.7-10.
 - 4 R.J. Lipkin, 'Free Will, Responsibility and the Promise of Forensic Psychiatry' (1990) 13 Int. J. L. & Psych. 331 at 331-2 and 355-6.
 - 5 Glanville Williams, *Criminal Law: The General Part*, 2nd ed. (Stevens, London, 1961), p.428. Hart has pointed out that this view is open to criticism - H.L.A. Hart, *Punishment and Responsibility* (Oxford University Press, 1968), p.19.
 - 6 S.J. Morse, 'Excusing the Crazy: The Insanity Defense Reconsidered' (1985) Sou. Cal. L. Rev. 777 at 783.

Enormous difficulties arise in seeking to define mental illness or disorder for the purposes of the criminal law.⁸ The debates in this area have been wide-ranging and heated. As a very general summary, it can be said that there has been a general movement away from purely cognitive definitions of mental illness and mental disorder to broader definitions which encompass volitional or emotional factors. Personality disorders such as psychopathy have also been recognised.⁹ There has been such a focus in academic discourse on the definition of mental illness and disorder that insufficient attention has been paid to the other questions which arise concerning criminal procedure and mental health and this thesis attempts to redress that imbalance. The definitional questions are not the primary focus of this thesis, but naturally they fundamentally affect each chapter of the thesis.

⁷ On therapeutic jurisprudence, see David B. Wexler (ed.), *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, Durham, 1991) and Bruce J. Winick (ed.), *Therapeutic Jurisprudence Applied: Essays on Mental Health Law* (Carolina Academic Press, Durham, 1997.)

⁸ These difficulties have led some to call for the abolition of the insanity defence. Barbara Wootton in *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist*, 2nd ed. (Stevens, London, 1981) believed that the law was attempting the impossible in deciding between those who were mentally disordered or criminally responsible. See also Norval Morris, *Madness and the Criminal Law* (University of Chicago Press, 1982.)

⁹ People with personality disorders such as psychopathy are generally classified as criminally responsible but may plead diminished responsibility in some jurisdictions. See *Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons: Treatment and Care of Persons Suffering from Mental Disorder Who Appear Before the Courts on Criminal Charges* [Chair: Henchy J.] (Stationery Office, Dublin, 1978), p.6. But contrast Finlay CJ's comment in *People (DPP) v O'Mahony* [1985] IR 517 at 522 that a sexual psychopath, if tried in accordance with the law of this country, would be acquitted on grounds of insanity.

A key factor in criminal procedure and mental health is the dichotomy between legal and other (e.g. psychiatric, psychological or sociological) perspectives. McAuley describes how the law proceeds on the basis that individuals are moral agents who are responsible for their actions while psychiatry is concerned with the clinical problem of diagnosing and treating mental disorders.¹⁰ Casey and Craven say that lawyers use concepts of disease and causation that do not accurately reflect complex clinical constructs while psychiatrists are primarily concerned with the well-being of the individual patient.¹¹ The contrast between legal and other perspectives is not confined to definitional issues but also applies to the entire approach to dealing with mental health: Gostin¹² has contrasted “legalism” and “welfarism” by saying that the former wraps the patient in a network of substantive and procedural protections against unjustified loss of liberty and compulsory treatment while the latter replaces legal safeguards with professional discretion which is seen as allowing speedy access to treatment and care, unencumbered by a panoply of bureaucracy and procedures.

The history of mental health in Ireland mirrors the international experience and shows in general terms that there has been a movement away from policies of coercion and

¹⁰ McAuley, p.4 and p.15. McAuley believes it is a serious mistake to suppose that psychiatric explanation implies a form of behavioural determinism that leaves no room for purposive action - *ibid.*, p.15.

¹¹ Casey and Craven, p.xxiii. They also state on the same page that the concerns of the lawyer are more diverse, ranging from issues of property rights to individual safety and the public interest.

¹² Larry Gostin, *Mental Health Services: Law and Practice* (Shaw and Sons, London, 1986: looseleaf with updates to 1998), p.v.

restraint towards humane treatment.¹³ In more recent times, there has been an emphasis on care in the community where possible¹⁴ and on patients' rights to information, complaints procedures, refusal of treatment, and privacy.¹⁵ However, while policy and "soft law" has changed considerably over the years, legislation has remained unchanged. This is partially because mental health law is not given a high political priority but also because there is a recognition that the task of reforming the legislation is a difficult and time-consuming one. As Costello P. said in 1995, "the best is the enemy of the good."¹⁶ Matters are complicated by the fact that separate pieces of legislation are being drafted by each of the relevant Departments. While the Department of Justice, Equality and Law Reform's Criminal Law (Insanity) Bill has not yet been published,¹⁷ it is likely that the Bill will be very similar in terms to the

¹³ See Joseph Robins, *Fools and Mad: A History of the Insane in Ireland* (Institute of Public Administration, Dublin, 1986); Mark Finnane, *Insanity and the Insane in Post-Famine Ireland* (Croom Helm, London, 1981). Some have questioned whether detention in mental hospitals is justifiable, e.g. Michel Foucault, *Madness and Civilisation* (Tavistock, London, 1967) and Thomas Szasz, *Law, Liberty and Psychiatry* (Macmillan, New York, 1963).

¹⁴ See Robins, op.cit., pp.205-207; Department of Health, *The Psychiatric Services: Planning for the Future* (Stationery Office, Dublin, 1985); Department of Health, *Shaping a Healthier Future* (Stationery Office, Dublin, 1994).

¹⁵ Department of Health and Children, *Guidelines on Good Practice and Quality Assurance in Mental Health Services* (Dublin, 1998).

¹⁶ *R.T. v Director of Central Mental Hospital* [1995] 2 IR 65 at 81.

¹⁷ The Minister for Justice obtained Government approval for the drafting of the Bill in 1996 (Department of Justice press release, 5 June 1996.) In a press release dated 15 April 1999, the Government Chief Whip stated that it was not expected that this Bill would be published until late 1999.

Fianna Fáil Bill of 1996.¹⁸ The Department of Health's White Paper on Mental Health¹⁹ has not yet led to publication of a Bill.²⁰ The Fianna Fáil Bill and the White Paper will be referred to frequently in the following chapters.

The Importance of Constitutional and Human Rights

Laws of criminal procedure are an essential element of the rule of law, and breaches of these laws often result in breaches of constitutional or human rights. In 1978, the Henchy Committee report did not refer even once to constitutional rights or human rights in making proposals concerning criminal procedure and mental health.²¹ But since then there has been a growing awareness that such rights are of crucial

¹⁸ Criminal Justice (Mental Disorder) Bill 1996, No. 20 of 1996, a private member's Bill introduced by John O'Donoghue, Fianna Fáil TD, ordered to be printed in May 1996. At the time, Fianna Fáil was in opposition but the party is now in Government and Mr O'Donoghue is the Minister for Justice, Equality & Law Reform. In 1997, the Minister's Secretary stated that the Bill had the support of the Government - Personal communication cited in Faye Boland, 'The Criminal Justice (Mental Disorder) Bill, 1996' [1997] 4 Web JCLI at fn.1.

¹⁹ Department of Health, *A New Mental Health Act: White Paper* (Stationery Office, Dublin, 1995).

²⁰ The Chief Whip's press release of 15 April 1999 stated that it was expected that the Mental Health Bill would be published by the Summer Recess of 1999. In June 1999 the Department of Health & Children stated that it was hoped that the Bill would be published in September (personal communication.) But in September it was stated that the Bill would be published during the forthcoming Dáil session - Press Release, Department of Health and Children, 22 September 1999; *Irish Times*, 23 September 1999.

²¹ *Third Interim Report* [Chair: Henchy J.], above n.9. Note that the Committee's members included a member of the European Commission on Human Rights and this may mean that there was some reference to Human

importance in this area.²² The Irish courts have issued decisions concerning constitutional and human rights in this field²³ and the possible establishment of a Human Rights Commission, if the peace process continues, will refocus attention on constitutional and human rights.²⁴ The growth of interest in Ireland reflects high levels of activity and discussion in other jurisdictions concerning constitutional and human rights in criminal procedure.²⁵ In the United Kingdom, the enactment of the Human Rights Act 1998 has led to speculation as to the future shape of the criminal process.²⁶

Rights in the discussions leading to the adoption of the Report.

- ²² See, for example, Department of Health, *Green Paper on Mental Health* (Stationery Office, Dublin, 1992) and White Paper, above n.15, but note that these papers concentrate almost exclusively on international human rights rather than Irish constitutional rights.
- ²³ See, for example, *R.T. v Director Central Mental Hospital* [1995] 2 IR 65 and *Application of Gallagher (No.2)* [1996] 3 IR 10. While international human rights instruments are not part of domestic Irish law, the courts have occasionally used these instruments to support points made concerning Irish constitutional rights. For those whose cases ultimately proceed to Strasbourg, important guidance on exhaustion of domestic remedies in Ireland is provided in *Application No. 24196/94, O'Reilly v Ireland* (1996) DR 84-A p.72. Contrast the earlier decision in *Application No.10296, O'D. v. Ireland*, Commission Decision of 3 December 1986.
- ²⁴ See Belfast Agreement (1998) 37 ILM 751. The heads of a Bill to establish the Human Rights Commission have been approved - *Irish Times*, 10 February 1999.
- ²⁵ See, for example, Ronald J. Allen, Richard B. Kuhns & William J. Stuntz, *Constitutional Criminal Procedure*, 3rd ed., (Little, Brown & Co., Boston, 1995); Joseph J. Cook & Paul Marcus, *Criminal Procedure*, 4th ed. (Matthew Bender, New York, 1997); Don Stuart, *Charter Justice in Canadian Criminal Law*, 2nd ed., (Carswell, Scarborough, 1996); Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff, Dordrecht, 1993); Mireille Delmas-Marty (ed.), *The Criminal Process and Human Rights : Toward a European Consciousness* (Martinus Nijhoff, Dordrecht, 1995)
- ²⁶ See, for example, Andrew Ashworth, *The Criminal Process: An Evaluative*

References to constitutional and human rights will be made throughout this thesis. For example, there will be discussion of the right to liberty, the right to fair trial (including the presumption of innocence), the right to bodily integrity and the right to good name. These rights derive primarily from the Constitution and the European Convention on Human Rights, but other instruments will also be considered.²⁷ There will also be consideration of the constitutional doctrine of the separation of powers. Cases brought to date will be analysed and potential future cases which might be brought will be highlighted.

The issue of fitness to plead involves consideration of the rights to liberty and fair trial and fitness to plead will be treated in the next Chapter.

Study, 2nd ed. (Oxford University Press, 1998), p.307, where he comments that the Human Rights Act “is likely to usher in a new legalism.”

²⁷ Other instruments include the International Covenant on Civil & Political Rights (1966), the Council of Europe Recommendation on the Legal Protection of Persons Suffering from Mental Disorders (No. R 83 (2), 1983), the UN Principles for the Protection of Persons with Mental Illness (1991) and the European Convention on the Prevention of Torture & Inhuman or Degrading Treatment or Punishment (1987)

CHAPTER 2

FITNESS TO PLEAD

Introduction	10
The Criteria for Fitness for Trial	12
Procedure in All Cases	21
Muteness	21
‘Provisional Acceptance’ of Guilty Pleas	22
Raising the Issue	23
Postponement of the Issue	27
The Court’s Decision on the Issue	34
Trial of the Facts	37
Appeals	41
Finding of Insanity on Entry of <i>Nolle Prosequi</i>	46
Consequences of Unfitness in Trials on Indictment	47
The 1821 Act	48
Removals to the Central Mental Hospital	55
Patients’ Rights in the CMH	57
Temporary Release	68
Transfers from the CMH to another hospital or hostel	69
Remission for Trial on Recovery	70
Full Release	70
Fitness for Trial in the District Court	73
Procedure in the District Court	74
Extended Remands in the District Court	92
Statistics	99

INTRODUCTION

The law does not allow a criminal case to proceed if it is clear that the defendant is mentally unfit for trial, thus protecting the constitutional right to a fair trial and the constitutional justice principle of *audi alteram partem*. However, the law then leads to detention in the Central Mental Hospital, which is automatically ordered in practice, thus interfering with the defendant’s constitutional right to liberty. This in itself is problematic, but the difficulties are compounded by additional factors: the

law on fitness to plead is uncertain and unclear, and the courts have sought to protect the defendant's right to a fair trial by defining unfitness for trial narrowly and thus paradoxically allowing a trial to go ahead where the defendant's mental health might inhibit but not prevent his or her conduct of the defence.

This chapter will consider the criteria for fitness for trial, the procedure in all cases, the consequences of unfitness in trials on indictment, and fitness for trial in the District Court.

The current Irish legislation on trials on indictment does not refer to fitness to plead but instead to insanity so that the person cannot be tried upon the indictment.¹ The Fianna Fáil Bill of 1996 refers to a finding that a person is "not fit to plead."² The terminology in other jurisdictions ranges from "disability in relation to the trial"³ to "competency to be tried."⁴ As the established term for this area of law in Ireland is 'fitness to plead', this term has been used in the title of this chapter. Throughout the chapter the term 'fitness for trial' will also frequently be used as it more accurately

¹ s.17 Lunacy (Ireland) Act 1821, 1 & 2 Geo. 4, c.33. Contrast the curious procedure under s.207 of the Mental Treatment Act 1945, considered in Chapter 3 below, which refers to *prima facie* evidence that a person would if placed on trial be found unfit to plead. See also s.19(2) Juries Act 1976 which uses fitness to plead and fitness for trial interchangeably.

² Criminal Justice (Mental Disorder) Bill 1996, s.3.

³ This is the terminology used in the body of the Criminal Procedure (Insanity) Act 1964 as amended [England and Wales] although the marginal notes refer to "fitness to plead", the short title of the amending legislation is the Criminal Procedure (Insanity and *Unfitness to Plead*) Act 1991 and the long title of the 1991 Act refers to unfitness to plead.

⁴ This is the terminology used in the USA.

reflects the finding which is made in relation to the defendant's ability to conduct his or her defence, communicate with lawyers and challenge jurors.

THE CRITERIA FOR FITNESS FOR TRIAL

It was stated in the Introduction that definitional questions are not the primary focus of this thesis, but that they fundamentally affect each chapter. The definition of fitness for trial impacts on all aspects of the procedure followed in such cases.⁵ It also has a consequential impact on other procedures. Since unfitness for trial is narrowly defined, a larger number of defendants are found fit for trial and may then go on to seek an insanity acquittal if appropriate. Furthermore, there has been a notable lack of discussion of the criteria for fitness for trial in Ireland, and thus a survey of the law on the criteria is more necessary than in the area of definition of the insanity defence. While the Irish courts have been willing to extend the insanity defence to include volitional insanity, there has been no corresponding broadening of the definition of unfitness for trial, perhaps due to the lack of cases in the area.

The classic criteria for determination of fitness for trial are laid down by Baron Alderson in *R v Pritchard*⁶ :

⁵ Note, however, that there is some international evidence that while in general psychiatrists' fitness judgments are consistent with psycholegal criteria, psychiatrists are in certain circumstances influenced in making their fitness judgments by information outside the psycholegal criteria - Stewart Plotnick et al, 'Is There Bias in the Evaluation of Fitness to Stand Trial?' (1998) 21 Int.Jnl. L.&Psych. 291. 318 psychiatrists in Ontario participated in this study.

⁶ (1836) 7 Car. & P. 303; 173 ER 135. See also the earlier case of *R v Dyson*

- [a] [W]hether he can plead to the indictment or not ;
whether he is of sufficient intellect
- [b] to comprehend the course of the proceedings on the trial,
- [c] so as to make a proper defence -
- [d] to know that he might challenge any of you [sc. the jury] to whom he may
object - and
- [e] to comprehend the details of the evidence.⁷

The test is a cognitive one, being based essentially on knowing and understanding.

While five criteria are given (letters [a] to [e] above), if the person does not satisfy any one of them, he or she is unfit for trial.⁸ In *R v Davies*⁹, the question of the person's capability of properly instructing his or her counsel for his or her defence due to his or her "madness" was added as a criterion.¹⁰

(1831) 7 Car. & P. 305n.; 173 ER 135n. Don Grubin, in 'What Constitutes Fitness to Plead?' [1993] Crim LR 748 at 753, has lamented the fact that because Pritchard (and Dyson) were deaf mutes, the focus in the criteria is on "mental deficiency" rather than mental illness. Previous authorities distinguished between mental deficiency and mental illness - M. Hale, *The History of the Pleas of the Crown*, vol.1, p.34 and Kenyon LCJ in *Proceedings in the Case of John Frith* (1790) 22 Howell's State Trials 308. See also Grubin, *Fitness to Plead in England and Wales* (Psychology Press, Sussex, 1996.)

⁷ (1836) 7 Car. & P. 303 at 304; 173 ER 135 at 135 (Letters [a] to [e] added.) Alderson B. said that there were three questions to be inquired into: "First, whether the prisoner is mute of malice or not; secondly whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect ..."

⁸ Mackay, p.224; P.J. Richardson, *Archbold – Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, London, 1998), para. 4-161.

⁹ (1853) 6 Cox C.C. 326

¹⁰ In *Davies* no reference was made to cognitive ability or intelligence; what was most important was whether the "madness" was genuine. *Pritchard* tends to be cited as if it includes the criterion in *Davies* (see McAuley, p.139, Mackay, p.224), whereas in fact the cases are quite differently reasoned - Grubin, op.cit., p.753. Mackay refers to five criteria for unfitness - four of the *Pritchard* criteria, omitting (c) - making a proper defence, and the *Davies* criterion (although without citing *Davies*).

It has been held in *R v Podola*¹¹ that amnesia at the time of the trial does not constitute unfitness to plead.

In *R v Robertson*¹², only a rudimentary understanding on the part of the accused was required for him to be classified as fit for trial. Thereafter he was said to be free to make decisions even if they were not in his own best interests.

The Butler Committee recommended that there should be statutory criteria. The Committee believed that the reference to challenging jurors should be omitted and the ability to give adequate instructions to legal advisers and to plead with understanding to the indictment should be included.¹³

A low-level test of fitness for trial, described as the “limited cognitive capacity” test, was adopted in Canada in *R v Taylor*.¹⁴ The test involved an acceptance by the court of the following statements made by amicus curiae counsel:

... the presence of delusions does not vitiate the accused’s fitness to stand trial unless the delusion distorts the accused’s rudimentary understanding of the

¹¹ [1960] 1 QB 325. See Rupert Furneaux, *Guenther Podola* (Stevens, London, 1960). The Court of Criminal Appeal followed the previous Scottish case of *Russell v H.M. Advocate* 1946 SC(J) 37.

¹² (1968) 52 Cr.App.R. 690; [1968] 3 All ER 557

¹³ Home Office & Department of Health and Social Security, *Report of the Committee on Mentally Abnormal Offenders* [Chair: Lord Butler] (Cmnd.6244, London, 1975) (1974-5) 16 Parl. Papers 221, para. 10.3

¹⁴ (1992) 77 CCC (3d) 551, 17 CR (4th) 371, 11 OR (3d) 323. See Richard D. Schneider & Hy Bloom, ‘R v Taylor: A Decision Not in the Best Interests of Some Mentally Ill Accused’ (1995) 38 Crim L Q 183.

judicial process ... under this test, a court's assessment of an accused's ability to conduct a defence and to communicate with and instruct counsel is limited to an inquiry into whether an accused can recount to his/her counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not relevant to the fitness determination to consider whether the accused and counsel have an amicable and trusting relationship, whether the accused has been co-operating with counsel or whether the accused ultimately makes decisions that are in his/her best interests.¹⁵

The Canadian Criminal Code defines fitness to stand trial as follows:

'unfit to stand trial' means unable on account of mental disorder¹⁶ to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to:

- (a) understand the nature or object of the proceedings;
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel.¹⁷

This section appears to apply a cognitive standard only, even though section 16 of the same Code, in dealing with the test for criminal responsibility (formerly insanity) uses the word "appreciating" rather than "knowing."¹⁸

A higher-threshold test of competency to stand trial was adopted in *Dusky v United States*:

We agree with the suggestion of the Solicitor General that it is not enough ... to find that the 'defendant [is] oriented to time and place and [has] some

¹⁵ (1992) 77 CCC (3d) 551 at 564.

¹⁶ Section 12 of the Code defines 'mental disorder' as a 'disease of the mind', which may not include mental handicap - see Denise Hitchen, 'Fitness to Stand Trial and Mentally Challenged Defendants: A View from Canada' (1993) 4 Int.Bull. L.&Ment.H. 5.

¹⁷ Section 2, Criminal Code of Canada, inserted by S.C. 1991, c.43.

¹⁸ Section 16(1), Criminal Code of Canada.

recollection of events', but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as a factual understanding of the proceedings against him.'¹⁹

The Law Commission's Criminal Code did not deal with fitness for trial, as the topic was placed in the projected Part III of the Code.²⁰

There has been no detailed consideration in the Irish courts of the criteria governing unfitness for trial, but there have been a few statements to the effect that a *Pritchard*-type test applies.²¹

The 1996 Fianna Fáil Bill proposed the following criteria:

An accused person shall be treated as not fit to plead if he is unable, by reason of mental disorder, to understand the nature or course of the proceedings so as to –

- (i) make a proper defence,
- (ii) challenge, in the case of a trial by jury, a juror to whom he may wish to object, or

¹⁹ 362 US 402 at 402 (1960). The Court did not require proof that the defendant had a mental illness or defect; but most US states require this - Hermann, p.236.

²⁰ Law Commission, *Criminal Law: A Criminal Code for England and Wales* (Law Com. 177, HMSO, London, 1989), vol.2, para.11-7. The Code team would have preferred the issue to be dealt with in Part I.

²¹ See *State (C.) v Minister for Justice* [1967] IR 106 at 115 (Ó Dálaigh CJ); extract from affidavit of District Justice Ó hUadhaigh in *Re Dolphin: State (Egan) v Governor CMH*, High Court, Kenny J., 27 January 1972, p.3; *O'C v Judges of Dublin Metropolitan District* [1994] 3 IR 246 at 252; *DPP (Murphy) v P.T.* [1998] 1 ILRM 344 at 363-4. See also the earlier Irish case of *R v Flynn* (1838) 1 Craw. & D. 283, where the person was under the influence of intense nervous excitement and incapable of understanding the proceedings.

(iii) understand the details of the evidence.²²

According to the Bill,

‘mental disorder’ means mental illness, mental handicap, personality disorder or any disease of the mind but does not include disorder arising from intoxication.²³

The question whether the criteria for fitness for trial should be extended beyond the traditional cognitive criteria is a difficult one. The Ontario Court of Appeal has referred to the need to balance the need for people to be able to defend themselves properly against their right to choose their own defence, their autonomy and their right to have a trial within a reasonable time. Lacourcière J.A., writing for that court in *R v Taylor*, referred to the need to balance these various factors and concluded as follows:

The ‘limited cognitive capacity test’ strikes an effective balance between the objectives of the fitness rules and the constitutional right of the accused to choose his own defence and to have a trial within a reasonable time In my opinion, the learned trial judge erred in adopting the ‘analytic capacity’ test which establishes too high a threshold for finding the accused fit to stand trial by requiring that the accused be capable of making rational decisions beneficial to him.²⁴

Schneider and Bloom have argued convincingly for the wider ‘analytic capacity’ type test, on the basis that mental illness affects not just a person’s cognitive processes, but also their judgement, motivation, insight, emotional status and volition.²⁵ They refer

²² Criminal Justice (Mental Disorder) Bill, 1996, No. 20 of 1996, s.3(2).

²³ *Ibid.*, s.1.

²⁴ (1992) 77 CCC (3d) 551 at 566-7.

²⁵ Schneider and Bloom, *op.cit.*, p.199.

to three different types of patient²⁶ who would pass the ‘limited cognitive capacity’ test but ought to be unfit for trial. They believe that while the law may rightfully be indifferent to whether an accused makes decisions in his or her own best interests, the courts must care about whether a person has the *ability* to make decisions in his or her own best interests.²⁷ And in their view,

[w]here the accused is not capable of rational understanding of his legal predicament, it is possible but unlikely that his actions will be in his best interests The ‘right to choose’ implies an informed, rational choice. Otherwise it is not choice at all so much as chance.²⁸

While at least one writer has proposed the abolition of unfitness for trial findings,²⁹ others have called for various modifications of the criteria to expand the definition of fitness for trial beyond the traditional cognitive criteria.³⁰ One of the most interesting approaches has been the suggestion that the focus should be on the person’s “decisional competence,” considering whether the person can choose between

²⁶ The punishment seeking, the paranoid and the grandiose accused.

²⁷ *Ibid.*, p.201.

²⁸ *Ibid.*, p.205.

²⁹ Norval Morris, *Madness and the Criminal Law* (London, 1969 or 1982?), p.48. Morris proposes that fitness for trial findings be replaced by rules of court which would enable trial continuances.

³⁰ For example, in *Trials and Punishments* (Cambridge University Press, 1986), p.120, R.A. Duff states his belief that the accused should have the ability “to understand the moral dimensions of the law and of his own actions.” See also R.A. Duff, ‘Fitness to Plead and Fair Trials: (1) A Challenge’ [1994] *Crim LR* 419. Grubin suggests that it should be left to “the trial judge to decide, in the light of the facts of the case, whether a mentally disordered defendant is fit to be tried” with a view to deciding whether the defendant can still have a fair trial - ‘What Constitutes Fitness to Plead?’ [1993] *Crim LR* 748 at 757-8.

alternative courses of action.³¹ Mackay³² favours such an approach and points out that this notion is beginning to achieve prominence in civil law, citing the Law Commission's Report on Mental Incapacity:

A person is without capacity if at the material time he or she is
(1) unable by reason of mental disability to make a decision on the matter in question³³

Mental disability is defined as

any disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.³⁴

The question of extending the criteria to include amnesia at the time of the trial (thus overruling *Podola*) was debated in the Butler Committee report³⁵ and the majority decided not to recommend a change of this nature. The majority believed that the law on unfitness was a concession to notions of justice but could not be extended too far and that amnesia could readily be feigned. In response the minority³⁶ argued that the loss of memory might prevent the defendant from giving important evidence on the

³¹ Richard J. Bonnie, 'The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*' (1993) 47 U Miami L Rev 539 at 556.

³² Mackay, pp.244-5.

³³ Law Commission, *Mental Incapacity* (Law Com. 231, HMSO, London, 1995), para. 3.14. See generally Alan Parkin, 'Where Now on Mental Incapacity?' [1996] 2 Web JCLI.

³⁴ *Ibid.*, para. 3.12.

³⁵ Butler Committee, paras. 10.4 - 10.11.

³⁶ Prof. Nigel Walker and Prof. Sir Denis Hill

facts in issue or on the issue of mens rea. Walker subsequently added that it was no easier to feign amnesia than other disorders.³⁷

In this writer's view, the right to a fair trial requires a broad definition of unfitness for trial, not based on cognitive criteria alone. The current narrow definition means that defendants may be tried who cannot make informed, rational decisions about the conduct of their defence. Alternatively, they may plead guilty because they do not have the capacity to decide otherwise.³⁸ It is unwise to 'balance' the right to a fair trial against other rights, as was done in the *Taylor* decision.³⁹ The right to a fair trial is such a fundamental norm that it ought to be rigorously protected. It follows that the definition of unfitness should also, in appropriate cases, cover personality disorders⁴⁰ and amnesia at time of trial.

³⁷ Nigel Walker, 'Butler v The CLRC and Others' [1981] Crim. LR 596 at 600. See also Walker, *Crime and Insanity in England*, vol.1, pp.235-7. Note that McAuley admits that *Podola* is open to criticism but states that it is preferable to jeopardising the prosecution of offences where the defendant's loss of memory was caused by drunkenness or concussion resulting from dangerous or reckless driving (McAuley, p.139.) The issue of motoring offences also crops up in the Butler Report and Walker has commented that "the real anxiety of the majority ... was chiefly concerned with motoring offences" – [1981] Crim. LR 596 at 600.

³⁸ Mark Chapman, who killed John Lennon, pleaded guilty because he said God told him to do so - see Fenton Bresler, *Who Killed John Lennon?* (St. Martin's Press, New York, 1989), p.261.

³⁹ See Ashworth's criticism of the notion of balance as a rhetorical device of which one must be extremely wary - *The Criminal Process: An Evaluative Study*, 2nd ed. (Oxford University Press, 1998), p.30.

⁴⁰ Note that in a review of patients found unfit to plead and detained in the CMH from 1937 to 1995, 3 of the 24 cases had a primary diagnosis of personality disorder – Lynn Hutchinson & Art O'Connor, 'Unfit to Plead in Ireland' (1995) 12 Ir. Jnl. Psychol. Med. 112.

PROCEDURE IN ALL CASES

Important questions of procedure arise at various stages in cases of fitness to plead. For example, it has rightly been held that a defendant cannot waive his or her constitutional right to a fair trial by not raising the issue of fitness for trial. The proposal that a “trial of the facts” procedure should be introduced would serve the very useful purpose of ensuring that the strength of the prosecution’s case is tested before it is possible to detain the person. But proposals to allow postponement of the issue of fitness until the prosecution case has ended would conflict with the right to a fair trial.

Muteness

The effect of s.80 of the Courts of Justice Act 1936 was to make the question as to whether or not a person was mute “by visitation of God” a matter for a Judge to decide on his or her own. This section was later replaced by s.28 of the Juries Act 1976, which has the same effect. If the Judge is not satisfied that the person is mute by visitation of God, it is provided that the Judge shall direct that a plea of not guilty be entered for him or her.

If the person is mute “by visitation of God,” then this is not a bar to the trial proceeding if the person can read or write, or if intelligence can be conveyed to him

or her by signs or symbols.⁴¹

‘Provisional Acceptance’ of Guilty Pleas

Sometimes a defendant will plead guilty to a charge in circumstances where, due to his or her mental condition, he or she is not fit to make the plea. There are some cases in related areas in which it has been held that the court ought to accept the guilty plea on a “provisional” basis and may later substitute a Not Guilty plea. For example, in *R v Blandford Justice, ex parte G. (An Infant)*,⁴² a girl aged fifteen had pleaded guilty to a charge of stealing, but later said that she had not intended permanently to deprive the owner of the goods. In granting certiorari of the conviction, Widgery J., speaking for a Divisional Court, said:

[In] cases where the defendant is not represented or where the defendant is of tender age or for any other reasons there must necessarily be doubts as to his ability finally to decide whether he is guilty or not, the magistrate ought, in my judgment, to accept the plea, as it were, provisionally, and not at that stage enter a conviction.⁴³

While there are precedents which point both in favour of such a practice and against it⁴⁴, the practice of permitting a guilty plea to be altered at a later stage has been

⁴¹ *R. v Steel* (1787) 1 Leach 451; *R. v. Jones* (1773) 1 Leach 102; Edward Ryan & Philip Magee, *The Irish Criminal Process* (Mercier Press, Dublin and Cork, 1983), p. 268; Walker, p.222. See summary of historical background in McAuley, p.136, fn.20.

⁴² [1966] 2 WLR 1232.

⁴³ [1966] 2 WLR 1232 at 1239.

⁴⁴ See *R v Gore Justice, ex parte N. (Infant)* [1966] 1 WLR 1522; *R v Durham Quarter Sessions, ex parte Virgo* [1952] 2 QB 1; *R v Guest, ex parte Anthony* [1964] 1 WLR 1273; Anon., ‘Guilty But ...’ (1966) 100 ILTSJ 434.

approved in principle in the Irish case of *People v Marshall*.⁴⁵

Raising the Issue

Since it is part of the constitutional concept of a fair trial that the defendant must be fit for trial, the question inevitably arises whether the defendant may waive his or her right to a fair trial and choose not to raise the issue of fitness for trial. Courts in common law jurisdictions have held that they may find the defendant unfit for trial in spite of his or her objections. Although the rationale has not often been articulated, this approach appears to be based on a fundamental concern for the imbalance and injustice which would result in conducting a trial where the defendant was unfit for trial.⁴⁶ The approach is based on a fundamental principle and is to be preferred to the prospect of holding a trial where the defendant might have mental disorder and insist on the trial going ahead. In any event since unfitness for trial is narrowly defined at present, courts use the power of raising the issue of fitness on their own initiative

⁴⁵ [1956] IR 79. The defendant pleaded guilty to carnal knowledge, but the Attorney General later stated that new facts had come to his knowledge which made it impossible that the defendant had committed the offence. The Court of Criminal Appeal allowed the accused to alter his plea in that court. Maguire J. said: "Something happened affecting the accused's plea of guilty in the Court below, which enables the court to take the view that the accused did not understand or appreciate what he was doing when he pleaded guilty" (p.80).

⁴⁶ See for example Finlay CJ in *O'C. v Judges of Dublin Metropolitan District* [1994] 3 IR 246, where he stated that a preliminary examination was a judicial exercise and it would be constitutionally impermissible that it could go forward in circumstances where a person was incapable of following the proceedings and of instructing lawyers.

sparingly. In fact, it is arguable that more frequent use of this function is required, for example in a case where a person representing himself or herself appears to be acting extremely irrationally.⁴⁷

In *State (C.) v Minister for Justice*, both Ó Dálaigh CJ and Walsh J stated that a District Justice must stop short if he or she is satisfied that the accused is unfit for trial⁴⁸ and implied that the District Justice would do this of his or her own initiative, even if the question had not been raised by either side. In the *O'Connor* case, the Supreme Court allowed the District Court to inquire into the applicant's fitness for trial in spite of his objections.⁴⁹ Similarly, in *DPP (Murphy) v PT*⁵⁰ McGuinness J. said that a judge was under a duty to inquire into fitness to plead of his or her own initiative if presented with psychiatric reports which implicitly raised questions of fitness.

In the case of Patrick Messitt,⁵¹ a retrial was ordered partly on the grounds that the trial judge had failed to investigate the defendant's complaints that he was physically ill (due to administration of drugs by a doctor who believed he was a psychopath) and also failed to establish "that his violent conduct [during the trial] was not caused by

⁴⁷ Sometimes such irrational behaviour may lead to a finding of contempt of court. See chapter 4 below.

⁴⁸ [1967] IR 106 at 115 (Ó Dálaigh CJ) and 120 (Walsh J).

⁴⁹ [1994] 3 IR 246.

⁵⁰ [1998] 1 ILRM 344.

⁵¹ *People (AG) v Messitt* [1972] IR 204.

mental illness.”⁵² The defendant had behaved in a disruptive manner⁵³ during the trial, he had been removed from the courtroom on three occasions, and his counsel and solicitor had left the trial due to his insistence on making certain statements to the court. There had earlier been ambiguous medical evidence to the effect that he was fit to plead “as far as his physical condition is concerned,” but that he was essentially a psychopath.⁵⁴ Kenny J., delivering the judgment of the Court of Criminal Appeal,⁵⁵ appeared to believe that if the defendant was either physically or mentally incapable of conducting his defence and had been removed from the court, the jury ought to be discharged and he might be tried before another jury when he recovered.⁵⁶ For present purposes, what is significant is that there had been no specific request by the defendant for an inquiry as to his *mental* state (apart from an interruption in the presence of the jury telling them that a doctor had said he was a psychopath,) but that the Court of Criminal Appeal nevertheless ruled that the trial judge should have investigated whether his “violent conduct” was caused by mental illness.⁵⁷

⁵² [1972] IR 204 at 212.

⁵³ It is not clear what “violence” had occurred, but violence is mentioned in the report a number of times.

⁵⁴ [1972] IR 204 at 207.

⁵⁵ McLoughlin, Kenny and Henchy JJ.

⁵⁶ See [1972] IR 204 at 210-11, where he cited *R v Stevenson* (1791) 2 Leach 546, *R v Streek* (1826) 2 C & P 413 and *R v Flynn* (1838) 1 Craw. & D. 293. (*Flynn* is noted above, fn.21.)

⁵⁷ Later in the judgment, the Court also ordered a retrial on the basis that evidence should have been heard on the defendant’s insanity at the time of the alleged offence, even if he did not raise the issue himself. See chapter 4 below.

The English position is that the question of fitness for trial may be raised “at the instance of the defence or otherwise.”⁵⁸ In Ireland, the Henchy Committee Report and the Fianna Fáil Bill of 1996 contained similar provisions.⁵⁹

United States courts regard the requirement that the defendant be competent as part of due process, and so the defendant’s failure to raise the issue does not waive his/her right to due process.⁶⁰

In Canada, the prosecution may raise the issue of fitness for trial against the wishes of the defence⁶¹ and concern has been expressed that this may occur in the absence of a strong prosecution case.⁶² A possible solution to these concerns is a trial of the facts procedure,⁶³ together with the introduction of flexible disposal options so that if the defendant is found unfit for trial, he or she does not inevitably face unjustified

⁵⁸ Criminal Procedure (Insanity) Act 1964, s.4(1); substance on this point not affected by replacement of this section by s.2 of Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

⁵⁹ Henchy Committee draft Bill, s.16, specifically refers to the issue being raised in higher courts “whether by the Judge, the prosecution or the person charged”, but note that while the District Court could have the defendant medically examined on its own initiative (s.10), the District Court could not determine unfitness to plead unless the medical report stated that the person was unfit (s.12(1)). The Criminal Justice (Mental Disorder) Bill 1996, s.3(1), refers to the issue being raised by any party or by the court.

⁶⁰ *Pate v Robinson* 383 US 375 (1966).

⁶¹ Simon Davis, ‘Fitness to Stand Trial in Canada in Light of the Recent Criminal Code Amendments’ (1994) 17 Int. J.L.&Psych. 319 at 320.

⁶² S. Verdun-Jones, ‘The Doctrine of Fitness to Stand Trial in Canada’ (1981) 4 Int.J.L.& Psych. 363.

⁶³ See p.37 below.

lengthy detention in a mental hospital.⁶⁴

Postponement of the Issue

There are three types of postponement of the issue of fitness for trial which might take place. The first two - postponement for assessment and treatment, and postponement for recovery - do not conflict with any fundamental principle, provided the postponements are short so that they do not interfere with the right to a speedy trial. But it is argued that the third type - postponement until the prosecution case has ended - conflicts with the right to a fair trial and would be unnecessary if a proper 'trial of the facts' were introduced.

(A) POSTPONEMENT FOR ASSESSMENT AND TREATMENT

At District Court level, s.24(4) of the Criminal Procedure Act 1967 states that if a person who has been remanded is unable by reason of illness to appear before the District Court, the court may, in the person's absence, remand him or her for an extended period exceeding eight days. There are conflicting authorities on the use of this provision⁶⁵ but it could presumably be used in a situation where the defendant's fitness for trial was in issue at District Court level and the court wished to allow time

⁶⁴ See pp.47ff. below.

⁶⁵ See pp.92ff. below.

for his or her psychiatric assessment and treatment.⁶⁶ Alternatively, the District Court could remand a person for successive periods of eight days while such an assessment and treatment were taking place. If the court makes a recommendation for psychiatric or other medical treatment, this is not part of the court's order.⁶⁷ Once the case reaches trial stage in another court (e.g. Circuit Court or Central Criminal Court), there do not appear to be any legislative restrictions on any adjournments which might take place for assessment and treatment, although of course a person is constitutionally entitled to a speedy trial.

In Scotland, a person may be remanded to a psychiatric hospital for pre-trial assessment and treatment for up to 40 days in summary proceedings or three months in indictment proceedings.⁶⁸ In England and Wales the Crown Court may remand an accused person to hospital for treatment on the evidence of two doctors⁶⁹ and all courts may remand an accused to hospital simply for reports on the evidence of one doctor.⁷⁰ These people cannot be treated without their consent⁷¹ unless they are

⁶⁶ The problem is that such an extended remand under s.24(4) may only take place in the defendant's absence and the defendant must be too ill to appear in court.

⁶⁷ *State (Goodman) v Governor of Mountjoy Prison*, Supreme Court, 21 March 1968; James V. Woods, *District Court Practice and Procedure in Criminal Cases* (James V. Woods, Limerick, 1994), p.170.

⁶⁸ Criminal Procedure (Scotland) Act 1975 ss.330, 331A, 25 and 101 as amended by Criminal Justice (Scotland) Act 1980; A.C. Normand, 'Unfitness for Trial in Scotland: Proposed Adjudication of the Facts and the Right to Reprosecute' (1985) 7 Int.J.L.& Psych. 415 at 426.

⁶⁹ s.36 Mental Health Act 1983. This is not permitted in the case of those accused of murder and Hoggett describes this as "illogical" (p.108).

⁷⁰ s.35 Mental Health Act 1983. Again, this does not apply to those accused of

“sectioned” under civil powers as well.

The 1991 amendments to the Canadian Criminal Code reduced the assessment period to determine fitness to 5 days⁷² but a court may lengthen the period to 60 days where “compelling circumstances exist.”⁷³

The Henchy Committee proposed adjournments for medical examinations either in custody, on committal to a designated centre or on bail.⁷⁴

(B) POSTPONEMENT FOR RECOVERY

Morse has said that with proper medication and management, most disordered defendants can be restored to competence within six to eight weeks⁷⁵ and Grubin has stated that in many cases an unfitness finding could have been avoided if more

murder. Magistrates may only remand after convicting the accused of a prisonable offence, or finding that the person did the act or made the omission charged, or with the person’s consent (s.35(2)). A remand cannot last for more than 28 days at a time and the total period cannot be more than 12 weeks.

⁷¹ s.56(1)(b) Mental Health Act 1983.

⁷² Canadian Criminal Code, s.672.14(2); Simon Davis, ‘Fitness to Stand Trial in Canada in Light of the Recent Criminal Code Amendments’ (1994) 17 Int. J. L & Psych 319 at 322.

⁷³ Ibid., s.672.14(3).

⁷⁴ Henchy Committee draft Bill, s.10 and s.14. The committal to the designated centre could not exceed 8 days.

⁷⁵ Morse, ‘Mentally Disordered Offenders’ in *International Encyclopaedia of Criminal Justice* (New York, 1983), 1046 at 1048, cited in McAuley at 148.

vigorous attempts at treatment had been made prior to the issue coming to trial.⁷⁶ The Butler Committee recommended that there should be a mechanism for delaying a trial to allow time for the defendant to recover from his or her unfitness to plead.⁷⁷

In *Murray (Crowley) v DPP*⁷⁸, Denham J. permitted an adjournment to allow the applicant to be treated at the Central Mental Hospital in the hope that he might become fit to plead. Although there was a conflict of evidence between two psychiatrists, Denham J. readily accepted the view of Dr Smith that treatment for six to twelve months was needed and might result in Murray becoming fit to plead. She said:

This case requires a balancing of rights. On the one hand there is the Applicant's right to liberty and on the other hand there is his right to medical treatment. There is no conflict on the fact that the Applicant is currently mentally ill. It is within his rights for him to receive his treatment so that a decision can then be made as to whether he will be permanently ill (and so not triable) or not.⁷⁹

The case is unusual in that it was a prosecution being brought through the Special Criminal Court (and so the normal laws concerning District Court procedures did not apply) and it was an application to the High Court for an injunction by way of

⁷⁶ Don Grubin, 'What Constitutes Fitness to Plead?' [1993] Crim LR 748 at 755-6.

⁷⁷ Butler Committee at 148, 170-1.

⁷⁸ High Court, Denham J., 13 May 1992. See further McAuley at p.140 and pp.142-3 but note that McAuley does not refer to Denham J's judgment but relies instead on newspaper reports.

⁷⁹ Ibid., p.12.

Judicial Review restraining the DPP from further prosecuting the case.⁸⁰ Denham J. stated that any further application to restrain the pending trial should be made more properly before the Special Criminal Court.⁸¹

While the Canadian Criminal Code does not provide that defendants may specifically be remanded for treatment which would restore fitness, and in fact states that the court may not direct treatment of the person, it has been noted that the person might still be compulsorily treated under the provincial mental health acts.⁸²

In *Riggins v Nevada*⁸³ it was held that involuntary administration of antipsychotic drugs during trial violated the right to fair trial.

⁸⁰ Murray had been charged with robbery and firearms offences before the Special Criminal Court. He had earlier been found fit to plead and the trial had commenced, but he relapsed into a psychotic state after a few days. Eight months later he was found unfit to plead and remanded in custody for another three months. Meanwhile, he was transferred to the CMH from Portlaoise Prison. As will be noted later (see p.51 below), it is arguable that when Murray was found unfit to plead the court ought to have ordered him to be kept in custody until the pleasure of the government be known, rather than remanding him for three months.

⁸¹ *Ibid.*, p.13. The Supreme Court had earlier granted the original leave to apply for Judicial Review, on appeal from a refusal by Carney J. at High Court level.

⁸² Canadian Criminal Code, s.672.19; Davis, *supra* n.61, at 322.

⁸³ 504 US 127 (1992). The defendant successfully argued that as he was proffering an insanity defence he had a right to have the jury see him in his true mental state. The court stated that the drug might have compromised the substance of the defendant's testimony, his interaction with counsel and his comprehension of the trial. See Christi Yandell, 'The Case against Forced Administration of Anti-Psychotic Drugs: *Riggins v Nevada*' (1994) 21 Am. J of Crim. L. 311.

The Henchy Committee would in certain circumstances have permitted committals for up to six months to a designated centre, with the possibility of an extension of up to six months.⁸⁴ It is unfortunate that these long committals should take place in the defendant's absence. The Fianna Fáil Bill of 1996 does not contain any such procedure.

(C) POSTPONEMENT UNTIL THE PROSECUTION CASE HAS ENDED

In 1948, Devlin J. allowed the postponement of the question of fitness for trial until the end of the prosecution case in the trial of Mr Roberts, who was a "deaf mute."⁸⁵ The English Parliament then enacted section 4 of the Criminal Procedure (Insanity) Act 1964 which provided for such postponements "having regard to the nature of the supposed disability" where it was "expedient so to do and in the interests of the accused."⁸⁶ It is possible that before the question of fitness comes to be determined, the jury will already have brought in a 'not guilty' verdict, in which case the question of fitness will not be determined and the defendant will be released. The Court of

⁸⁴ Henchy Committee draft Bill, s.11 and s.15.

⁸⁵ *R v Roberts* [1954] 2 QB 329. Devlin J said at 333: "... to insist on the issue of fitness to plead being tried might result in the grave injustice of detaining as a criminal lunatic a man who was quite innocent; indeed, it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and of the authorities, to have been the person responsible for the crime - whether he was or was not - and investigations which might have led to the apprehension of the true criminal would not take place." In *R v Beynon* [1957] 2 QB 111, Byrne J disagreed with Devlin J's views.

⁸⁶ See also Mental Health (Northern Ireland) Order 1986, art.49(3).

Appeal has held that postponement may be used where the prosecution case is thin.⁸⁷

The Canadian Criminal Code allows the postponement of the issue of fitness at preliminary hearing until the end of the case for the prosecution⁸⁸ or at trial “until a time not later than the opening of the case for the defence or, on motion of the accused, any later time that the court may direct.”⁸⁹

The Fianna Fáil Bill of 1996 proposed that postponement should be allowed in similar circumstances to those stated in s.4 of the English Criminal Procedure (Insanity) Act 1964.⁹⁰

Postponements of this type are of a very different nature to the first two types. The court permits the trial to go ahead in spite of serious doubts about the defendant’s fitness for trial. It is quite possible that the defendant’s conduct of his or her defence will be hampered by his or her mental condition⁹¹ and this fundamentally conflicts

⁸⁷ *R v Burles* [1970] 2 QB 191. See also *R v Webb* [1969] 2 QB 178. Section 4 of the 1964 Act was not changed by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

⁸⁸ Canadian Criminal Code, s.672.25(2)(a).

⁸⁹ *Ibid.*, s.672.25(2)(b). The Canadian Criminal Code provisions were partly based on proposals by the Canadian Law Reform Commission. See Law Reform Commission, *The Criminal Process and Mental Disorder* (Working Paper 14, Information Canada, Ottawa, 1975) and *A Report to Parliament on Mental Disorder in the Criminal Process* (Information Canada, Ottawa, 1976).

⁹⁰ Criminal Justice (Mental Disorder) Bill, 1996, No. 20 of 1996, s.3(8).

⁹¹ Similarly, see McAuley at p.134: “In the common law tradition, part of what it means to try someone on a criminal charge is that he has an opportunity to

with the right to a fair trial. In addition, the supposed necessity to have postponements of this type virtually disappears if a 'trial of the facts' type procedure is introduced, as has happened in various jurisdictions (see below, p.37).

The Court's Decision on the Issue

The decision that a defendant is unfit for trial is made by a jury in trials on indictment⁹² but both the Henchy Committee and the Fianna Fáil Bill of 1996 proposed that the decision should be made by the judge alone.⁹³ In England, the decision is made by the jury, but must be "on the written or oral evidence of" at least two medical witnesses, at least one of whom is approved as having special experience

reply to the charge preferred against him: to plead guilty or not guilty and to instruct counsel accordingly. The defendant's ability to understand and participate in the proceedings as a rational and autonomous agent is therefore an essential component of the trial, not merely a contingent feature that can be dispensed with as soon as the occasion demands."

⁹² s.17 Lunacy (Ireland) Act 1821. Note that the Criminal Lunatics Act 1800, 39 & 40 Geo. 3, c.94, never applied in Ireland. That Act was given the Royal Assent on 28 July 1800; the Act of Union came into force on 1 January 1801 (Keane J. in *Application of Neilan* [1990] 2 IR 267.) Contrast McLoughlin J.(dissenting) in *State (O.) v O'Brien (Children Act case)* [1973] IR 50 at 79, Henchy Committee draft Bill, Second Schedule. If the issue arises after a trial has commenced, a separate jury is often empanelled to try the issue of fitness to plead. See for example the recent Fr. Fortune case - *Irish Times*, 3 March 1999 (court proceedings) and 15 March 1999 (defendant's suicide.)

⁹³ Henchy Committee draft Bill s.16(2)(a); Criminal Justice (Mental Disorder) Bill 1996, s.3(6)(b)(i). These proposals may have been influenced by the Butler Committee's similar recommendation. Note that while the finding of unfitness to plead on indictment would be made by the Judge alone under the proposals of the Henchy Committee and the 1996 Bill, the decision to commit the defendant to a designated centre may only be made on medical evidence (see below).

in the diagnosis or treatment of mental disorder.⁹⁴ According to case-law on Article 5(1)(e) of the European Convention, courts must ensure that they base a decision to detain a person on grounds of unsound mind on “objective medical expertise.”⁹⁵

In 1968, Walker wrote that the burden of proof on fitness to plead had “swung to and fro over the last century.”⁹⁶ In *R v Davies*⁹⁷ it was held that the Crown must prove fitness to plead, but in *R v Turton*⁹⁸ it was held that it was for the defence to prove that the accused was not fit to plead. Later, doubts arose as to whether the Crown could even call evidence of insanity.⁹⁹

The most recent English authorities are *R v Podola*¹⁰⁰ and *R v Robertson*.¹⁰¹ The net result of these two cases is that the proceedings are an inquiry not a trial and the person is presumed to be sane.¹⁰² If the defence contends that the accused is unfit,

⁹⁴ Criminal Procedure (Insanity) Act 1964, s.4(6) as substituted by s.2 Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

⁹⁵ *Winterwerp v The Netherlands* (1979) 2 EHRR 387.

⁹⁶ Walker, p.231.

⁹⁷ (1853) 6 Cox CC 326

⁹⁸ (1854) 6 Cox CC 395

⁹⁹ See for example *R v Arlington*, unreported, 1946, cited in Walker at p.232, where Stable J. remarked, “My absolute invariable practice is that I will not allow the Crown to call evidence of insanity: it is purely a matter for the defence.”

¹⁰⁰ [1960] 1 QB 325

¹⁰¹ [1968] 1 WLR 1767

¹⁰² See the approval by Lord Parker CJ in *Podola* of Cresswell J’s dictum in *R v*

and the prosecution contests this, the defence must prove this on the balance of probabilities. But if the prosecution alleges unfitness to plead and the defence contests this, it must prove its case beyond a reasonable doubt.¹⁰³

If the issue is raised by the Judge, it is unclear whether the burden of proof is on the prosecution or the defence, although some writers state that the burden is on the prosecution.¹⁰⁴

If evidence of the alleged unfitness is not contested, it was stated *obiter* in the *Podola* case that “the question of onus of proof is not a live issue”, although the jury must be satisfied of the person’s insanity before so finding.¹⁰⁵ McAuley has argued that the courts in Ireland should not take this approach and instead the prosecution should be obliged to probe the soundness of medical evidence in such cases.¹⁰⁶

There has been no reported Irish case law on the question of the burden of proof, and

Turton (1854) 6 Cox CC 385. The 1996 Bill stated at s.3(1) that an accused person shall be presumed to be fit to plead unless the issue has been raised by any party to the proceedings or by the court but did not clarify any other aspect of the burden of proof.

¹⁰³ Williams has criticised the latter requirement as being inappropriate – Glanville Williams, *Criminal Law: The General Part*, 2nd ed., (Stevens, London, 1961), para. 143.

¹⁰⁴ See Casey and Craven, p.435n., citing *R v Sharp* (1957) 41 Cr App R 197; but note that in *Podola* Lord Parker CJ stated that *Sharp* was wrongly decided – [1960] 1 QB 325. Richard Card, Rupert Cross & Philip Asterley Jones, *Criminal Law*, 13th ed., (Butterworths, London, 1995) state at p.131 that “presumably” the burden would be on the prosecution in such cases.

¹⁰⁵ *R v Podola* [1960] 1 QB 325

¹⁰⁶ McAuley, pp.143-4

so it is not certain whether the Irish courts would follow these English precedents. Because a decision on fitness for trial is not actually part of the trial itself, but rather determines whether the trial should go ahead, much of the general law about the burden of proof in criminal matters¹⁰⁷ is not directly relevant. For example, the presumption of innocence, which is a constitutional right in Ireland¹⁰⁸ and is enshrined in Article 6(2) of the European Convention, is not really affected by any shift in the burden of proof on fitness to plead.

The US Supreme Court has upheld the constitutionality of a statute placing the burden of proof of competency to stand trial on the defendant.¹⁰⁹

Trial of the Facts

The Thomson Committee in Scotland appears to be the first Committee to have suggested that if a person is found unfit to plead, an inquiry ought to take place to determine whether he or she did the act or made the omission charged.¹¹⁰ This was

¹⁰⁷ See generally Úna ní Raifeartaigh, 'Reversing the Burden of Proof in a Criminal Trial: Canadian and Irish Perspectives on the Presumption of Innocence' (1995) 5 *Ir.Crim.L.J.* 135.

¹⁰⁸ *O'Leary v AG* [1993] 1 IR 102 (HC); [1995] 1 IR 254 (SC.).

¹⁰⁹ *Medina v California* 505 US 437 (1992). However, in *Cooper v Oklahoma* 116 S Ct. 1373 (1996), the Supreme Court struck down a provision which required defendants to prove their incompetence with clear and convincing evidence.

¹¹⁰ ***Criminal Procedure in Scotland*** (Second Report): Report by the Committee appointed by the Secretary of State for Scotland and the Lord Advocate [Chair: Lord Thomson], Cmnd. 6218, (HMSO, Edinburgh, 1975), para. 52.18; A.C. Normand, 'Unfitness for Trial in Scotland' (1985) 7 *Int.J.L.&*

followed by a similar proposal from the Butler Committee.

These proposals were implemented in 1991 in England and Wales, 1995 in Scotland and 1996 in Northern Ireland. The English and Northern Irish versions are virtually identical and may be considered together.

The English and Northern Irish legislation requires that if the jury has found the defendant unfit for trial, a jury must then make a finding as to whether the defendant did the act or made the omission charged.¹¹¹ A new jury must be used to make the finding if the question of fitness was determined on arraignment, but if the question was determined at a later time, the same jury which was trying the defendant makes the finding.¹¹² The legislation does not refer to the burden of proof, but a Home Office circular stated that the act or omission should be proven beyond a reasonable doubt.¹¹³ The Home Office favoured a narrow interpretation of the “act” or

Psych. 415. It was proposed that the trial of the facts should be by the judge alone, and that the inquiry would also consider insanity at the time of the act.

¹¹¹ Section 4A Criminal Procedure (Insanity) Act 1964 as inserted by s.4 Criminal Procedure (Insanity and Unfitness to Plead) Act 1991; Art. 49A Mental Health (Northern Ireland) Order 1986, SI No. 595 of 1986 (NI 4) as amended by art. 49 Criminal Justice (Northern Ireland) Order 1996, SI 3160 of 1996 (NI 24). “Trial of the facts” appears in the long title of the English legislation but not in the marginal note or the body of the legislation. The heading of art. 49 of the Criminal Justice (Northern Ireland) Order 1996 refers to “trial of the facts” but the heading of the new art. 49A of the 1986 Order, as inserted by art. 49 of the 1996 Order, does not.

¹¹² s.4A(5) 1964 Act as amended; art. 49A(5) 1986 Order as amended.

¹¹³ Home Office Circular 93/91, para. 9; reproduced in Larry Gostin, *Mental Health Services: Law and Practice* (Shaw & Sons, London, 1986: looseleaf with updates to 1998), Appendix C125.

“omission”, so as not to include questions of mens rea¹¹⁴ but the Court of Appeal has held that all ingredients of an offence must be proven, including mental elements.¹¹⁵

If the defendant is *not* found to have done the act or made the omission, then he or she is acquitted as if the trial had proceeded to a conclusion.¹¹⁶ If the jury finds that the defendant did the act or made the omission, then except in cases of murder, the court has a choice of a number of different disposals, including an absolute discharge.

The Scottish legislation specifically requires proof beyond reasonable doubt that the person did the act or made the omission and also differs in requiring the court in addition to be satisfied “on the balance of probabilities, that there are no grounds for acquitting him.”¹¹⁷ This seems to invite consideration of the mental element, and indeed the legislation even specifically provides that if it appears to the court that the person was insane at the time of the act or omission, the court must state whether the acquittal is on the ground of such insanity. The legislation uses the term “examination of the facts” rather than “trial of the facts.”

¹¹⁴ Ibid., para. 8.

¹¹⁵ *R. v. Egan* (1998) 1 Cr.App.Rep. 121. This is line with the Butler Committee, para. 10.24.

¹¹⁶ s.4A(4) 1964 Act as amended; art. 49A(4) 1986 Order as amended.

¹¹⁷ Section 174ZA Criminal Procedure (Scotland) Act 1975 as inserted by Criminal Justice (Scotland) Act 1995. See Clare Connelly, ‘Insanity and Unfitness to Plead’ [1996] Jur. Rev. 253.

The Fianna Fáil Bill of 1996¹¹⁸ adds the trial of the facts as an “optional extra” which *may* occur on application to the court, after the defendant has been found unfit to plead.¹¹⁹ This means that detention is not dependent on a finding that the defendant did the act, and so it is a very different approach to the legislation in England & Wales, Northern Ireland and Scotland. If a trial of the facts is being introduced, it is difficult to see why it ought to be optional.¹²⁰ One interesting feature of the 1996 Bill is that in the case of an indictable offence if the question of fitness to plead arises at District Court level, the District Court may not determine the question but if it finds there is not a sufficient case to put the defendant on trial the court must discharge the defendant.¹²¹ If this provision were used carefully by the District Court, it could operate as a useful filtering mechanism to ensure that weak prosecution cases against defendants who may be unfit to plead would not proceed past District Court level, and so this would in a sense achieve similar results to the trial of the facts.

The ‘trial of the facts’ system serves the very useful purpose of ensuring that the strength of the prosecution’s case is tested before it is possible to detain the person. While the defendant’s mental disorder may well restrict his or her ability to contradict the prosecution’s case, at least the defendant is given an opportunity to attempt to do so. If the defendant’s efforts fail, the result is not a finding of guilt, it is a finding that

¹¹⁸ Criminal Justice (Mental Disorder) Bill 1996, s.3(9).

¹¹⁹ Note also that the court would conduct the trial of the facts without a jury.

¹²⁰ Similarly, see Faye Boland, ‘The Criminal Justice (Mental Disorder) Bill 1996’ [1997] 4 Web JCLI in ‘unfitness to plead’ section.

¹²¹ Criminal Justice (Mental Disorder) Bill 1996, s.3(5).

he or she did the act or made the omission charged. Restrictions on media reporting of the ‘trial of the facts’ could be used to protect defendants’ reputations, and ensure a fair trial if they become fit to plead at a later stage.¹²² If the defendant successfully contradicts the prosecution’s case, then the defendant is acquitted and cannot be detained.¹²³ The ‘trial of the facts’ is also consistent with the right to a speedy trial under the Irish Constitution and Article 6(1) of the European Convention.

Appeals

If a person is found unfit to plead at District Court level, the court is supposed to discharge him or her and make no further order¹²⁴ and so an appeal would be unnecessary, unless the person had some objection in principle to being labelled as unfit to plead.

If the person is found unfit to plead in the Circuit Court or the Special Criminal Court, there would not appear to be any avenue of appeal open as the legislation only allows for appeals against convictions.¹²⁵

¹²² Clare Connelly, *supra* n.117, p.211.

¹²³ All of this assumes that a proper trial of the facts is required, not the “optional extra” model proposed in the 1996 Bill.

¹²⁴ *O’Connor v Judges of Dublin Metropolitan District* [1992] 1 IR 387 (HC); *O’C. v Judges of Dublin Metropolitan District* [1994] 3 IR 246 (SC.)

¹²⁵ The powers of the Court of Criminal Appeal to deal with appeals from the Circuit Court were laid down in the Courts of Justice Act 1924 and the Courts (Supplemental Provisions) Act 1961. The Supreme Court then took over the jurisdiction of the Court of Criminal Appeal under the Courts and Court Officers Act 1995. Appeals from the Special Criminal Court to the

If a person were found unfit to plead in the Central Criminal Court, it is arguable that while a right of appeal would not lie under statute¹²⁶ it may lie under the Constitution.

Article 34.3.3 states that

The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court.

It has been held that the Central Criminal Court is the High Court for the purposes of Article 34.3.3¹²⁷ and *People (AG) v Fennell (No.2)*¹²⁸ strongly suggests that a finding of unfitness to plead is a “decision” of the Central Criminal Court.¹²⁹ The wording of the current statutory restriction on appeals from the Central Criminal Court to the Supreme Court does not appear to apply to a decision that a person is unfit to plead:

An appeal shall not lie to the Supreme Court from a decision of the Central Criminal Court to acquit a person, other than an appeal under s.34 of the Criminal Procedure Act 1967.¹³⁰

Court of Criminal Appeal were dealt with by s.44 of the Offences against the State Act 1939, and the Supreme Court again took over these powers under the 1995 Act.

¹²⁶ See powers of Court of Criminal Appeal laid down in Courts of Justice Act 1924 and Courts (Supplemental Provisions) Act 1961; taken over by Supreme Court under Courts and Court Officers Act 1995.

¹²⁷ *People (AG) v Conmey* [1975] IR 341; *People (DPP) v O’Shea* [1982] IR 384.

¹²⁸ [1940] IR 453.

¹²⁹ In the *Fennell (No.2)* case, it was held that a jury finding that the accused was fit to plead was *not* a “decision” as the court was not obliged to record the finding and the court had no jurisdiction to make any order consequent on the finding. However, the court noted that if the accused had been found to be insane, it would have been the duty of the court to direct the finding to be recorded and to make an order for his custody.

¹³⁰ s.44 Courts and Court Officers Act 1995.

A decision that a person is unfit to plead is not a “decision ... to acquit a person”, and so the constitutional right of appeal would appear to exist.¹³¹

The right of appeal may be vested both in the defence and the prosecution, if the above interpretation is correct.

If a person is found fit for trial and wishes to argue that he or she is in fact unfit for trial, before the trial proceeds, this is not allowed. The Irish authority for this is *People (AG) v Fennell (No.2)*,¹³² which admittedly only concerned an appeal from the Central Criminal Court to the Supreme Court, but the principle in the case would apply to appeals at lower levels. Sullivan CJ pointed out that s.17 of the Lunacy (Ireland) Act 1821 required the court to record a finding that a person was unfit to plead, but there was no obligation to record a finding that the person was fit to plead. It followed that a finding of fitness to plead was not a “decision” and no appeal lay from it.

¹³¹ Note that a previous statutory provision governing the area was significantly different – s.11(1) of the Criminal Procedure Act 1993 provided that “the right of appeal to the Supreme Court, other than an appeal under s.34 of the Criminal Procedure Act 1967, from a decision of the Central Criminal Court is hereby abolished.” Section 111 of the 1993 Act was repealed by the 1995 Act (s.3 and 1st Schedule.) For a full discussion of the law on criminal appeals, see Casey, ‘Confusion in Criminal Appeals: The Legacy of Conmey’ (1975) 10 Ir Jur (ns) 300; Casey, *The Irish Law Officers: Roles and Responsibilities of the Attorney General and Director of Public Prosecutions* (Round Hall Sweet and Maxwell, Dublin, 1996), pp.313-320 and Addendum p.ix.

¹³² [1940] IR 453

In England, the *Podola* case points in the same direction. Lord Parker CJ, in commenting on the previous case of *R v Jefferson*¹³³, said:

What was intended to be covered by that ruling is not altogether clear. It may be that its effect was limited to this: that the [Criminal Appeal Act 1907] does not enable this court to hear an appeal specifically expressed to be an appeal against a finding on a preliminary issue as to an accused person's fitness to plead, such finding not being a conviction.

However, the situation may well be different if, having been found fit for trial, the person is later convicted of the charge. There is no Irish authority on this, but two English authorities might be followed here. Firstly, in *Podola*, Lord Parker CJ, in a continuation of the passage just cited, said:

On the other hand that ruling [*Jefferson*] has apparently been taken to be a ruling that a person who has been found fit to plead, and thereafter convicted, cannot in any circumstances question the finding on the preliminary issue, or matters which arose in the course of its hearing. If the latter is the true meaning we think that the ruling was wrong. If a convicted person appeals against his conviction on the ground that the hearing of the preliminary issue was open to objection for error in law, so that he should never have been tried on the substantive charge at all, we are of opinion that this court has jurisdiction to entertain the appeal.

The second authority is *R v O'Donnell*¹³⁴ in which the Court of Appeal ordered a retrial (“venire de novo”) due to various breaches of procedure concerning fitness for trial.¹³⁵

¹³³ (1908) 24 TLR 877

¹³⁴ [1996] 1 Cr App R 286

¹³⁵ Much of the case turns on the wording of English legislation, but the case demonstrates the willingness of an appeal court to order a retrial for breaches of procedure on fitness to plead. While *O'Donnell* had been found *unfit* to plead, it is submitted that the principle of the case would also apply where the person was found fit to plead.

There are two other possible methods by which a decisions concerning fitness to plead might be reviewed. Firstly, s.34 of the Criminal Procedure Act 1967 provides for a reference to the Supreme Court where the trial judge¹³⁶ has directed a verdict in favour of the accused on a question of law. The reference may be made either by the DPP or the Attorney General¹³⁷ but is without prejudice to the verdict in favour of the accused.¹³⁸ Section 34 applies in spite of the general abolition of appeals by the prosecution.¹³⁹

Secondly, Article 34.3.4 of the Constitution states that no law may prevent appeals to the Supreme Court in cases which involve questions as to the constitutionality of any law.¹⁴⁰

The English and Welsh legislation allows appeals regarding fitness to plead, but not regarding the disposal option which the court chooses to exercise.¹⁴¹ In addition, the

¹³⁶ The trial judge might be sitting at Circuit Court or Central Criminal Court level.

¹³⁷ Prosecution of Offences Act 1974, s.3(4), s.14(2)

¹³⁸ Section 40 of the Criminal Justice Bill 1967 would have permitted the Supreme Court to order a new trial.

¹³⁹ Section 44 Courts and Courts Officers Act 1995 – “other than appeals under section 34 of the Criminal Procedure Act 1967.”

¹⁴⁰ This was confirmed by s.11(2) of the Criminal Procedure Act 1993, but that subsection was repealed and not re-enacted by the Courts and Court Officers Act 1995. Presumably it was considered unnecessary to restate this constitutional provision in the Act.

¹⁴¹ See summary of appeal options in Phil Fennell, ‘The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991’ (1992) 55 MLR 547 at 553-4 and Hoggett, p.110. For Northern Ireland, see art. 51 of 1986 Order.

situation regarding the timescale for appeals to Mental Health Review Tribunals is ambiguous.¹⁴² By way of contrast, the Scottish legislation makes specific provision for appeals regarding disposal options.¹⁴³

The Henchy Committee recommended that either the prosecution or the defendant should be entitled to appeal against findings of fitness or unfitness to plead¹⁴⁴ and this seems to be a sensible approach. Similar proposals were contained in the 1996 Fianna Fáil Bill.¹⁴⁵

Finding of Insanity on Entry of *Nolle Prosequi*

Section 17 of the Lunacy (Ireland) Act 1821¹⁴⁶ allows for a finding of insanity on entry of a nolle prosequi. This part of the section is not widely known and does not appear to be used in practice. In the *Toohey* case, Ó Dálaigh CJ said that it was unnecessary to consider the provision as the procedure had not been used in that case.¹⁴⁷ The provision could be used in three situations:

A. Where the State enters a nolle prosequi at the preliminary stages (e.g. on

¹⁴² See Fennell, op.cit., p.554.

¹⁴³ Connelly, op.cit., p.210.

¹⁴⁴ Henchy Committee, p.33

¹⁴⁵ Criminal Justice (Mental Disorder) Bill 1996, No. 20 of 1996, s.6.

¹⁴⁶ 1 & 2 Geo. 4, c.33.

¹⁴⁷ *State (Toohey) v Governor of Central Mental Hospital*, Supreme Court, 28 March 1968, p.3; see chapter 5 below.

indictment)

B. Where a person was found unfit to plead and was ordered to be kept in strict custody, but later (e.g. six months later) the State entered a nolle prosequi on the charge.

C. Where a trial has commenced (possibly after a finding of fitness to plead) and the State then enters a nolle prosequi.

If the State attempted to use this provision in any of these situations, a person might raise constitutional arguments against the provision, for example based on interference with the right to liberty, referring to the *O'Callaghan* and *Ryan* cases.¹⁴⁸

If Situation B arises (person unfit to plead, but six months later State enters nolle prosequi), the existence of the provision could be of benefit to both sides. The State could use the section to ensure that the person is kept in custody even though the charges have been dropped. The detained person could use the section to seek to convince the court that he or she is no longer insane and therefore ought to be released.

CONSEQUENCES OF UNFITNESS IN TRIALS ON INDICTMENT

The legislation currently in force is normally interpreted to require automatic detention in the CMH on a finding of unfitness to plead, but it is likely that more flexible disposal options will be introduced in future. Once a person has been

¹⁴⁸ *People (Attorney General) v O'Callaghan* [1966] IR 501; *Ryan v DPP* [1989] IR 399.

detained in the CMH, he or she has limited rights to question that detention, the most effective being the right to apply for *habeas corpus* in the High Court. A review body for cases of unfitness to plead is urgently required, as they are not entitled to use the advisory committee procedure which deals with insanity acquittees.

The 1821 Act

The Lunacy (Ireland) Act 1821 states at the relevant part of section 17:

XVII. And be it further enacted, That if any Person indicted in Ireland for any Offence shall be found to be insane, by a Jury lawfully impanelled for that Purpose, so that such Person cannot be tried upon such Indictment; or if upon the Trial of any Person so indicted, such Person shall appear to the Jury charged with such Indictment to be insane, it shall be lawful for the Court before whom such Person shall be brought to be tried as aforesaid, to direct such Finding to be recorded, and thereupon to order such Person to be kept in strict Custody, and to be taken care of, until the Pleasure of the Lord Lieutenant, or other Chief Governor or Governors of Ireland for the Time being, shall be known ... ; and in all Cases of Insanity so found, it shall be lawful for the Lord Lieutenant or other Chief Governor or Governors of Ireland for the Time being, to give the like Order for the safe Custody and Care of such Person so found to be insane, as the Lord Lieutenant or other Chief Governor or Governors of Ireland is or are by this Act enabled to give in the Cases of Persons acquitted on the Ground of Insanity.¹⁴⁹

The section only deals with trials on indictment. Detention following a finding of unfitness is not automatic, as the section merely states that “it shall be lawful” for the court to order the person to be kept in strict custody. However, in practice, courts do

¹⁴⁹ Lunacy (Ireland) Act 1821, 1 & 2 Geo. 4, c.33, s.17. Powers expressly saved by Mental Treatment Act 1945 and Health (Mental Services) Act 1981, which was never commenced. Section 16 of the 1821 Act had enabled the Lord Lieutenant to give such order for the safe custody and care of persons acquitted on grounds of insanity in such place and such manner as seemed fit, but s.16 was repealed by the Trial of Lunatics Act 1883.

not exercise any discretion and automatically detain the person in the Central Mental Hospital.¹⁵⁰ This may be referred to as a “patent illogicality.”¹⁵¹ McAuley argues that the Irish courts should consider re-activating the residual discretion that appears to be vested in them by section 17.¹⁵²

Because persons found unfit to plead are, in practice, automatically detained in the CMH, this probably breaches Article 5(1)(e) of the European Convention, which has been interpreted as requiring that

the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of ‘unsound mind.’ The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement.¹⁵³

While there will presumably have been psychiatric evidence which indicates that the person has a mental disorder, this medical evidence will probably not have addressed the question whether the person’s condition is such that he or she needs to be compulsorily detained, and this is where the incompatibility with the Convention lies. Even in the absence of amending legislation which would remedy this problem, the

¹⁵⁰ This is confirmed by the Justice FOI s.16 Book and the White Paper.

¹⁵¹ In *R.T. v Director of Central Mental Hospital* [1995] 2 IR 65 at 80, Costello P. said the procedures in s.207 of the Mental Treatment Act 1945 were based on a “patent illogicality.” He said that it did not follow that because a patient might be unfit to plead if placed on trial that he or she was suitable for transfer to the Central Mental Hospital. The Judge of the District Court was required by statute to certify something which might be quite untrue.

¹⁵² McAuley, p.146. McAuley refers to s.2 of the Criminal Lunatics Act 1800, the Irish equivalent of which is s.17 of the 1821 Act.

¹⁵³ *Winterwerp v Netherlands* (1979) 2 EHRR 387, para.39.

courts ought to change their practice immediately and instead of automatically ordering detention, should hear specific psychiatric evidence on whether it is appropriate in the case before deciding whether to detain or release the person.

If the court orders the person to be detained, the European Convention requires that the person be informed promptly of the reasons for his or her detention.¹⁵⁴

Section 17 refers to detention until the pleasure of the Lord Lieutenant shall be known, and so many of the arguments which were made in the well-known Irish cases concerning insanity acquittals¹⁵⁵ could also be made in cases of unfitness to plead cases, but do not appear to have been raised.¹⁵⁶ It is not known whether in 1972 an informal decision was taken to adapt the form of order to cause the person to be

¹⁵⁴ Article 5(2) states: “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.” This provision applies to all people deprived of their liberty by law, including mental patients: *Van der Leer v Netherlands* (1990) 12 EHRR 567. Note also that Article 9(ii) of the International Covenant on Civil and Political Rights contains a similar provision but uses the words “at the time of arrest” rather than “promptly.”

¹⁵⁵ *Application of Ellis* [1990] 2 IR 291; *Application of Neilan* [1990] 2 IR 267; *Application of Gallagher (No. 1)* [1991] 1 IR 31. See Chapter 4 below.

¹⁵⁶ See also the various arguments made in Chapter 3 of this thesis regarding constitutional and human rights issues concerning insanity acquittals, many of which also apply to persons found unfit to plead. One significant difference is that the wording of the 1821 Act appears discretionary (“it shall be lawful”) when compared with the Trial of Lunatics Act 1883, which may leave the 1821 Act less open to challenge. On the other hand, any court reviewing the 1821 Act would have to have regard to the fact that in practice, and presumably in the individual case before it, detention is automatic.

detained until further order of the court¹⁵⁷ but it would have led to more coherence if such an approach were adopted. In any event, this issue has now been resolved by the Supreme Court in the *Gallagher (No.1)* case¹⁵⁸ and so presumably the statutory form of order is now used again.

In *Murray (Crowley) v DPP*¹⁵⁹, the facts of the case as summarised in the judgment raise questions as to the consequences of a finding of unfitness to plead at Special Criminal Court level. Aspects of the case have been referred to above (page 30) but crucially there is no clear explanation of the order made by the Special Criminal Court, when it had found Murray unfit to plead in 1991. If the Lunacy (Ireland) Act 1821 were being applied, the defendant ought to have been ordered to be kept in strict custody until the pleasure of the executive be known. But this form of words does not appear in the summary of the facts. On the contrary, the impression is given that this is only a preliminary matter and the court can adjourn the case a number of times until the defendant becomes fit to plead. However, the trial had actually commenced in this case eight months previously, and thus the finding of fitness to plead ought no longer to have been considered part of any “preliminary” process. It is also remarkable that in the summary of the facts, no reference is made to the implications of the *Gallagher (No.1)* judgment¹⁶⁰ for the form of wording of the court’s order on a

¹⁵⁷ In the case of the insanity defence, this informal change was introduced as a result of *State (O.) v O’Brien (Children Act Case)* [1973] IR 50. See chapter 4 below.

¹⁵⁸ *Application of Gallagher (No.1)* [1991] 1 IR 31.

¹⁵⁹ High Court, Denham J., 13 May 1992.

¹⁶⁰ *Application of Gallagher (No.1): Gallagher v DPP* [1991] 1 IR 31.

finding of unfitness to plead.¹⁶¹ It must be noted again that the *Murray* case was unusual because it came before the Special Criminal Court, but nonetheless the procedural issues could have been dealt with more clearly.

If the view is taken that the Special Criminal Court ought to have ordered Murray to be kept in custody until the pleasure of the executive be known, then the remand in custody to Portlaoise Prison for mention in three months time which was made by the Special Criminal Court would not be in accordance with the 1821 Act and therefore Murray could have successfully applied for his release under Article 40 of the Constitution at the time. It is also highly unlikely that if the proper form of order had been made, Murray would have been detained in Portlaoise Prison. Instead, the normal practice would have been for the executive to send him to the Central Mental Hospital, in which case Murray's more specialist treatment would have commenced far sooner than ultimately turned out to be the case.

Even though the conduct of the Special Criminal Court in this case is questionable, this would not in itself preclude an application for injunction by way of judicial review of the type involved in the case. If Murray had indeed been detained at the pleasure of the government, that would not have meant that the DPP could not bring the case to court again in the future, and so an application to restrain the DPP from doing this, although unusual, would not be entirely inappropriate.

¹⁶¹ The *Gallagher (No.1)* decision had been issued in 1991, prior to Denham J's judgment on the injunction application.

The Henchy Committee proposed that, if the defendant was found unfit to plead, detention would not be automatic but if there was oral medical evidence that the defendant was in need of in-patient treatment in a designated centre, the court could commit the defendant to a designated centre until further court order.¹⁶² The requirement that the court may only order such committal if the medical report recommends it appears to conflict with normal principles of the role of a judge in a case.¹⁶³ In addition, the test does not mention the person's right to liberty and appears to be solely based on a *parens patriae* model of mental health legislation, with no requirement that the person be in any way dangerous before he or she is compulsorily confined. If the court released the person, it could require the person to undergo out-patient treatment.¹⁶⁴

English and Welsh legislation provides a wide variety of disposal options, including absolute discharge, to the court in the case of findings of unfitness to plead¹⁶⁵ but these options do not apply in a murder case, where the only option open to the court is a hospital order restricting discharge without limitation of time.

¹⁶² Henchy Committee draft Bill, s.12(4) and s.16(2)(b).

¹⁶³ However, note that the European Court of Human Rights requires that there should be a strong correlation between legal and medical criteria assessing the issue of unsound mind, and that the assessment must take proper account of objective medical expertise - *Winterwerp v Netherlands* (1979) 2 EHRR 387; *Luberti v Italy* (1984) 6 EHRR 440.

¹⁶⁴ Henchy Committee report, para. 15.

¹⁶⁵ These options are summarised in Hoggett at p.109: A hospital order restricting discharge either for a specified or unlimited time, a guardianship order, a supervision and treatment order or an order for absolute discharge.

The Fianna Fáil Bill of 1996 provided that detention would not be automatic, but, having heard evidence of an approved medical officer and having considered any other evidence, the court could¹⁶⁶ commit the defendant to a designated centre in either of two situations:

if the court is satisfied

that the accused is in need of in-patient treatment or care in a designated centre or

that because of his mental condition there is a substantial risk that, if set at liberty, he may be a danger to himself or others.¹⁶⁷

There is no mention in these criteria of the person's constitutional right to liberty and it would be preferable if a presumption that the person ought to be at liberty were written in to the criteria.¹⁶⁸ The criteria are also problematic because they give the court the option of detaining the person either for paternalistic reasons or on the "police power" grounds of mental condition combined with substantial dangerousness. Strong objections may be made on principle to any legislation which

¹⁶⁶ The Bill states that the court "may", if it is satisfied that either of two conditions is fulfilled, commit the defendant to a designated centre. This differs from detention on an insanity acquittal where the word "shall" is used. Boland finds this difference "alarming" in 'The Criminal Justice (Mental Disorder) Bill 1996' [1997] 4 Web JCLI, but the difference may be justified by the fact that under the 1996 Bill the trial of the facts is optional and so it is possible that the person may not have done the act with which he or she is charged. In any event, in the case of a dangerous person, the Gardaí have the power to take him or her to a Garda station under s.165 of the Mental Treatment Act 1945.

¹⁶⁷ Criminal Justice (Mental Disorder) Bill 1996, s.3(4)(a) and s.3(6)(b)(ii). Line breaks added.

¹⁶⁸ See further discussion of the constitutional right to liberty in Chapter 4 below.

allows detention on purely paternalistic grounds.¹⁶⁹

Removals to the Central Mental Hospital

It would appear that when a person is found unfit to plead, he or she is ordinarily sent directly to the CMH. However, if this did not occur, it is possible under s.8 of the Central Criminal Lunatic Asylum (Ireland) Act 1845¹⁷⁰ for a Minister to order that any “criminal lunatic”¹⁷¹ in custody in a mental hospital or prison be removed to the CMH. It is debatable whether the Minister in question ought to be the Minister for Health or the Minister for Justice. The Act refers to “the Lord Lieutenant or other Chief Governor or Governors of Ireland.” The Provisional Government (Transfer of Functions) Order 1922¹⁷² assigned the administration of lunatic asylums (including the CMH) to the Ministry of Local Government. The functions of the Minister for Local Government under the 1845 Act were later specifically transferred to the Minister for Health.¹⁷³ But in a one page judgment in *State (Murtagh) v Governor of CMH*,¹⁷⁴ Ó Dálaigh CJ held that the powers under *section 12* of the 1845 Act (as

¹⁶⁹ See for example Tom Cooney and Orla O’Neill, *Psychiatric Detention: Civil Commitment in Ireland* (Baikonur, Wicklow, 1995)

¹⁷⁰ 8 & 9 Vic., c.107.

¹⁷¹ Under s.26 of the 1845 Act, a “criminal lunatic” means either a person acquitted on the grounds of insanity, or found insane (i.e. unfit to plead) under the Lunacy (Ireland) Act, 1821.

¹⁷² United Kingdom Statutory Rules and Orders, 1922, No. 315, 1 April 1922.

¹⁷³ SR & O No. 58 of 1947.

¹⁷⁴ Supreme Court, 12 November 1968.

opposed to section 8 which is being considered here) were exercisable by the Minister for Justice.

It would appear that section 8¹⁷⁵ was used in *State (Toohey) v Governor Central Mental Hospital*¹⁷⁶ to remove the applicant to the CMH. Mr Toohey had been indicted for arson at the Central Criminal Court and found unfit to plead by a jury. Five days later, he was removed¹⁷⁷ to the CMH by the Minister for Justice. Later, he was transferred to Clonmel district mental hospital, escaped, was recaptured and was transferred back to the CMH.¹⁷⁸ Eventually, Toohey brought an application for his release under Article 40. This application was refused by the President of the High Court¹⁷⁹ and Toohey appealed to the Supreme Court. While the appeal was pending, the Attorney General entered a nolle prosequi in the case. The resident medical superintendent of the CMH had written a letter stating that it would enhance Toohey's prospects of recovery if his preoccupation with the pending charge could be eliminated. In his Supreme Court judgment, Ó Dálaigh CJ stated that there were

¹⁷⁵ There is no specific reference in the judgment to section 8, although the 1845 Act is cited.

¹⁷⁶ Supreme Court, 28 March 1968.

¹⁷⁷ At the time of the removal to the CMH, Toohey may have been at liberty or in custody; it is not clear from the judgment. Under section 8, the person ought to be "in custody in any Lunatic Asylum or Gaol."

¹⁷⁸ The statutory authority for these transfers was not cited and Ó Dálaigh CJ commented that the court had not seen the instrument by which the final transfer to the CMH was made. This may be because the case had not even reached the stage where the production of Toohey's body in court had been ordered.

¹⁷⁹ It would appear that the President of the High Court refused even to order Toohey's production in court.

three issues which needed to be resolved¹⁸⁰ but it had become unnecessary for the court to make any order in this case as on that morning counsel for the respondents had stated that an order for Toohey's release from the CMH would be made that day.

The situation in this case might have been different if Toohey had applied for certiorari as well as habeas corpus.¹⁸¹

Patients' Rights in the CMH

As stated earlier, even though in theory the Lunacy (Ireland) Act 1821 makes detention of those found unfit to plead optional (by using the words "it shall be lawful") in practice all persons found unfit to plead are sent to the Central Mental Hospital. It is therefore appropriate to outline patients' rights while in the Central Mental Hospital. These rights also apply to other categories of patient sent to the Central Mental Hospital, i.e. those acquitted on grounds of insanity, those transferred from prison, and those transferred from other mental hospitals.¹⁸²

¹⁸⁰ (1) Arising out of the entry of the nolle prosequi whether any basis existed in law for the continued detention of the applicant, (2) The question of the duration of the detention which is lawful in the case of an order of the kind made in this case and whether such an order can remain in force if the applicant can recover his sanity, (3) The means and machinery proper for raising the issue of the applicant's sanity.

¹⁸¹ See for example *In Re Dolphin: State (Egan) v Governor CMH*, High Court, Kenny J., 27 January 1972, where the Governor of the CMH could not bring the proceedings to an end by releasing Dolphin as certiorari had been sought.

¹⁸² It is convenient to deal fully with patients' rights in the CMH for all patients in this chapter, rather than returning to that topic in each of the following chapters.

Legislative provision for the Central Criminal Lunatic Asylum dates from 1845.¹⁸³ The Asylum was opened in 1850, 13 years in advance of the first such asylum in Britain,¹⁸⁴ with accommodation for eighty males and forty females.¹⁸⁵ It may have been the first establishment exclusively for the reception of “criminal lunatics” in the world.¹⁸⁶ While its name was changed to the Central Mental Hospital (CMH) in 1961,¹⁸⁷ the main statutory bases of its activities require as a minimum criminal charges to have been brought against a person before he or she may be admitted.¹⁸⁸ The hospital’s function is to cater for mentally ill offenders and alleged offenders.¹⁸⁹ It is a highly secure environment, part of which was described as “drab and gloomy,”¹⁹⁰ although it appears that the premises now include a gymnasium, a

¹⁸³ Central Criminal Lunatic Asylum (Ireland) Act 1845, 8 & 9 Vic., c.107.

¹⁸⁴ Broadmoor was not founded until 1863.

¹⁸⁵ *Correspondence between the Irish government and grand juries on the subject of additional accommodation of pauper lunatics 1844* H.C. 1844 (603) p.xliii; Robins, p.149.

¹⁸⁶ Noel Sheppard and Éamon Hardiman, ‘Treatment of the Mentally Ill Offender in Ireland - An Examination of the Forensic Psychiatric Services’ (1986) v.7, no.1, *Ir.Jnl. of Psychiatry* 13 at 14.

¹⁸⁷ s.39 Mental Treatment Act 1961.

¹⁸⁸ A person is either unfit to plead, guilty but insane so as not to be responsible, transferred from prison or transferred under s.207 - see the detailed treatment of each of these categories in other chapters. The one exception is transfers under s.208 of the Mental Treatment Act 1945 - see chapter 3 below.

¹⁸⁹ Sheppard and Hardiman, *supra* n.186, p.14.

¹⁹⁰ *Ibid.*, *loc.cit.*, referring to the original building before a new unit was built. See also comments in Reports of Inspector of Mental Hospitals, below page 63. However, it should be noted that in *Croke v Smith (No.2)*, Budd J., High Court, 27 and 31 July 1995, it was stated that Croke would actually have

swimming pool and libraries.¹⁹¹ While the Eastern Health Board has primary responsibility for the hospital,¹⁹² the *Prisons* Division of the Department of Justice, Equality and Law Reform is involved in decisions concerning certain patients at the CMH¹⁹³ and the State does not release information which might prejudice the CMH's security.¹⁹⁴ From time to time, paramilitaries have been detained in the CMH, and this may explain the State's emphasis on the CMH's security.¹⁹⁵ There is a certain stigma attached to detention in the CMH¹⁹⁶ and one section of the Mental Treatment legislation refers to a patient in the CMH as an "inmate."¹⁹⁷ Staff have been paid at prison officer rates.¹⁹⁸ In 1988, only 4 of the 90 attendant staff (other than medical

more freedom in the CMH than he would have had in St. Ita's and that he was quite happy in the CMH.

¹⁹¹ Smoking Control Policy, CMH.

¹⁹² Health Act 1970, s.44.

¹⁹³ FOI books of Department of Justice, Equality and Law Reform.

¹⁹⁴ Freedom of Information Act 1997, s.23(a)(vi).

¹⁹⁵ In 1985, the cost of maintaining two paramilitaries as patients in the CMH in one year was quoted at £200,000 - *Irish Times*, 18 May 1985, cited in Sheppard & Hardiman, *op.cit.*, p.17.

¹⁹⁶ See Murnaghan J. in *State (Coughlan) v Minister for Justice* (1968) 102 ILTR 177 at 180 - "In the course of the argument I did allow myself to say that one would understand and perhaps sympathise with the view of the mother that there was some stigma to be attached to confinement in the Central Mental Hospital. This may have been true in the past but I take the view that in the light of modern development a more enlightened approach must now be taken about confinement in that institution."

¹⁹⁷ Mental Treatment Act 1945, s.248. In addition, the remaining sections of the 1845 Act still refer to 'lunatics.'

¹⁹⁸ Department of Health, *Report of Inspector of Mental Hospitals 1988-89* (Stationery Office, Dublin, 1991), p.49.

staff) were qualified nurses.¹⁹⁹

A standard list of mental patients' statutory rights is often given, and it is interesting to compare this list with the policies and procedures of the Central Mental Hospital itself.²⁰⁰ Some of these rights are contained in the Mental Treatment Act 1945 (MTA 1945), in which case matters are complicated by a legislative provision which states that "no power, restriction or prohibition contained in [the 1945 Act] shall apply in relation to a person detained" under certain criminal procedures.²⁰¹ It is unclear whether each of the rights being discussed is a "power, restriction or prohibition."²⁰² What is more, the list of criminal procedures included in this latter legislative provision does not include any procedure contained in the 1945 Act itself and so does not include sections 207 and 208 of that Act.²⁰³ In other words, patients detained

¹⁹⁹ Ibid., p.49.

²⁰⁰ The Central Mental Hospital's policies and procedures were supplied in a letter from the Eastern Health Board under the Freedom of Information Act 1997 dated 29 June 1999.

²⁰¹ MTA 1945, s.284(3). The criminal procedures are listed in s.284(1): sections 17 and 18 of the Lunacy (Ireland) Act 1821 covering persons found unfit to plead, s.2 of the Trial of Lunatics Act 1883 covering insanity acquittals, and provisions governing transfers from prisons to mental hospitals (ss.2 and 3 of the Criminal Lunatics (Ireland) Act 1838, s.12 of the Central Criminal Lunatic Asylum (Ireland) Act 1845, ss.12 and 13 of the Lunatic Asylums (Ireland) Act 1875 and s.17 of the Criminal Justice Administration Act 1914.)

²⁰² In *Croke v Smith* (No.2), High Court, Budd J., 27 and 31 July 1995, it was assumed that various sections of the MTA 1945 applied to patients detained in the Central Mental Hospital.

²⁰³ Section 207 of the 1945 Act governs prima facie findings of unfitness to plead in the District Court and s.208 concerns transfers from mental hospitals to any other hospital or place for treatment. See further chapter 3.

under sections 207 and 208 would have a stronger case for arguing that rights contained in the 1945 Act apply to them.

Patients and friends or relatives of patients may make an application under Article 40.4 of the Constitution (habeas corpus) for an inquiry into the legality of their detention. They may also apply for judicial review of the order detaining them in the hospital and it may be wise to combine, for example, an application for judicial review by way of certiorari with the application for an inquiry into detention.²⁰⁴

A relative or friend of an eligible patient²⁰⁵ may apply to a mental hospital for release of the patient into his or her care²⁰⁶ and any person may apply to the Minister for Health and Children for an examination of the patient with a view to release.²⁰⁷ It is unclear whether either of these two rights apply to patients detained in the Central Mental Hospital. Both of them appear in Part XVI of the Mental Treatment Act 1945, which is headed “Persons Detained under Reception Orders” and reception

²⁰⁴ In *In Re Dolphin: State (Egan) v Governor of Central Mental Hospital*, High Court, Kenny J., 27 January 1972, it was held that a friend may also apply for certiorari when it is associated with a habeas corpus application. The *Dolphin* demonstrates that it is important for a friend to apply both for habeas corpus and certiorari where appropriate, and that the Governor of the CMH could not bring the proceedings to an end by releasing the patient as this did not resolve the question of whether the District Court orders could be quashed.

²⁰⁵ An eligible patient is a public patient.

²⁰⁶ MTA 1945, s.220.

²⁰⁷ MTA 1945, s.222.

orders are defined as solely civil orders.²⁰⁸ However, the headings of Parts of statutes are not conclusive and the wording of the actual sections might be given a broader interpretation.²⁰⁹

Any patient in a mental institution may send a sealed letter to the Minister for Health and Children, the President of the High Court, the Registrar of Wards of Court, a Health Board, or the Inspector of Mental Hospitals.²¹⁰ The Central Mental Hospital's procedures confirm this right, but make variations in the list of recipients of the letters.²¹¹ Once the letter has been received by one of these people, it is not clear how he or she should deal with the matter.²¹²

²⁰⁸ Under MTA 1945, s.3, "reception order" means a chargeable patient reception order, a private patient reception order, a temporary chargeable reception order, or a temporary private patient reception order.

²⁰⁹ MTA 1945, s.220, refers to "a person detained as a chargeable patient in a district mental hospital or other institution maintained by a [Health Board]" and there appears to be little scope to apply this to patients detained under criminal procedures. However, MTA 1945, s.222, refers to "a person detained in a mental institution", which might apply to patients detained under criminal procedures.

²¹⁰ s.266 MTA 1945 as amended by s.36 MTA 1961. Section 266 also continues to refer to visiting committees but this reference is redundant as s.96 MTA 1945, which established such committees, was repealed by the Health Act 1970. Under s.267 MTA 1945, the Minister for Health and Children or the Inspector of Mental Hospitals may direct that notices setting forth the sealed letter rights of patients be displayed in mental institutions.

²¹¹ 'Policy on Patients' Letters', Central Mental Hospital, 1998, para. 4. The policy omits the Minister for Health and Children and the Eastern Health Board but adds the Minister for Justice.

²¹² Note that in the case of a person detained as a person of unsound mind, the President of the High Court may require the Inspector of Mental Hospitals to examine the person and report on the person's condition - MTA 1945, s.241. The wording would appear to confine this to persons detained under civil legislation.

The Inspector of Mental Hospitals may visit and inspect the Central Mental Hospital at any time and must inspect the Hospital at least once in each half-year.²¹³ He or she must investigate any complaint regarding the administration of the Hospital or the treatment of any “inmate” and must make an annual report on the CMH to the Minister for Health and Children.²¹⁴ These annual reports must be laid before each House of the Oireachtas, but some of the reports have never been published,²¹⁵ and there have been delays in publication of others. The reports which are available contain various criticisms of conditions in the CMH, e.g. statements that conditions in “the old building” were unsuitable for modern therapeutic purposes²¹⁶ and that the seclusion policy was not strictly enforced.²¹⁷

²¹³ MTA 1945, s.248. Other Health Board hospitals need only be inspected once a year - MTA 1945, s.236.

²¹⁴ Ibid., s.248(3) and (7).

²¹⁵ In TCD library, reports from 1924 to 1942 (obviously not governed by the MTA 1945) are included in the Department of Local Government and Public Health shelves. From 1943 on, see Department of Health shelves. There are major gaps from 1963-1976 and 1980-1987. Fergal Bowers has commented on the suppression of these reports stating that the Inspector was denied the right to publish the reports because it would be politically unpalatable - ‘Freedom of Information and the Medical Journalist’, UCC Conference Paper, 1998. The Inspector does not always report on two visits per year as required by the legislation, e.g. see the 1991 report at pp.27-30.

²¹⁶ Department of Health, *Report of the Inspector of Mental Hospitals 1992* (Stationery Office, Dublin, 1995), p.43. See also 1988-89 Report, p.49, referring to dark and gloomy cells and inadequate toilet facilities. The report also stated that a new building had been completed two years earlier but was never used.

²¹⁷ Department of Health, *Report of the Inspector of Mental Hospitals 1993* (Stationery Office, Dublin, 1995), p.72. It was later reported that the seclusion registers were satisfactory - *Report of Inspector of Mental Hospitals 1997*, p.17.

Where a patient in the CMH recovers, the Inspector must report this to the Minister for Justice, Equality and Law Reform.²¹⁸ It is notable that this report is sent to the Minister for Justice rather than the Minister for Health. The legislation does not state how the Minister should act on such a report. Reports of patients' recovery have been made on at least two occasions.²¹⁹ At least one legal source believed that the Minister would have little choice but to release a patient in such a case.²²⁰ One of the reports was later withdrawn for further consideration.²²¹

The CMH has also been visited by the European Committee for the Prevention of

²¹⁸ MTA 1945, s.248(6). The report must state the name of the patient, the offence in connection with which he or she was convicted or charged, and particulars of the patient's general character and conduct.

²¹⁹ (1) Gerard O'Halloran's case - Inspector of Mental Hospitals letter of February 1995, cited in *Irish Times*, 25 June 1998; (2) John Gallagher's case - Inspector of Mental Hospitals report of March 1995, cited in *Application of Gallagher (No.2)* [1996] 3 IR 10 at 26; *Irish Times*, 26 April 1995; Faye Boland, 'Diminished Responsibility as a Defence in Irish Law' [Part I] (1995) 5 *Ir.Crim.LJ* 173 at 178. O'Halloran's and Gallagher's cases are described in detail in chapter 4.

²²⁰ *Irish Press*, 25 April 1995, referring to Gallagher case. The newspaper refers to possibilities of a *habeas corpus* action, an order of mandamus or an application to the European Court of Human Rights.

²²¹ Report withdrawn in Gallagher's case. Geoghegan J refers to this as follows: "The Inspector of Mental Hospitals, Dr Dermot Walsh, wrote to the Minister for Justice by letter of the 25th April 1996, recalling a statutory report which he made on the 27th March 1995, apprising her of the recovery of the applicant but subsequently withdrawing that report for further consideration when certain other matters concerning the applicant's clinical condition and personality had been drawn to his attention." ([1996] 3 IR 10 at 26). The Inspector's precise reasoning is not publicly known, but it is stated that Dr Walsh is in agreement with Dr Smith, the Clinical Director of the CMH, and a detailed letter from Dr Smith is reproduced at [1996] 3 IR 10 at 26-8.

Torture.²²²

Parole is authorised by s.204 of the 1945 Act, for a maximum of forty-eight hours.

If a patient were subjected to “inhuman or degrading treatment or punishment”, this would breach Article 3 of the European Convention, but it would be very difficult to establish that such treatment took place.²²³ In *Herczegfalvy v Austria*²²⁴, the European Court of Human Rights found no breach of Article 3 where the patient was force fed and handcuffed.²²⁵

It is hospital policy that all patients are given a copy of the Central Mental Hospital information booklet on admission.²²⁶ Injections may be given without the patient’s

²²² Press Release of European Committee for the Prevention of Torture, 15 September 1998, available at www.cpt.coe.fr. A report of this visit has not yet been published. The CMH was not visited in the Committee’s first visit to Ireland in 1993.

²²³ It would also breach Article 7 of the International Covenant on Civil and Political Rights and the European Convention for the Prevention of Torture.

²²⁴ (1992) 15 EHRR 437. However, a friendly settlement in *A v UK*, Application No.6840/74, 16 July 1980, included an undertaking by the UK Government to improve seclusion facilities at Broadmoor.

²²⁵ CMH policy allows use of handcuffs in some circumstances - ‘Policy on Routine Transfer to Extern General Hospital’, CMH, para.8.

²²⁶ Admission Procedure, CMH. The information booklet consists mainly of guidelines for relatives rather than for patients. Contrast Principle 12 of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991, but note the General Limitation Clause.

consent.²²⁷ There are restrictions on patients' correspondence,²²⁸ which might be challenged as violating the right to freedom of expression under the Constitution²²⁹ or the right to respect for correspondence under the European Convention.²³⁰ Queries might also be raised about the restrictions on phone calls and visits.²³¹ Patients in the CMH have a right to marry under the European Convention²³² but it is not clear whether they have a right to sexual relations.²³³ Patients may apply for access to

²²⁷ 'Administering an injection without a patient's consent', CMH. Contrast the detailed rules on informed consent in Principle 11 of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991, but note the General Limitation Clause.

²²⁸ Policy on Patients' Letters, CMH.

²²⁹ In the context of *prisoners'* correspondence, see *State (Gallagher) v Governor of Portlaoise Prison*, *Irish Times*, 7 March 1978; Raymond Byrne, Gerard Hogan, & Gerard & McDermott Paul, *Prisoners' Rights: A Study in Irish Prison Law* (Co-op Books, Dublin, 1981), pp.86-7.

²³⁰ See Byrne et al, loc.cit. Note also that while article 6 of the Council of Europe Recommendation No. R (83) 2 on the legal protection of persons suffering from mental disorders placed as involuntary patients, 1983, refers to the right of a patient to send any letter unopened, this does not apply to patients detained pursuant to criminal proceedings - art. 1.1. See also Principle 13.1(c) of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991.

²³¹ CMH Policy on Patients' Telephone Calls and CMH Policy in Relation to Visiting Patients.

²³² See *Hamer v UK* (1981) 4 EHRR 139, upholding a right to marry for prisoners under Article 12, which would presumably also apply to mental patients.

²³³ In *X & Y v Switzerland* (1979) 13 D & R 242, the Commission rejected a complaint by two fellow prisoners denied sexual relations. The Irish courts reached a similar conclusion in *Murray and Murray v Ireland* [1985] IR 733 (HC); [1991] ILRM 465 (SC). But it is arguable that a different regime ought to apply to mental patients - see Oliver Thorold, 'Implications of the European Convention on Human Rights for United Kingdom Mental Health Legislation' [1996] Eur. Hum. Rights L. Rev. 619 at 635.

their medical records under the Freedom of Information Act 1997²³⁴ and access to electronic data under the Data Protection Act 1988.²³⁵

A case could arise where a patient in the CMH claimed that he or she was not receiving adequate treatment. In international human rights instruments, a definitive entitlement to treatment has not been established for people with mental illness²³⁶ but there are various articles which could be cited in support of such a claim.²³⁷

Having discussed the existing rights of mental patients, it ought to be noted that, apart from improving those existing rights, consideration ought to be given to adding new rights in the future. For example, Ashworth has suggested that a new right of 'protection of the vulnerable' should be created, to apply to the young and the

²³⁴ Maeve McDonagh, *Freedom of Information Law in Ireland* (Round Hall Sweet & Maxwell, Dublin, 1998). See also Principle 19 of UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991.

²³⁵ Robert Clark, *Data Protection Law in Ireland* (Round Hall Press, Dublin, 1989).

²³⁶ Gostin has commented that it is ironic that a human right may be fashioned from the concept of freedom from treatment, but not from that of access to adequate treatment and care - Larry Gostin, 'Human Rights in Mental Health' in Martin Roth and Robert Bluglass (eds.), *Psychiatry, Human Rights and the Law* (Cambridge University Press, 1985), 148 at 154.

²³⁷ Art. 5 of Council of Europe Recommendation No. R (83) 2 on the legal protection of persons suffering from mental disorders placed as involuntary patients, 1983; Principle 1 of UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991. See Gerard Quinn, 'Civil Commitment and the Right to Treatment under the European Convention on Human Rights' (1992) 5 Harv. Hum.R.J. 1

mentally disordered.²³⁸

Temporary Release

The 1821 Act provides that once the court has ordered the person to be kept in strict custody, it shall be lawful for the Lord Lieutenant to give the like order for the safe custody and care of the person as the Lord Lieutenant is by the 1821 Act enabled to give in the cases of persons acquitted on the ground of insanity.²³⁹ Section 16 of the 1821 Act had enabled the Lord Lieutenant to give such order for the safe custody and care of such person in such place and such manner as seemed fit, but s.16 was repealed by the Trial of Lunatics Act 1883. It appears that the 1821 Act is interpreted as permitting the Minister for Justice to grant temporary release to persons found unfit to plead if the court order specified the place of detention.²⁴⁰

However, if the court order does not specify a place of detention, then the Minister will make an order under s.8 of the Central Criminal Lunatic Asylum (Ireland) Act 1845²⁴¹ detaining the person in the CMH. In that situation, temporary release may be

²³⁸ Andrew Ashworth, *The Criminal Process: An Evaluative Study*, 2nd ed. (Oxford University Press, 1998), pp.58-60. Ashworth believes that the young and the mentally disordered should have a right to special protection, perhaps in the form of extra support and advice, perhaps in the form of special procedural provisions.

²³⁹ s.17 Lunacy (Ireland) Act 1821 (1 & 2 Geo. 4, c.33).

²⁴⁰ Justice FOI s.16 book, p.92.

²⁴¹ 8 & 9 Vic., c.107

granted under s.3 of the Criminal Justice Act 1960.²⁴² Section 3 only permits such temporary release if, in the opinion of the Resident Physician and Governor of the CMH, the person is not dangerous to himself, herself or others.²⁴³

The Justice FOI s.16 Book states that a number of factors are taken into account when considering temporary release, including the medical recommendation, form of current medication (“i.e. depot or self-administering”), security issues for the safety of the offender and public safety.²⁴⁴

The Fianna Fáil Bill of 1996 allows temporary release by the chief medical officer of a designated centre with the consent of the Minister for Justice.²⁴⁵

Transfers from the CMH to another hospital or hostel

The 1821 Act is interpreted as permitting the Minister for Justice to transfer persons found unfit to plead to another hospital or hostel.²⁴⁶ The Fianna Fáil Bill of 1996

²⁴² Justice FOI s.16 Book, p.92. Section 3 of the 1960 Act applies where the person is detained “by warrant, order or direction of the Government or the Minister.”

²⁴³ s.3(2) Criminal Justice Act 1960.

²⁴⁴ Justice FOI s.16 Book, p.92.

²⁴⁵ Criminal Justice (Mental Disorder) Bill 1996, s.8.

²⁴⁶ Justice FOI s.16 Book, p.92. This interpretation may arise partially from s.18 of the 1821 Act, although a literal reading of that section would mean that a person found unfit for trial must be detained in the district mental hospital for his or her county. This was before the establishment of the

allows transfers between designated centres with the consent of the Minister for Health.²⁴⁷

Remission for Trial on Recovery

In Ireland, if a person is found unfit for trial, he or she is rarely remitted for trial on recovery.²⁴⁸ This means that such people rarely get the opportunity either to be fully acquitted by the court or to receive a short sentence which would be more appropriate to the crime committed than the length of detention in a mental hospital. By way of contrast, in Canada there are regular reviews of the cases of all those found unfit for trial and, if it is found that the person is fit for trial, he or she is remitted back to court for trial.²⁴⁹ In addition, within two years of a verdict of unfit to stand trial, the court must hold an inquiry to determine whether sufficient evidence can be adduced at that time to put the accused on trial. The court must acquit the accused if the Crown is unable to establish that a prima facie case exists.²⁵⁰

Full Release

As stated earlier, Section 17 of the Lunacy (Ireland) Act 1821 refers to detention until

CMH by the 1845 Act.

²⁴⁷ Criminal Justice (Mental Disorder) Bill 1996, s.8.

²⁴⁸ Statistics concerning 24 Irish cases of unfitness to plead show only one case where the defendant was said to have become fit to plead - see below, p.99.

²⁴⁹ A.J.C. O'Marra, 'Hadfield to Swain: The Criminal Code Amendments Dealing with the Mentally Disordered Accused' (1993) 36 *Crim.LQ* 49 at 87-8.

²⁵⁰ Canadian Criminal Code, s.672.33; O'Marra, *op.cit.*, p.91.

the pleasure of the Lord Lieutenant shall be known, and so many of the arguments which were made in the well-known Irish cases concerning insanity acquittals²⁵¹ could also be made in cases of unfitness to plead cases, but do not appear to have been raised.

As will be discussed in chapter 4, the procedure whereby insanity acquittees may apply to the executive for their release would appear to conflict with Article 5(4) of the European Convention on Human Rights. By extension, if such a procedure were to be applied to those found unfit for trial, it would breach the Convention.²⁵²

The Henchy Committee proposed the establishment of a Mental Care Review Body to which a person could apply for review of his or her detention.²⁵³ If the court, on consideration of the report of the review body, was of the opinion that the person should not be further detained, it could make such order in relation to the custody or release of the person as it thought proper. Hospitals would be required to keep the review body informed of every person detained under the Bill and every new admission. If a medical officer, having consulted the review body, believed that the

²⁵¹ *Application of Ellis* [1990] 2 IR 291; *Application of Neilan* [1990] 2 IR 267; *Application of Gallagher (No.1)* [1991] 1 IR 31. See Chapter 3 below.

²⁵² The Justice s.16 FOI Book states at p.92 that there is no advisory committee procedure in cases of unfitness to plead as full release cannot be granted by the Minister. The person must return to court when he or she recovers sufficiently to answer the charges and the decision to return the person to court is taken by the medical authorities in the CMH.

²⁵³ Henchy Committee draft Bill, ss.20-23. The person could apply for review on initial detention and thereafter at annual intervals or at such earlier time as the appropriate court might allow for good cause.

person, although still unfit to plead, was no longer in need of in-patient treatment, the officer would forthwith inform the court. The court would then make such order as it thought proper for the patient's disposition. Options available would include discharge subject to conditions for out-patient treatment or supervision, unconditional discharge, or further detention in a designated centre.²⁵⁴ But if the officer believed that the patient was no longer unfit to plead, the officer would inform the court and the court would order the patient to be brought before it to be dealt with in accordance with law.²⁵⁵

The 1996 Bill did not propose the establishment of a review body, but would permit a person found unfit to plead to apply to the High Court for a review of his or her detention. If the High Court determined that the person was still unfit to plead, it could make such order as it thought proper for the person's disposal, including discharge with or without conditions concerning out-patient treatment or supervision or both.²⁵⁶ If the person was no longer unfit to plead, the court would deal with the case as it thought proper.²⁵⁷ The Minister for Justice and the DPP would be entitled to be heard or represented at these proceedings.²⁵⁸ A medical officer would also be obliged to notify the High Court if the patient was no longer unfit to plead, in need of

²⁵⁴ Henchy Committee draft Bill, s.25(4).

²⁵⁵ *Ibid.*, s.25(3). The Review Body would not need to be consulted under this provision.

²⁵⁶ Criminal Justice (Mental Disorder) Bill 1996, s.7(4)(b).

²⁵⁷ *Ibid.*, s.7(4)(a).

²⁵⁸ *Ibid.*, s.7(6).

in-patient treatment or dangerous.²⁵⁹

While the White Paper proposes the establishment of a Mental Health Review Board, it does not propose that this Board would review the detention of those found unfit to plead.²⁶⁰ It refers to the fact that legislation is in preparation in the Department of Justice.²⁶¹

FITNESS FOR TRIAL IN THE DISTRICT COURT

As virtually all criminal proceedings are commenced in the District Court,²⁶² its jurisdiction as regards the mental fitness of the defendant is of great importance. It was stated in *State (C.) v Minister for Justice*²⁶³ that the District Court must not continue the proceedings if the defendant is unfit to plead, but it was not clear what would happen next. In the *O'Connor* case,²⁶⁴ the High Court failed to clarify this question, but the Supreme Court put a radical gloss on *C.* and held that the person must be released from custody if found unfit to plead in the District Court. The District Court also has the power to order extended remands in cases of illness, and

²⁵⁹ *Ibid.*, s.7(1)-(2).

²⁶⁰ See full list of functions of proposed Board in White Paper, para. 5.22.

²⁶¹ White Paper, paras. 7.25-6.

²⁶² Apart from cases commenced in the Special Criminal Court

²⁶³ [1967] IR 106.

²⁶⁴ *O'Connor v Judges of Dublin Metropolitan District* [1992] 1 IR 387 (HC); *O'C. v Judges of Dublin Metropolitan District* [1994] 3 IR 246 (SC.)

cases on the use of this power in cases of mental disorder will be discussed.

Procedure in the District Court

If the person is already detained in a mental hospital and is charged with an indictable offence before a judge of the District Court sitting in the hospital, then the curious procedure laid down in section 207 of the Mental Treatment Act 1945 might be invoked²⁶⁵, although there are doubts about its constitutionality. Even if the person is not detained in a mental hospital at the time of his or her first appearance before the District Court, section 207 might be used on a subsequent occasion if the person is at that time detained in the hospital.²⁶⁶

Another procedure which may apply in the District Court is the long remand for medical reasons, provided for by the Criminal Procedure Act 1967.²⁶⁷ Up until 1967, it was also possible for the Minister for Justice to transfer a person who had been remanded by a District Justice for further examination but was certified as insane to a mental hospital and detain the person there until he or she was certified as sane.²⁶⁸ The net result of this was very similar to a finding of unfitness for trial, even though the decision had not been made by a judge or jury. However, the importance of this

²⁶⁵ See the full treatment of section 207 in Chapter 6 below. While the wording of s.207 refers to a person who is *prima facie* “unfit to plead”, in practice it appears that this is interpreted as equivalent to unfitness for trial.

²⁶⁶ See *State (M.) v O'Brien* [1972] IR 169 at 175-6.

²⁶⁷ Section 24(4) Criminal Procedure Act 1967, discussed fully at pp.92ff. below.

²⁶⁸ Section 13, Lunatic Asylums (Ireland) Act 1875; chapter 5 below.

power has been diminished by the main finding in the *C.* case in 1967, which means that while the person may be transferred to a mental hospital, he or she must still be brought before the District Court on each remand date.²⁶⁹

In many cases, none of the above procedures will apply and up to this year no other special statutory provision enabling the District Court to decide on fitness for trial existed.²⁷⁰ The lack of such a statutory provision in England was lamented by Walker in 1968:

What is open to question is whether the present procedure for identifying [cases of unfitness for trial] is the best possible. Certainly the Act of 1964 has made it about as flexible as could be expected of any transaction in our higher courts. One might ask perhaps, why magistrates should not be allowed to consider the issue at the stage of committal for trial, especially if the defence is willing that they should do so. To argue that only a jury, assisted by a judge, can be entrusted with this task is not only implausible but also unrealistic; for ever since 1840 it has been possible for doctors, and especially those attached to prisons, to prevent altogether the appearance of the accused in court, at least until his condition improves.²⁷¹

²⁶⁹ *State (C.) v Minister for Justice* [1967] IR 106; chapter 5 below.

²⁷⁰ Section 17 of the Lunacy (Ireland) Act 1821 refers only to “any person indicted in Ireland for any offence.” Indictments take place after the accused has been sent forward for trial in a court other than the District Court - Ryan & Magee, p.243. See also Criminal Justice (Administration) Act 1924. If a person consents to summary trial of an indictable offence in the District Court, no indictment takes place. Walsh J. confirms in *State (C.) v Minister for Justice* [1967] IR 106 at 120 that no statutory provision exists for fitness for trial to be determined by a jury in the District Court. He adds that there is no such provision in the case of the Circuit Court when dealing with the hearing of criminal appeals from the District Court. See now the Criminal Justice Act 1999; below, p.91. See also *Metropolitan Stipendiary Magistrate, ex p. Aniifowosi* (1985) JP 748; Casey & Craven, p.446.

²⁷¹ Walker, vol.1, p.239. His reference to “the Act of 1964” concerns the Criminal Procedure (Insanity) Act 1964 and when he refers to doctors’ powers since 1840, this concerns the Insane Prisoners Act 1840 (3 & 4 Vict., c.54), whereby prisoners awaiting trial could be transferred to an asylum by the Home Secretary’s warrant, given on a certificate of insanity signed by

However, English magistrates have the power to impose a hospital order without conviction²⁷² which is a different way of achieving the same result as a finding of unfitness to plead.²⁷³

It has been argued that English magistrates have the power to determine fitness to plead at common law²⁷⁴ but this view has been contested elsewhere, the recommendation being that in such a case the defendant should be committed for trial to the Crown Court which could then deal with the matter.²⁷⁵ This debate may now need to be reconsidered in light of the Divisional Court decision that the insanity defence may be raised before magistrates.²⁷⁶

If the case concerns an indictable offence, and a preliminary examination takes place in the District Court, a useful precedent which may be cited is *R. v Peacock*²⁷⁷, in which it was held that a defendant may argue that he or she was not in a sane state of

two justices of the peace and two doctors. These powers were later modified by the Mental Health Act 1959 and ss.47-49 of the Mental Health Act 1983.

²⁷² s.37(3) Mental Health Act 1983

²⁷³ Martin Wasik, 'Hospital Orders without Trial' (1983) 147 JPN 211; Stephen White, 'Insanity Defences and Magistrates' Courts' [1991] Crim LR 501; Alec Samuels, 'Hospital Orders without Conviction' [1995] Crim. LR 220; Hoggett, p.110.

²⁷⁴ Billy Strachan, 'Fitness to Plead' (1969) 133 JPN 338

²⁷⁵ See Practical Point 4 (1971) 135 JPN 332; letter from Billy Strachan and reply from JPN editors (1971) 135 JPN 532; Practical Point 1 (1980) 144 JPN 576.

²⁷⁶ *R v Horseferry Magistrates' Court, ex parte K* [1997] QB 23. See below, chapter 4.

²⁷⁷ (1870) 12 Cox C.C. 21

mind at the time depositions were taken and therefore the defendant or his or her counsel did not have a “full opportunity” to cross-examine witnesses.²⁷⁸ While the precedent is not very strong²⁷⁹, its significance has been increased by the judgment of Walsh J. in the *C.* case.²⁸⁰ The facts of that case are described more fully in chapter 5 below. For present purposes, it is sufficient to note that *C.* had been charged with indictable offences and while on remand in custody in the course of the preliminary examination, he had been transferred to a mental hospital by the Minister for Justice. The Supreme Court found part of section 13 of the Lunatic Asylums (Ireland) Act 1875 to be an unconstitutional interference with the judicial power. The most comprehensive judgment was that of Walsh J., who referred with approval to the *Peacock* case.²⁸¹ His primary purpose in referring to that case was to note that even though Peacock had been removed to a mental hospital by the Secretary of State, when the time arrived for his trial a writ of habeas corpus was granted and he was then tried by the court. Walsh J. used these facts to support his view that it is for a court to decide if the defendant is fit to be tried or to be subjected to a preliminary

²⁷⁸ Section 17, Indictable Offences Act 1848, 11 & 12 Vic., c.42. See also s.17 Indictable Offences (Ireland) Act 1849, 12 & 13 Vic., c.69.

²⁷⁹ No argument about Peacock’s mental fitness was made at the time the deposition was taken before a magistrate. The deposition had been taken from a man who had allegedly been shot by Peacock and who had since died of his injuries. At Peacock’s later trial at the assizes, his counsel then objected to the deposition being read, but while the report states that Brett J. held as stated above, it is unclear whether the deposition was ultimately admitted as evidence. It is noted however that the jury eventually found Peacock to be insane and not in a fit state to take his trial.

²⁸⁰ *State (C.) v Minister for Justice* [1967] IR 106.

²⁸¹ [1967] IR 106 at 125-6.

examination and that no other procedure can affect the matter.²⁸² But he also referred with approval to the point taken in the *Peacock* case concerning the possibility that the defendant did not have “full opportunity” to cross-examine witnesses as he was not in a sane state of mind. Partly through a consideration of the inherent nature of a preliminary examination, and partly through reliance on the *Peacock* case, Walsh J. concluded that a District Justice could not continue with a preliminary examination (or a summary trial) if the defendant was mentally unfit:

There have been many cases of persons, who have been returned for trial, being found unfit to plead upon their appearance for trial on indictment. It may well have been that these persons were already in that condition while the preliminary examination was being conducted, but that the point was not raised. It appears to me that if a District Justice, whether conducting a preliminary investigation or the summary trial of any criminal matter, comes to the conclusion upon proper evidence that the accused person is by reason of unsoundness of mind in a condition which may be described shortly as “unfit to plead”, he cannot proceed with the hearing of the matter while the accused is in that condition and that if he did so, in a case where the evidence was such that no other reasonable view was open save that the accused was unfit to plead, the proceedings would be quashed. It is furthermore quite clear that if the Justice is satisfied that the accused person is in that condition, then the accused is not in a condition to consent to the proceedings going on or to consent to the summary trial of an indictable offence under the provisions of the Criminal Justice Act, 1951.²⁸³

While it is clear from Walsh J’s judgment that the judge of the District Court cannot continue with the preliminary examination in these circumstances, it is not entirely clear what happens next.²⁸⁴ Walsh J emphasises that the decision is up to the court

²⁸² [1967] IR 106 at 125.

²⁸³ [1967] IR 106 at 120-1. Brendan O’Donnell was found fit to plead at District Court level, presumably in reliance on the *C.* guidelines - *Irish Times*, 20 August 1994.

²⁸⁴ Similarly, see Ó Dálaigh CJ at 115, where he stated that “the District Justice must stop short if he is satisfied that the accused is insane”, but did not

and that the defendant must appear before the judge again on the date of any order for remand either for trial, preliminary investigation or further remand as the judge might direct.²⁸⁵ He also refers to the power of the judge to remand the person for an extended period in his or her absence if through illness the person is unable to attend²⁸⁶ and to the possibility that the State might withdraw the charges or offer no further evidence.²⁸⁷

But if none of these eventualities occurred, it is conceivable that Walsh J's judgment would mean that the person would be brought to court every eight days, found unfit to be subjected to preliminary examination, and continuously remanded for further successive periods of eight days.²⁸⁸ If such a case were to arise, the person could possibly challenge any continuous remands in custody on the grounds that they were an unconstitutional interference with his or her constitutional right to liberty.

A further issue which arises at preliminary examination stage is the question of

explain what would happen subsequently.

²⁸⁵ [1967] IR 106 at 124.

²⁸⁶ District Court Rules 1948 and s.24(4) Criminal Procedure Act 1967. See pp92 ff. below.

²⁸⁷ [1967] IR 106 at 124. Ó Dálaigh CJ, in making the same point, adds that if no evidence is offered by the State, this leaves the way open for a renewal of the charges at a later date - [1967] IR 106 at 116.

²⁸⁸ Interestingly, if the Supreme Court decision in *State (O.) v O'Brien (Ballinasloe case)* [1971] IR 42 were being applied correctly the same might be happening in all cases taken under section 207 of the Mental Treatment Act 1945.) However, this aspect of that decision has been disregarded in all subsequent cases - see chapter 3 below.

remanding the defendant on bail. In *R. v Green-Emmott*²⁸⁹, it was held that a person who has been certified as insane cannot enter into a binding recognisance. Walsh J referred to this precedent in the *C.* case and concluded that if a District Justice decided that the person was unfit for trial, the Justice would have no alternative but to remand the person in custody as he or she would not be able to enter into a recognisance.²⁹⁰ A constitutional challenge to this could certainly be envisaged, with reference to the *O'Callaghan* and *Ryan* cases.²⁹¹ It would also be appropriate to deal with this problem in any subsequent legislative change in this area, perhaps by abolishing the mandatory recognisance in cases where the defendant is mentally unfit.²⁹²

Walsh J's judgment in the *C.* case also applies to summary trials in the District Court, whether of summary or indictable offences. Walsh J. stated that the District Justice could not proceed with the hearing of the matter if the defendant was mentally unfit. He added that the defendant was not in a condition to consent to the proceedings going on or to consent to the summary trial of an indictable offence under the Criminal Justice Act 1951.²⁹³ Again, it is not entirely clear what should happen next.

²⁸⁹ (1931) 22 Cr. App. R. 183; 29 Cox C.C. 280

²⁹⁰ [1967] IR 106 at 126.

²⁹¹ *People (Attorney General) v O'Callaghan* [1966] IR 501; *Ryan v DPP* [1989] IR 399.

²⁹² The Henchy Committee proposed adjournments of up to six months if a person was unable by reason of mental disorder to enter into a recognisance - draft Bill, s.37.

²⁹³ [1967] IR 106 at 120.

The State might withdraw the charges or the person might be remanded, either for successive periods of eight days or for an extended period in his or her absence. In the case of such remands, a constitutional challenge might be brought on liberty grounds. Neither Walsh J nor Ó Dálaigh CJ refer to the possibility that the defendant might be released by the District Court if unfit to be tried in the absence of any special statutory provision to deal with such cases.

The importance of the guidelines laid down in the *C.* case was underlined by the *O'Connor* decision in 1992.²⁹⁴ *O'Connor* was charged with rape and indecent assault and had been remanded on bail in the District Court a number of times. He was granted legal aid and a book of evidence was served on him. It was claimed that due to his mental condition his solicitor and counsel were unable to take proper instructions from him. Psychiatric and psychological reports were obtained²⁹⁵ and the Judge of the District Court then proposed to hold an inquiry into *O'Connor's* fitness to plead. *O'Connor's* lawyers opposed this, but after further legal argument another Judge still proposed to go ahead with the inquiry. *O'Connor* then applied for an order of prohibition in the High Court against the Judges of the District Court to prohibit them from holding an inquiry into whether he was fit to plead. Both the High Court and Supreme Court refused to prohibit the inquiry, relying heavily on the *C.* case.

²⁹⁴ *O'Connor v Judges of Dublin Metropolitan District* [1992] 1 IR 387 (High Court); *O'C. v Judges of Dublin Metropolitan District* [1994] 3 IR 246 (Supreme Court, 1992).

²⁹⁵ Apparently these reports stated that *O'Connor* was unlikely ever to be fit to plead - [1994] 3 IR 246 at 249.

The applicant's counsel argued²⁹⁶ that the only forum for an inquiry into whether O'Connor was unfit to plead was the court of trial, which in this case would be the Central Criminal Court, and that the applicant was entitled to have the evidence supporting the charges put before a court of trial so that if the evidence was insufficient²⁹⁷ he could be cleared of the charges and have his good name vindicated. Counsel referred to section 4 of the relevant English statute, the Criminal Procedure (Insanity) Act 1964²⁹⁸ and argued that the procedure laid down in that section should be grafted on to the provisions of our Criminal Procedure Act 1967. Counsel submitted that an accused person had a constitutional right to a trial and a trial as early as possible and that as things stood if the applicant was found unfit to plead he would eventually be remitted to the CMH and would never get a trial. It was argued that this was all a gloss on the *C.* case and did not impinge on the principles laid down in that case. O'Hanlon J's summary of counsel's arguments in the High Court contained the following important sentence:

It is submitted that the alternative course, which is normally followed, and which may lead to a preliminary finding of unfitness to plead, followed by an order for the detention of the accused in a suitable institution until a finding of fitness to plead can be made in his favour, may not respect the constitutional rights of the accused to have his good name vindicated at the earliest possible time, and to have his right to liberty of the person defended in an appropriate

²⁹⁶ [1992] 1 IR 387 at 390-3 (HC); [1994] 3 IR 246 at 248-9 (SC).

²⁹⁷ It was argued that the evidence in support of the prosecution was palpably weak in character.

²⁹⁸ That section allowed a court to postpone consideration of the question of fitness to be tried until any time up to the opening of the case for the defence. Postponement is also allowed under the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. Counsel also cited *R v Roberts* [1954] 2 QB 329, *R v Webb* [1969] 2 QB 178 and *R v Burles* [1970] 2 QB 191.

manner.²⁹⁹

Counsel for the respondents submitted that the District Court was entitled to inquire into O'Connor's fitness to plead because of the judgments in the *C.* case.³⁰⁰

At High Court level, O'Hanlon J. was not bound by the guidelines regarding fitness to plead laid down by the Supreme Court in the *C.* case because, as he rightly pointed out, these guidelines were obiter dicta. However, having quoted extensively from those guidelines, he decided that they

should be followed unless and until the matter is again reviewed by the Supreme Court or dealt with as happened in the UK by way of amending legislation.³⁰¹

It is disappointing that O'Hanlon J. does not see fit to engage in even a short reconsideration of the guidelines in the *C.* case, or address more directly the various arguments made by counsel concerning postponement of consideration of the issue of fitness to plead.

Having decided to follow the *C.* guidelines, O'Hanlon J. inevitably refused to prohibit the inquiry into O'Connor's fitness to plead, but he failed to confront directly the problems which were bound to arise with the application of the guidelines. He said that either the District Court would resume its investigation into the issue of fitness to plead or the State might discontinue the prosecution for the time being (and

²⁹⁹ [1992] 1 IR 387 at 391

³⁰⁰ [1992] 1 IR 387 at 393 (HC); [1994] 3 IR 246 at 249-50 (SC).

³⁰¹ [1992] 1 IR 387 at 397.

perhaps reopen it if the applicant's mental condition improved.) He did not clarify what would happen if the State did not withdraw the charges and O'Connor was found unfit to plead, apart from stating that O'Connor might not be released on bail if he was not fit to enter into a recognisance. He also stated that the case of *State (Caseley) v Daly and O'Sullivan*³⁰², while not directly in point, threw further light on the procedure to be followed in dealing with persons believed to be of unsound mind, even though a close reading of that decision reveals that it is poorly reasoned and oddly structured.³⁰³

It is likely that O'Hanlon J. believed that his extensive quotations from the *C.* case were sufficient to clarify what should happen if O'Connor were found unfit to plead. The quotations which he chooses appear to indicate that if O'Connor were unfit to plead he should be remanded in his absence under the District Court Rules and s.24(4) of the Criminal Procedure Act 1967.³⁰⁴ As is noted below at page 92, these extended remands are problematic for various reasons. Furthermore, there is a danger that O'Hanlon J's summary of the arguments of counsel, referred to earlier, would be taken as an accurate account of the procedure to be followed in such cases.³⁰⁵

³⁰² Gannon J., High Court, 19 Feb. 1979

³⁰³ See below, chapter 5.

³⁰⁴ [1992] 1 IR 387 at 395-6, quoting from [1967] IR 106 at 124.

³⁰⁵ O'Hanlon J's summary of counsel's arguments fails to state that the procedure would be governed by s.24(4) of the Criminal Procedure Act 1967, does not mention the word "remand", does not clarify that the remand must take place in the absence of the defendant, and fails to distinguish between inability by reason of illness to appear before a court and unfitness to plead.

At Supreme Court level, Finlay CJ delivered a three page *ex tempore* judgment³⁰⁶ in which he said he was satisfied that O’Hanlon J. was correct in the view which he took of the matter and in the decision which he reached. Finlay CJ believed that the *C.* case was correctly decided and that it was not possible to put the gloss on it which counsel for the applicant had urged. A preliminary examination was clearly a judicial exercise³⁰⁷ and it would be constitutionally quite impermissible that such a proceeding could go forward in circumstances where a person through no fault of his or her own was incapable of following the proceedings and of instructing lawyers. Finlay CJ continued:

That constitutional impermissibility of such a proceeding outweighs all considerations that have been put forward in my view as to possible benefits (and they are only possible there being alternative disadvantages also a possibility), arising from the postponement of the issue.³⁰⁸

Counsel had asked the Supreme Court to be more specific about the procedure to be followed if the appeal against O’Hanlon J’s decision were dismissed and so Finlay CJ stated that the District Court should now decide on oral evidence whether O’Connor was fit to plead.³⁰⁹ If the court decided that the applicant was so fit, the preliminary

³⁰⁶ [1994] 3 IR 246 at 250-2. The four other Judges agreed with Finlay CJ.

³⁰⁷ Finlay CJ cited the *C.* case [1967] IR 106 and *Costello v DPP and AG* [1984] ILRM 413.

³⁰⁸ [1994] 3 IR 246 at 252.

³⁰⁹ Finlay CJ stated the test as follows: “whether [the Judge] is satisfied that the accused man is fit notwithstanding his mental condition to understand and follow the proceedings in the District Court and to give real and valid instructions to his solicitor and counsel in regard to their defence of him in these proceedings” - [1994] 3 IR 246 at 252.

examination would continue in the ordinary way. If the conclusion was that he was not so fit the Court “must decline to enter upon the preliminary examination and should make no further order of any description with regard to the further attendance of the accused or with regard to his custody.”³¹⁰

As with so many decisions of the courts, this Supreme Court judgment is too short and does not deal comprehensively with the issues raised. The arguments of O'Connor's counsel are quickly summarised and then summarily rejected. While Finlay CJ clearly lays down the procedure to be followed when the matter is dealt with by the District Court, he gives the impression that these instructions are consistent with what was decided by O'Hanlon J. in the instant case and by the Supreme Court in the *C.* case. But O'Hanlon J. had not said that if the applicant was found unfit to plead no further order should be made with regard to him. In fact, he seemed to say that the applicant should in these circumstances be remanded for an extended period under the Criminal Procedure Act 1967 and that since he might not be fit to enter into a recognisance, it might not be possible to grant bail. And, if reference is made back to the Supreme Court decision in the *C.* case, it will be remembered that neither Walsh J. nor Ó Dálaigh CJ referred to the possibility that the defendant might be released in these circumstances.

Having refused to put the gloss on the *C.* case which was requested by O'Connor's counsel, Finlay CJ then put a new gloss on it which could have far-reaching

³¹⁰ Ibid., loc.cit.

consequences. By stating that in these circumstances the District Court should make no further order, he is saying that persons who are found unfit to plead in the District Court should not be remanded on the charge, whether on bail or in custody. This solution is quite innovative in that it overcomes some of the problems with the few scraps of legislation which do apply in cases of unfitness to plead in the District Court. The court need not twist the meaning of s.24(4) of the Criminal Procedure Act 1967 so that it can be used to detain such persons and need not follow the embarrassing course in a case where a person is unfit to enter into a recognisance of refusing that person bail even though he or she deserves it. An objection may be raised by reference to the following passage in the Ballinasloe case:

[Section 207 of the Mental Treatment Act 1945] does not require the Justice - nor could it - to drop the charge. A finding that the patient would, if placed on trial, be unfit to plead means, in effect, that the patient is unfit to make a proper defence in the District Court. In natural justice the court must then stop short; but the charge remains undisposed of and the appropriate order is to direct a remand.³¹¹

Admittedly, this passage has been ignored in all subsequent cases on s.207 of the 1945 Act, but it remains a clear statement by the Supreme Court which ought not to be ignored without good reason and could be applied by analogy to other cases (not coming within the terms of s.207) where a person is found unfit to plead in the District Court. It might be argued that it is to the defendant's benefit that there is no remand in such cases as the defendant is not detained and the State might decide not to re-enter the charge at any future time. But an alternative view is that by not remanding the defendant and ultimately bringing the case to a final resolution, the courts allow the charge to hang over the defendant for longer than is necessary,

perhaps for the rest of the defendant's life.³¹²

There is a practical reason for the difference in approach of Ó Dálaigh CJ in the Ballinasloe case and Finlay CJ in *O'Connor*. In the Ballinasloe case, O. was in custody under s.207 of the Mental Treatment Act 1945 and so it would be more beneficial to keep his case alive to try to ensure that his custody was no longer that necessary. However, if Finlay CJ had decided that the District Court was obliged to remand O'Connor on the charge, his situation would have disimproved considerably. It is therefore possible to read Finlay CJ's judgment in the O'Connor case as a victory for mental patients' constitutional right to liberty, along the lines of Costello P's later decision in the *R.T.* case.³¹³

The *O'Connor* case was recently followed in *DPP (Murphy) v P.T.*,³¹⁴ a case where a fifteen year old boy was charged in the District Court with larceny of a sports jacket. The boy was placed in the care of the Eastern Health Board and the judge adjourned the proceedings to chambers to consider his medical and psychiatric condition.³¹⁵ Documents appear to have shown a preliminary diagnosis of Asperger's Syndrome. The judge later decided to inquire into his fitness to plead of his own initiative. The

³¹¹ *State (O.) v O'Brien (Ballinasloe Case)* [1971] IR 42 at 49; below, chapter 3.

³¹² See the arguments of O'Connor's counsel as summarised by Finlay CJ - [1994] 3 IR 246 at 251.

³¹³ *R.T. v Director of CMH* [1995] 2 IR 65; below, chapter 3.

³¹⁴ [1998] 1 ILRM 233

³¹⁵ [1998] 1 ILRM 344 at 350. This adjournment was with the consent of the parties. The judge stated that he did not wish the accused to be present while his medical and psychiatric condition was discussed.

High Court judgment on a case stated primarily revolves around the question of whether the District Court was also entitled to embark on an enquiry as to the appropriateness of the care arrangements for the boy³¹⁶ but in addition it confirms that the District Court was under a duty to enquire into P.T.'s fitness to plead. McGuinness J. said that if the District Court ultimately found that P.T. was not fit to plead, the District Court must decline to enter upon the criminal proceedings and, in accordance with the *O'Connor* decision, should make no other order of any description.

The Henchy Committee proposed that the District Court should have the power to determine fitness to plead.³¹⁷ If it appeared to the court that the defendant might have a mental disorder, the court could arrange a medical examination.³¹⁸ If the medical report stated that the defendant was unfit to plead, then in a summary case the court could determine fitness to plead.³¹⁹ It is remarkable that the Committee made the court's power dependent on the medical report, as this requirement would interfere with the usual principles that fitness to plead may be determined on the court's initiative and that, while medical evidence is of assistance to courts, courts are free to reach different conclusions from the medical witnesses. This provision, if enacted,

³¹⁶ McGuinness J. in the High Court held that the District Court was not so entitled.

³¹⁷ The Committee appears to have overlooked Walsh J's *obiter dicta* in the *C.* case and stated in its Introduction at para. 5 that "as the law now stands, the District Court has no jurisdiction to try an issue of fitness to plead."

³¹⁸ Henchy Committee draft Bill, s.10.

³¹⁹ *Ibid.*, s.12.

might be open to constitutional challenge on liberty or separation of powers grounds.

In a summary case, the court would be obliged to hear oral medical evidence and if the court found the defendant unfit to plead, then there would be two consequences: the court would be obliged to adjourn the proceedings until further order, and *might* commit the defendant to a designated centre. Committal would be dependent on oral medical evidence that the person was in need of in-patient treatment in a designated centre. Again, it is remarkable that committal would be dependent on the opinion of the medical witness. This differs significantly from the requirement in English legislation that oral evidence of two medical witnesses must be heard before a defendant can be found unfit to plead.³²⁰

In the case of an indictable offence not being tried summarily, if the medical report stated that the defendant was unfit to plead, the District Court would be obliged to send the defendant to a higher court for a trial on the question of unfitness to plead.³²¹ If the higher court determined that the defendant was unfit to plead, the court would notify the District Court of this.³²² It was presumably intended that the District Court would then deal with the matter,³²³ although from a drafting point of view, the Bill

³²⁰ The difference is that the Henchy Committee Bill does not allow committal to designated centre unless the opinion of the medical witness is to this effect.

³²¹ Henchy Committee draft Bill, s.12(2).

³²² *Ibid.*, s.16(2)(b).

³²³ See Explanatory Note, Henchy Committee Report, p.18.

does not actually state this.³²⁴

The Fianna Fáil Bill of 1996 also specifically allows the District Court to try an issue of fitness to plead in a summary case.³²⁵ In the case of an indictable offence, if the issue of fitness to plead arose, the Bill states that if there is not a sufficient case to put the defendant on trial the court must discharge the defendant, but if there is a sufficient case, the court must send the defendant forward for trial without determining the issue of fitness to plead.³²⁶ The higher court may then deal with the question of fitness to plead if it arises.³²⁷ This appears to be a more reasonable procedure than the one proposed by the Henchy Committee, as if the prosecution case is very weak the defendant will be discharged at District Court level.

The Criminal Justice Act 1999 contains one short reference to fitness to plead in the District Court. It amends the Criminal Procedure Act 1967 to abolish preliminary examinations of indictable offences in the District Court and provides that the court shall send the accused forward for trial unless, *inter alia*, the accused is unfit to plead.³²⁸ While this is a statutory acknowledgement that the District Court may

³²⁴ Henchy Committee draft Bill, s.12(4), only permits the District Court to commit the defendant to a designated centre “where the Justice determines that the person is unfit to plead.”

³²⁵ Criminal Justice (Mental Disorder) Bill 1996, s.3(3) and (4).

³²⁶ *Ibid.*, s.3(5).

³²⁷ *Ibid.*, s.3(6).

³²⁸ Section 4A(1)(c) Criminal Procedure Act 1967, as inserted by s.9 Criminal Justice Act 1999.

adjudicate on fitness to plead, it only applies to proceedings concerning indictable offences. It also fails to provide detailed guidance as to how fitness to plead is to be determined and the consequences of a finding of unfitness to plead.

Extended Remands in the District Court

The relevant subsections of section 24 of the Criminal Procedure Act, 1967 provide as follows:

- (1) The Court³²⁹ shall not remand a person for a period exceeding eight days, except where this section otherwise provides.
.....
- (4) If the Court is satisfied that any person who has been remanded is unable by reason of illness or accident to appear or to be brought before the court at the expiration of the period of remand, the Court may, in his absence, remand him for such further period, which may exceed eight days, as the Court considers reasonable.³³⁰

Section 24(4) must be read closely to appreciate the meaning of “in his absence.” It envisages a situation where a person was remanded for eight days, but on the eighth day when the case is called, the Judge is told that the person is too ill to appear or be brought before the court, even though the period of remand is about to expire, and this explains why the person is absent. If the Judge finds that this is true, the Judge may remand the person either for another eight days or for a longer period. The phrase “the expiration of the period of remand” refers to the current period which is about to expire on the eighth day. The person must be absent and unable to attend

³²⁹ This presumably refers only to the District Court, as it follows after s.21 and s.22 which specifically refer to “the District Court.”

due to illness or accident on that eighth day.

Section 24(4) had not been used in the *C.* case and in fact the 1967 Act was not in force at the time.³³¹ However, both Ó Dálaigh CJ and Walsh J referred to the section in discussing what might happen *C.* in the future, given that his detention had been found to be unconstitutional.³³² It is difficult to know whether mental illness was contemplated by the Oireachtas in making the provision for extended remand, and a special statutory system for mental illness in the District Court would have been preferable.³³³ But Ó Dálaigh CJ and Walsh J. are quite happy to allow this provision to be used in cases of mental illness, even though the decision to grant an extended remand takes place in the absence of the defendant and there is no mechanism to deal with situations where the defendant recovers from the mental illness during the extended remand period. The test in s.24(4) is that the defendant should be “unable by reason of illness or accident to appear or to be brought before the court.” In the case of mental illness, very few people are ever so ill that they cannot be brought into a courtroom. While a person might be unfit to instruct counsel or conduct a defence, he or she would probably be able to attend the court. The notion that a court should make decisions in the defendant’s absence is questionable, particularly when the

³³⁰ See also Rule 60(11) of District Court Rules 1948, SR & O No.431 of 1947.

³³¹ Ó Dálaigh CJ stated ([1967] IR 106 at 116) that Walsh J. had informed him that the 1967 Act would come into force on the day after judgment was delivered, i.e. 1 August 1967.

³³² [1967] IR 106 at 116 (Ó Dálaigh CJ) and 124 (Walsh J.)

³³³ The Criminal Procedure (Insanity) Act 1964 had recently been passed in England and Wales and could have been used as a model for Irish legislation.

defendant is in custody.³³⁴ However, these considerations are not discussed in the *C.* case. It is even possible that the following statement by Walsh J. could be interpreted as meaning that ordinary unfitness to plead is enough to grant an extended remand:

The provisions of s.24, sub-s.4 of the Criminal Procedure Act 1967 permit the District Justice to grant longer remands ... where it is satisfied that the person is, by reason of illness, unable to appear or to be brought before the court at the expiration of remand. At the making of such remand in a case such as this, where the illness is mental illness, the District Justice would of course have to be judicially satisfied of the continued 'unfitness to plead' of the accused.³³⁵

The first reserved judgment on the scope of s.24(4) of the 1967 Act does not contain even one reference to the *C.* case. *In Re Dolphin: State (Egan) v Governor of Central Mental Hospital*³³⁶ was an application by Daniel Egan for habeas corpus and certiorari concerning the detention of his friend, Martin Dolphin.³³⁷ Dolphin had been charged with assault of three people, including a Garda, and with use of abusive language with intent to provoke a breach of the peace.³³⁸ After three remands and a period of imprisonment for contempt of court, he was found unfit to plead³³⁹ in his absence by the District Court and twice remanded again, first for twelve days and

³³⁴ See also European case-law that a fair hearing may require the presence of the person concerned, e.g. *Ekbatani v Sweden* (1991) 13 EHRR 504.

³³⁵ [1967] IR 106 at 124

³³⁶ High Court, Kenny J., 27 January 1972

³³⁷ Mr Dolphin had refused to recognise the jurisdiction of any of the courts.

³³⁸ There appears to have been a political dimension to the case as it is stated that Mr Egan did not share Mr Dolphin's political views (p.2.)

³³⁹ District Justice Robert Ó hUadhaigh defined unfitness to plead as follows: "he was not in a fit state to comprehend the course of the proceedings, to make his own defence, or to instruct a solicitor or counsel to act for him" (p.3).

then for two months. At the second, more detailed, hearing concerning his fitness to plead, Dolphin was not legally represented and three psychiatrists testified that he was unfit to plead, with another believing that he was fit.³⁴⁰ On the day following the most recent remand, two doctors certified that Dolphin was of unsound mind and the Minister for Justice transferred him to the Central Mental Hospital under s.13 of the Lunatic Asylums (Ireland) Act 1875 as adapted by s.8 of the Criminal Justice Act 1960.

Mr Egan then applied for habeas corpus and for certiorari of the most recent orders of the District Court. Meanwhile, the Governor of the Central Mental Hospital decided that Dolphin was fit to plead and no longer of unsound mind and released him two days before his remand date. Mr Egan argued that the District Justice should not have considered whether Dolphin was unfit to plead or heard evidence on this matter in his absence and that his only jurisdiction under s.24(4) of the 1967 Act was to remand him.

Counsel for the respondents argued that Mr Egan did not have locus standi to seek the order he sought. Kenny J. rejected this argument, saying that it was settled law that a friend of a person who is said to be unlawfully detained may apply for a conditional order of habeas corpus³⁴¹ and holding that a friend may also apply for certiorari when

³⁴⁰ *In Re Dolphin*, p.2 and p.3.

³⁴¹ He cited *Ashby v White* (1704) 14 State Trials 695 and *State (Tynan) v Governor of Portlaoise Prison*, Supreme Court, 19 December 1967.

it is associated with a habeas corpus application.³⁴² The *Dolphin* case is a useful precedent on this point, as it demonstrates that it is important for a friend to apply both for habeas corpus and certiorari where appropriate, and that the Governor of the CMH could not bring the proceedings to an end by releasing the patient as this did not resolve the question of whether the District Court orders could be quashed.

Kenny J. next quoted the provisions of s.24(4) of the 1967 Act and pointed out that if Mr Dolphin was too ill to appear in court, the only jurisdiction was to remand him for a further period. He continued:

There was no jurisdiction to enter on or to decide the issue as to whether the accused was unfit to plead. In my opinion this is such a serious issue that it should not be decided in the absence of the accused unless his behaviour in Court makes it necessary to have him removed. It certainly should not be decided in his absence when he is in custody.³⁴³

Kenny J. held that the District Justice's finding that Mr Dolphin was unfit to plead was made without jurisdiction, but the finding that he was absent owing to illness would be valid if it were only the adjudication. Kenny J. believed it was not possible to divide up the Order and therefore he granted certiorari of the District Court orders made.

Kenny J. ought to have referred to the *C.* case, as we are left to speculate as to how the two cases are to be reconciled. It is possible to argue that *Dolphin* is not inconsistent with *C.* as Kenny J. in the former case would permit s.24(4) to be used

³⁴² *In Re Dolphin*, pp.4-6

³⁴³ *In Re Dolphin*, p.6

provided the District Court confined itself to finding that the person was unable to appear due to illness. However, it is more realistic to see the *Dolphin* case as contradicting the *C.* case on the question of the interpretation of the 1967 Act. Whereas Walsh J. and Ó Dálaigh CJ in the latter case were willing to see s.24(4) being used in many cases of unfitness to plead, and Walsh J. even referred to the District Justice being satisfied of the person's continued unfitness to plead in the case of extended remands under the subsection, Kenny J. in the *Dolphin* case holds that s.24(4) should not be used in cases of unfitness to plead unless the person's behaviour in court makes it necessary to have him or her removed. From the point of view of precedent, the *Dolphin* case is a binding High Court authority and the statements in the *C.* case concerning s.24(4) are obiter dicta.

The *Dolphin* judgment is also to be preferred on other grounds, as Kenny J. interprets s.24(4) in a manner appropriate to the situation of persons with mental illness. He recognises that it is only in very rare cases that a person would be so mentally ill that he or she could not appear in court.

It is unfortunate that more detail is not given in the judgment of the basis on which the District Justice decided that *Dolphin* was "absent owing to illness", one of the findings which had been made in the most recent set of orders. "In his absence" in s.24(4) means absence due to inability by reason of illness to appear or to brought before the Court, and it is doubtful that *Dolphin*'s mental condition fulfilled this test. But Kenny J. does not question this part of the District Court order. While it would not have made a difference to the end result, if Kenny J. had expressed doubts about this part of the order it would have sent a signal to District Justices in future cases that

such findings should not be lightly made.

Seven years after the *Dolphin* decision, Gannon J gave a somewhat similar interpretation of s.24(4) of the Criminal Procedure Act 1967 in *State (Caseley) v Daly*³⁴⁴, but without any citation of the former decision. The facts of *Caseley* are outlined below in chapter 5, where a detailed analysis of the decision will also be found. Gannon J's views on fitness to plead are as follows:

[I]f the evidence offered to the District Justice on the 18th September, 1975, when considered in the light of that given on 15 May 1975, suggested a continuing incapacity of indefinite duration the District Justice should have taken steps to deal with the matter then pending under the provisions of the Mental Treatment Act 1945. A decision as to whether a person is "unfit to plead" is a judicial decision founded on medical evidence and is not a medical decision. The determination of that issue is a judicial function which should be performed in a judicial manner upon proper notice to the prosecutor with proper opportunity for him, if required, to be adequately represented and should not be postponed indefinitely at the instance initially of the Minister for Justice and thereafter by medical officers. The evidence on affidavit indicates a conflict in the area of medical assessment of the mental health and capacity of the prosecutor which I cannot, and do not have to, resolve. But it clearly indicates that the question of whether or not the prosecutor is, or at any previous time was, "unfit to plead" has not been investigated or resolved in course of judicial function. This could not have been done in the absence of the prosecutor nor without giving him due notice thereof and affording him, or someone competent to represent his interests, an opportunity of hearing the evidence thereon.³⁴⁵

While this shows that Gannon J. does not approve of extended remands when the person has a "continuing incapacity of indefinite duration", it also demonstrates that the Judge believed that such remands were permissible in cases of temporary mental incapacity. In fact, Mr Caseley had already been remanded for successive extended

³⁴⁴ High Court, 19 February 1979

³⁴⁵ *Ibid.*, pp.11-12.

periods amounting to four months before the date on which Gannon J believed the time had come to hold a full hearing, with the patient represented, on the issue of fitness to plead. Even more remarkably, as will be discussed later, Gannon J. held that the District Justice's tenth remand in custody was valid even though he believed that at the time of the earlier remand on 18 September 1975 the District Justice ought to have determined Caseley's fitness to plead.

The *Caseley* judgment is also unsatisfactory for other reasons: Gannon J equates unfitness to plead with inability to appear in court due to illness; he does not refer even once to the obiter dicta guidelines in the *C.* case about unfitness to plead in the District Court; and he appears to advocate the use of s.207 of the Mental Treatment Act 1945 in all cases of unfitness to plead in the District Court. It is therefore remarkable that in the *O'Connor* case, O'Hanlon J. referred to the *Caseley* case as a judgment which "throws further light on the procedure which should be followed in dealing with accused persons believed to be of unsound mind."³⁴⁶

STATISTICS

In a review of patients found unfit to plead and detained in the CMH from 1937 to 1995, 24 cases were identified, including 23 males and one female.³⁴⁷ Lengths of

³⁴⁶ [1992] 1 IR 387 at 397.

³⁴⁷ Lynn Hutchinson & Art O'Connor, 'Unfit to Plead in Ireland' (1995) 12 Ir. Jnl. Psychol. Med. 112.

stay in the CMH ranged from three weeks to 56 years, averaging at 18 years, with almost 50% of patients staying more than 20 years. Six patients remained at the CMH, one became fit to plead, 14 left the CMH³⁴⁸ and three died. The review included seven informative case vignettes, illustrating the charges, diagnosis and outcome for those patients.³⁴⁹ The authors suggested that the question of fitness to plead ought to be raised more frequently.³⁵⁰

³⁴⁸ Three absolute discharges, five conditional discharges and six removals to catchment area service.

³⁴⁹ For example: “Case 3: This 27 year old married man was admitted to the CMH when he was found unfit to plead. He was charged with the murder of his young daughter and his infant son. He was floridly psychotic at the time and he believed that his children were possessed by devils. He pushed their pram into a canal in order to ‘banish the devils.’ His diagnosis was schizophrenia. His early history was unremarkable and he had no previous psychiatric history. He has now been in the CMH for more than 30 years.”

³⁵⁰ “How many people are unfit to plead in the courts in general, especially the district courts? We only look at the issue sometimes and mostly in serious cases.” – Hutchinson & O’Connor, *op.cit.*, p.114.

CHAPTER 3

TRANSFERS FROM ORDINARY MENTAL HOSPITALS TO THE CENTRAL MENTAL HOSPITAL

Transfers from Ordinary Mental Hospitals to the Central Mental Hospital under s.207 of the Mental Treatment Act 1945	102
Transfers of Detained Patients from Ordinary Mental Hospitals to the Central Mental Hospital under s.205 and s.208 of the Mental Treatment Act 1945	139
Statistics	162

If a patient is transferred from an ordinary mental hospital to another hospital of the same type, this does not raise significant problems and is merely a change in the location at which treatment is taking place. But if a patient is transferred from an ordinary mental hospital to the Central Mental Hospital, which is a highly secure environment, this involves a change in status of the patient and should not be done lightly. Furthermore, it may be extremely difficult for the patient to be accepted back in the ordinary mental hospital once he or she has been labelled as a 'Dundrum patient.'

The Oireachtas provided a very odd system of transfers to the CMH in s.207 of the Mental Treatment Act 1945, involving prima facie findings of commission of an indictable offence and unfitness to plead. Section 207 was interpreted inconsistently in a number of cases, until eventually it was found to be unconstitutional in 1995.¹

¹ This finding of unconstitutionality is not definitive however, as the Constitution required there to be a case stated to the Supreme Court, but that case stated lapsed due to mootness - see below, p.134.

Meanwhile, the State began to explore the possibility of using another section of the 1945 Act, section 208, to achieve the same purpose as section 207. The courts supported the State's endeavours by holding that the CMH came within the phrase "any hospital or other place" in that section. In a major case which arose after a transfer under s.208, the High Court held that the 'civil commitment' system was unconstitutional, but the Supreme Court extinguished the potential shown by that judgment and closed off many avenues of challenge to mental health law.

Transfers from Ordinary Mental Hospitals to the Central Mental Hospital under s.207 of the Mental Treatment Act 1945

Section 207 of the 1945 Act facilitates transfer to the Central Mental Hospital of a person who is *prima facie* unfit to plead:

207 (1) Where

- (a) a person detained in a district mental hospital or other institution maintained by a mental hospital authority is charged with an indictable offence before a justice of the District Court sitting in such district mental hospital or other institution, and
- (b) evidence is given which, in the opinion of the justice, constitutes *prima facie* evidence
 - (i) that such person has committed the offence, and
 - (ii) that he would, if placed on trial, be unfit to plead,

the justice shall by order certify that such person is suitable for transfer to the Dundrum Central Criminal Lunatic Asylum² and shall cause copies of such order to be sent to the Minister³ and to the person in charge of such district

² Now known as the Central Mental Hospital - s.39 Mental Treatment Act 1961.

³ "The Minister" means the Minister for Health and Children.

mental hospital or other institution.

As can be seen, the section only applies to a person who is already *detained* in a mental hospital (not to voluntary patients), the offence must be an indictable offence, the Judge must be sitting *in the mental hospital*, the person must *prima facie* have committed the offence and *prima facie* be unfit to plead⁴ and the Judge only certifies that the person is “suitable for transfer.” Subsection (2)⁵ states that the Minister for Health and Children then orders the Inspector of Mental Hospitals to visit the person and report on their condition. After this, the Minister makes the decision whether to make the transfer to the CMH.⁶ The Minister is also empowered to send the person back to a district mental hospital.⁷ Otherwise, the person is detained until discharge or death⁸ (s.207(2)(d)). If the person ceases to be of unsound mind, the person must be discharged.⁹

⁴ A somewhat similar statutory provision in the U.K. comes into operation if the court is “satisfied that the accused did the act or made the omission charged.” - s.37(3), Mental Health Act 1983 [U.K.]. See Martin Wasik, ‘Hospital Orders without Trial’ (1983) 147 JPN 211; Stephen White, ‘Insanity Defences and Magistrates’ Courts’ [1991] Crim LR 501; Alec Samuels, ‘Hospital Orders Without Conviction’ [1995] Crim.LR 220.

⁵ As amended by s.25(1) of the Mental Treatment Act 1961 (No.7) and adapted by S.I. 108 of 1971.

⁶ The delay caused by these two extra stages was noted by Flood J. in *Croke v Smith (No.1)* [1994] 3 IR 525 at 536: “It certainly is not appropriate in a situation requiring immediate action.”

⁷ Section 207 (3) of 1945 Act, as amended by s.25(2) of 1961 Act and adapted by S.I. 108 of 1971.

⁸ Section 207(2)(d).

⁹ S. 207 (4) of 1945 Act. The decision must be agreed by the resident governor and physician of Dundrum and the Inspector of Mental Hospitals.

Because the special sitting takes place in the mental hospital, it is unlikely that the media are ever notified of, or attend, such sittings.¹⁰ It would be preferable if such cases were determined at ordinary District Court hearings, giving proper emphasis to the person's ordinary status as a citizen entitled to have his or her case determined in the same court as other citizens.

On first reading s.207, many lawyers would probably assume that it is primarily a mechanism to transfer patients, particularly because the section is located in the Mental Treatment Act 1945, an Act which in the main concerns civil commitment. But on a second reading, one notices that the drafters have taken quite a cumbersome approach to the task. The section's criminal aspects predominate and one sees that what is involved is actually a serious matter involving a *prima facie* finding of commission of an offence. It is notable that important functions under s.207 are given to the Minister for Health and Children rather than the Minister for Justice. This is consistent with the fact that the CMH is administered by the Eastern Health Board.¹¹

The section uses the term 'unfit to plead' which theoretically differs from 'unfit for

¹⁰ If the media did attend, note that if s.207 hearing is regarded as a preliminary examination, then there are restrictions on reporting - below, fn.23.

¹¹ By way of contrast, since *Application of Gallagher (No.1)* [1991] 1 IR 31, decisions on release of persons found guilty but insane so as not to be responsible are made by the Minister for Justice, Equality and Law Reform - see chapter 4 below.

trial.¹² It also appears to be predicated on the assumption that a person could ordinarily only be found unfit to plead if placed on trial whereas it was later stated by the Supreme Court that unfitness to plead ought to be determined at the very early stages of criminal proceedings.¹³

Under the European Convention, the person must be informed promptly of the reasons for his or her detention.¹⁴ In *Ashingdane v UK*¹⁵ it was held that the patient's potential move from a secure hospital to a more open hospital was merely the substitution of one form of deprivation of liberty for another, and that a delayed transfer was not an unlawful deprivation of liberty under Article 5. There is no statutory right of appeal from a s.207 certificate and it is unlikely that the European Convention could be invoked to require an appeal.¹⁶

Section 207 has been the subject of a number of court decisions.¹⁷ The first significant case on the section arose in 1969 - *State (O.) v O'Brien (Ballinasloe*

¹² See chapter 2 above.

¹³ *State (C.) v Minister for Justice* [1967] IR 106; *O'C v Judges of Dublin Metropolitan District* [1994] 3 IR 246. See chapter 2 above.

¹⁴ Article 5(2); *Van der Leer v Netherlands* (1990) 12 EHRR 567.

¹⁵ (1984) 7 EHRR 528.

¹⁶ Protocol 7, Article 2, of the European Convention establishes a right of appeal in criminal matters but is restricted to persons "convicted of an offence by a tribunal."

¹⁷ See the article by this writer - 'Criminal Charges against Mental Patients' (1995) 5 Ir.Crim.L.J. 67.

case).¹⁸ O. was detained in the district mental hospital, Ballinasloe, and was charged with assaulting a doctor. At a District Court sitting in the hospital, five witnesses were heard, including O. himself. Counsel later stated that O. had not been asked whether he pleaded guilty to the charge.¹⁹ The District Justice found that O. had “committed the offence charged”, found that he would be unfit to plead if tried, and certified under s.207 that he was suitable for transfer to Dundrum. The report does not state whether O. was legally represented, nor the nature of O’s mental disorder. The Inspector of Mental Hospitals then visited the patient and the Minister for Health later ordered O’s transfer to Dundrum. O. sought his release under Article 40.4.2 (habeas corpus) and an order of certiorari to quash the orders of the District Justice and the Minister for Health. A divisional court of the High Court refused to order certiorari and declared that O. was being lawfully detained.²⁰ The Supreme Court dismissed O’s appeal.

Counsel for O. submitted that the District Justice’s order should be quashed because he had decided that O. had “committed the offence charged”, whereas s.207 only permits a finding that there is prima facie evidence that the patient has committed the offence. Ó Dálaigh C.J., with whom the other two Judges agreed, acknowledged that it was incorrect to speak of a finding of guilty and also that the District Justice “went

¹⁸ [1971] IR 42. This case will be referred to as the Ballinasloe case to distinguish it from other cases with an O. in the title.

¹⁹ However, since O. was found to be prima facie unfit to plead, it would have been inconsistent for the District Justice to ask him how he pleaded.

²⁰ O’Keeffe P., McLoughlin and Teevan JJ., 14 Jan. 1969.

beyond what he was required to find under s.207.”²¹ However, the court ruled that this ground of appeal failed:

What [the District Justice] found amounts to a finding that there was a prima facie case, and more. That in his opinion the case was stronger than a prima facie case does not in any way affect the validity of his finding. By necessary implication he has found the statutory degree of proof was established.²² (p.51).

While the court’s decision is logical, it is not necessarily in keeping with the spirit of s.207. It is dangerous for a District Justice to find a patient guilty of a charge when that patient is prima facie unfit to plead. Obviously since there was no trial on the charge there can be no finding of guilty. What would happen if the patient later became fit to plead and was tried before a jury which was informed that a District Justice had already stated that the patient was guilty?²³ The error here may only have been a slip of the pen, but it should not have happened.²⁴

The District Court hearing in this case was held by District Justice Seosamh Mac Craith. It is not entirely clear from the report whether District Justice Mac Craith was

²¹ [1971] IR 42 at 51.

²² [1971] IR 42 at 51.

²³ While s.17 of the Criminal Procedure Act 1967 prohibits publication of any information regarding a preliminary examination other than the bare minimum information, this information includes the decision on the preliminary examination and therefore the decision of the District Justice in the Ballinasloe case could have been published to a juror.

²⁴ This slip of the pen was repeated when the Eastern Health Board compiled its Freedom of Information books in 1998 - see below, p.139. There was at least one other obvious slip of the pen in the Justice’s minute book concerning the case.

the Judge for the Ballinasloe District Court Area but from the context it would appear that he was. Counsel for the Governor of the Central Mental Hospital stated that any Justice of the District Court had jurisdiction to hear a charge brought pursuant to section 207 and that it might be better if the Justice to hear such charge were not the Justice for the District Court Area in which the person charged was detained.²⁵ This issue was important for counsel for the Governor, because they were arguing that the powers granted by s.207 are different from normal powers of a District Justice and do not include a power of remand (see below).

However, on this point the Supreme Court disagreed with counsel for the Governor. The court said that only the District Justice from the relevant area could sit in the hospital and exercise powers under s.207.²⁶ The court based this on rule 24 of the District Court Rules, 1948²⁷ which provided that sittings of the District Court would be held at such places and times as were appointed under particular statutes and orders²⁸ but also authorised a Justice to hold a sitting of the District Court in his/her

²⁵ [1971] IR 42 at 45.

²⁶ [1971] IR 42 at 49.

²⁷ S.R. & O. No.431 of 1947. See now the consolidated version - District Court Rules 1997.

²⁸ The particular statutes and orders mentioned were the District Court (New Districts) Order 1927 (S.R. & O. No. 102 of 1927), the District Court (New Areas) Order 1927 (S.R. & O. No. 103 of 1927), s.64 of the Courts of Justice Act 1936 (No.46), and the provisions of the Courts Officers (Amendment) Act 1937 (No.21) and of the Courts of Justice (District Court) Act 1946 (No. 21) or any other provisions for the time being substituted for the foregoing or any of them. These have largely been superseded by the Courts (Supplemental Provisions) Act 1961 (No.39). See Hilary Delany, *The Courts Acts 1924-1991* (Round Hall Press, Dublin, 1994).

district at any place or time not so appointed, for the preliminary investigation of indictable offences.²⁹ The problem with s.207 is that it refers to a District Justice sitting in a hospital, but it does not specify *who* fixes the sitting for this time and place. Perhaps the drafters of the 1945 Act intended there to be a later section in the Courts Acts or a later amendment of the District Court rules which would clarify this, but this has not happened. The Supreme Court therefore decided that the District Court sitting under s.207 was not enabled by the general part of rule 24 of the District Court Rules 1948, but instead was authorised by the second part of the rule, which authorised a Justice to hold a sitting at any time or place not so appointed for the preliminary investigation of indictable offences. It necessarily followed from this that when the District Justice heard the case he was making a preliminary investigation of the indictable offence.³⁰

This portion of the Ballinasloe case judgement demonstrates that s.207 does not state

²⁹ The rule also permits adjournments of summary cases to times not appointed.

³⁰ The Court did not state this explicitly, but it is submitted that it is implicit at pp.48-9 of the report. Note however that under Part II of the Criminal Procedure Act 1967 it would appear that the preliminary examination cannot begin until the book of evidence has been served (see also Edward Ryan and Philip Magee, *The Irish Criminal Process* (Mercier Press, Dublin and Cork, 1983), p.230). Walsh J. took a different approach in *State (C.) v Minister for Justice* [1967] IR 106 at 121, stating that the s.207 procedure “does not amount to a return for trial or a conviction but is a special type of investigation ... , the object of which is to have the person transferred to the Central Mental Hospital Dundrum.” Walsh J. did not address the issues of the proper interpretation of rule 24 of the District Court Rules or whether the person should be remanded on the criminal charge. Gannon J. in *State (Caseley) v Daly & O’Sullivan*, High Court, 19 February 1979, stated that s.207 concerns “the stage of preliminary examination before a District Justice” (p.10).

who fixes the hearing for the mental hospital and as a result the hearing can only be heard by a District Justice in a mental hospital in his/her own district, and the District Justice must engage in a preliminary examination of the indictable offence. This is not necessarily what was intended when the section was enacted, and it would have been helpful if the 1945 Act or the 1948 rules had been amended after this judgement.

The final and most important aspect of the Ballinasloe case as far as s.207 is concerned related to the issue of whether s.207 was mere machinery incidental to effecting a transfer from a district mental hospital to Dundrum or was the beginning of a criminal proceeding.

Counsel for the Governor of the CMH argued that the charging of the patient was mere machinery incidental to effecting a transfer from a district mental hospital to Dundrum³¹ and the District Justice had no function except to act in pursuance of the powers conferred on him/her by s.207.³² The Supreme Court, however, rightly posed the question - what would happen if the District Justice found that the patient would be fit to plead if placed on trial? The court concluded that s.207 was the initial stage of a criminal proceeding which could only be disposed of according to law. If the patient was fit to plead, the District Justice was obliged to proceed with the case. He/she might refuse informations, return for trial, or deal summarily with the offence, as appropriate. If, *prima facie*, the patient was *not* fit to plead, then the District

³¹ [1971] IR 42 at 49.

³² [1971] IR 42 at 48.

Justice had to certify that the patient was suitable for transfer to the CMH but the criminal charge remained undisposed of. The Supreme Court stated that s.207 did not require the Justice - nor could it - to drop the charge.³³ The court decided that the appropriate order was to direct a remand and pointed out that in a case of illness a remand of such extended duration as might appear proper might be granted.³⁴ It follows from this that a proper decision on fitness to plead should later take place. Presumably, in the vast majority of cases, what would happen is that the patient would be formally charged again, and a trial would take place on his/her fitness to plead.

Having decided that O. should have been remanded, the Supreme Court considered whether the failure to remand him invalidated the District Justice's order. The court said that District Justice Mac Craith's jurisdiction to deal with the charge was quite distinct from his power of certification under s.207.³⁵ In the court's view, the s.207 power was exercisable by the Justice in the course of the discharge of his judicial

³³ [1971] IR 42 at 49.

³⁴ s.24(4) Criminal Procedure Act 1967. The section does not necessarily fit in with what the Supreme Court is saying. It only applies to someone who has been remanded. The court makes a decision in his or her absence to remand for a longer period. The person must be unable to appear or to be brought before the court. In *Re Dolphin: State (Egan) v Governor of Central Mental Hospital*, High Court, 27 January 1972, Kenny J. held that s.24(4) should not be used to find that a person is unfit to plead in his or her absence. Similarly, in *State (Caseley) v Daly & O'Sullivan*, High Court, 19 February 1979, Gannon J. held that s.24(4) should not be used if the evidence suggests a continuing mental incapacity of indefinite duration. See also rule 60(11) of the District Court Rules, 1948, supra n.27. On s.24(4), see further chapter 2 above.

³⁵ [1971] IR 42 at 49-50.

duties but there was no further connection between the two. The Justice's failure to remand could have nothing to say to the validity of the s.207 certificate and so this argument against the validity of the District Justice's order failed.

It is strange that the Supreme Court deals with this argument in this way. It is no mere technicality that O. was not remanded in this case, because his case is left in limbo by the fact that no time has been fixed for his next court appearance. The Supreme Court does not remit the case to the District Court so that the District Justice can order the remand, which might have been a more acceptable procedure. It might be said that the court had no jurisdiction to do this as O. only applied for his release and certiorari and did not apply for any other relief. In Article 40.4.2 applications, the court is under a duty to investigate all possible grounds that might affect the validity of the detention and not merely those raised by the prisoner.³⁶ However, if the Supreme Court felt constrained by O's choice of remedy, the court could at least have stated this explicitly. Alternatively, the court could have granted the certiorari since the lack of a remand was so problematic, knowing that other procedures could ensure the safety of O. and of the public if necessary.³⁷

The net effect of the court's decision was that future District Justices would not necessarily feel obliged to remand a patient in a similar position to O., as the Supreme

³⁶ *State (Smith) v Governor Mountjoy Gaol* (1964) 102 ILTR 93.

³⁷ s.165 of the Mental Treatment Act 1945 permits the removal of a person of unsound mind to a Garda station. If necessary, a new District Court sitting under s.207 could later take place to transfer O. back to Dundrum. Alternatively, s.208 of the 1945 Act could be used - see pages 139ff. below.

Court had ruled that a failure to remand did not affect the validity of the s.207 certificate. To put it another way, the Supreme Court's statement that there should have been a remand is *obiter* when it would have been preferable if it were part of the *ratio*. Perhaps the court was of the opinion that it was doing O. a favour by not forcing a remand in this case, as this might unnecessarily have opened up the criminal side of the case once more. However, it would have been fairer and more consistent to force the criminal charge to be disposed of. This would have been more in keeping with the court's earlier statement that the sitting of the District Court was the beginning of a criminal proceeding and not mere machinery to facilitate transfers of patients. It is also noteworthy that the importance of a proper preliminary examination of a case in the District Court has been emphasised in quite a number of cases³⁸ and has even been given a constitutional character in *Glavin v Governor of Mountjoy*.³⁹

The Supreme Court judgments in the second and third cases on s.207 were both delivered on the same day, 31 July 1970. The second case was *State (M.) v*

³⁸ O's counsel referred to *State (Shanahan) v Attorney General* [1964] IR 239. Subsequent cases include *Costello v DPP* [1984] IR 436, *O'Shea v DPP* [1988] IR 655 and *Glavin v Governor of Mountjoy Prison* [1991] 2 IR 421. See Peter Osborne, 'The Preliminary Examination of Indictable Offences' (1995) 5 Ir.Crim.L.J. 1.

³⁹ [1991] 2 IR 421. The majority of the Supreme Court stated in the *Glavin* case that while the right to a preliminary examination was a legal (as opposed to a constitutional) entitlement, the breach of that legal right meant that the applicant had also been deprived of his constitutional entitlement to a trial in due course of law. (Griffin J. at 434-5, O'Flaherty J. at 436, Hederman J. concurring.)

O'Brien.⁴⁰ M. was detained in St. Ita's Hospital, Portrane, Co. Dublin as a temporary patient and it was alleged that he had broken and entered a dwelling house burglariously with intent to commit a felony. The facts are not entirely clear, but it is safe to assume that the authorities believed that M. had temporarily absented himself from the hospital and allegedly burgled a house on Portrane Road. M. was served at the hospital with a summons for Swords District Court, Co. Dublin. He was charged at the court on 1st February 1966 and the hearing was then adjourned to 18th February 1966 at St. Ita's Hospital with M. being placed on remand at the hospital. It is not stated whether M. was legally represented on either occasion. On 18th February, the District Justice, sitting in the hospital, issued a certificate under s.207. It does not appear that M. was remanded on 18th February. This was followed by a ministerial order transferring M. to Dundrum. More than two years later, M. sought his release under Article 40.4.2 of the Constitution. Henchy J. refused to release M. and M. appealed to the Supreme Court.

The judgements delivered in the Supreme Court are examined below, but what is most surprising about this case is the fact that it does not appear that M. was remanded again on 18th February, and no comment of any sort is passed by any of the Judges on this. The Judges refer to the Ballinasloe case and appear to believe that they are following the case, but they give no explanation as to how they permit there to be no remand at the 18th February hearing. It can be speculated that the Judges may have ignored the point either because it was not raised by counsel, because they

⁴⁰ [1972] IR 169.

would not be doing any favours for M. (see discussion of the Ballinasloe case above), because the Ballinasloe case was *obiter* on this point, or because it was irrelevant given their decision that the s.207 certificate was invalid for other reasons (see below). But the court should have been explicit about why it chose to act in this way.

M. argued that he should be released because he had not been charged in the hospital (having been charged in Swords) and so his case did not come within the terms of s.207(1) of the 1945 Act which stated that the section applied if a person “is charged... before a justice of the District Court sitting in such district mental hospital...” Ó Dálaigh C.J. acknowledged that normally one would expect the charge to have been initiated in the district mental hospital, but given the circumstances, he saw no obstacle to construing the words “is charged” as meaning “stands charged” as this interpretation did nothing to curtail the rights of the accused, or of the People, nor did it diminish the authority of the District Court in any respect.⁴¹ This seems reasonable and one could not really quibble with the Chief Justice on this point. In fact, this demonstrates how cumbersome it is for s.207 to require the District Justice to actually sit in the district mental hospital to issue a certificate under s.207.

M. also made minor technical arguments about the wording of the District Justice’s minute of the case, none of which were very significant.⁴² In rejecting these

⁴¹ [1972] IR 169 at 176.

⁴² The minute failed to set out that M. was a detained person, it failed to recite that he had been charged, and it failed to invoke the section and Act under

arguments, the court rightly stressed that the s.207 certificate determines nothing finally and is no more than a certificate of matters established prima facie by the evidence.⁴³

However, M. succeeded on a more important point regarding the wording of the summons and the District Justice's minute. Both stated that M. was alleged to have broken and entered with intent to commit a felony, but neither specified what felony was allegedly intended. The majority of the court ruled that this invalidated the entire process and that M. should therefore be released.⁴⁴ McLoughlin and Fitzgerald JJ. dissented. There is much discussion in the judgements of this point. The majority emphasise that the summons should have been clear because, as had been stated in the Ballinasloe case, if M. had been found fit to plead then the District Justice would have had to proceed with the charge and might, for example, have tried the case summarily. Also, the District Justice's order, while not amounting to a conviction, was nevertheless one which made a finding to the effect that the evidence given constituted a prima facie case that the patient had committed the offence of breaking and entering a dwelling house with intent to commit a felony. Therefore, the District Justice ought to have had in his mind a particular felony before he could be satisfied that there was a prima facie case of intent to commit a felony.⁴⁵ The decision concerning the wording of the summons is reasonable and the care which the court

which the order was made.

⁴³ [1972] IR 169 at 178.

⁴⁴ Ó Dálaigh C.J. pointed out (p.181) that if necessary M. could immediately be detained by the Gardaí under s.165 of the 1945 Act.

⁴⁵ Walsh J. - [1972] IR 169 at 183.

took to ensure that M's rights were respected on this point is to be commended.

The third case was *State (McGrath) v Governor of Dundrum Central Mental Hospital*.⁴⁶ In 1964, Charles McGrath had been transferred to the Central Mental Hospital by a Ministerial order made under s.207.⁴⁷ McGrath challenged the constitutionality of s.207(4) of the 1945 Act, the subsection which allows for the discharge of a patient when the patient is certified to have ceased to be of unsound mind. McGrath argued that this subsection interfered with the constitutional guarantee of freedom of expression, because a patient might choose to remain silent. Apparently, he alleged that the patient would be required to answer questions when being interviewed by the medical officers. Ó Dálaigh C.J. said that McGrath misconceived the provisions of the Act and their effect. A patient was free to answer enquiries or remain silent, as the patient chose. The procedure was for the benefit of the detained person. In certain cases, the patient's silence might prejudice his or her case, but this would be of the patient's own making, whether consciously or not. The constitutional challenge failed. Even though this was a constitutional challenge, the

⁴⁶ Supreme Court, unreported, 31 July 1970. See also *R v Worth* (1995) 98 CCC (3d.) 133 (Can. CA) where the accused raised the defence of insanity at trial but refused to cooperate in an interview with a Crown psychiatrist. The Court of Appeal approved comments to the effect that adverse inferences could be drawn from the accused's refusal, and held that these comments did not violate the right to silence in s.7 of the Canadian Charter.

⁴⁷ No details are given in the judgement of the charge, the District Court proceedings, whether McGrath was legally represented, whether he was remanded, the nature of his mental disorder, or the decision of the High Court.

Attorney General is not referred to as having been involved in the proceedings.⁴⁸

The fourth case on s.207 was *State (O.) v. Daly (Ardee Case)*.⁴⁹ O., who was detained in St. Brigid's Hospital, Ardee, was charged with assault causing actual bodily harm. The District Justice, sitting in the mental hospital, issued a certificate in accordance with section 207. The report does not state how many witnesses were examined. O. does not appear to have been remanded. The Minister for Health then decided to transfer O. to Dundrum. More than eighteen months later, O. objected that he had not been informed of his right to legal aid. Section 2 of the Criminal Justice (Legal Aid) Act 1962 states that legal aid should be granted if it appears to the District Court that it is essential in the interests of justice that the accused should have legal aid "in the preparation and conduct of his defence." The Supreme Court had held in *State (Healy) v Donoghue*⁵⁰ that an accused should be informed of his/her right to legal aid.

In the High Court, Hamilton J. (as he then was) upheld O's argument, granted an

⁴⁸ See chapter 4 below.

⁴⁹ [1977] IR 312. This case will be referred to as the Ardee case to distinguish it from other cases with an O. in the title. The judgment in this case (7 July 1977) was given a different title when unreported and is sometimes still referred to as unreported, e.g. Ryan and Magee, *supra* n.30, p.269 where the case is cited as authority for the proposition that it is not necessary for the accused to be present for the s.207 procedure to operate. It is not clear from the report of the case whether O. was present.

⁵⁰ [1976] IR 325.

absolute order of habeas corpus and directed O's release from the CMH. However, the Supreme Court reversed Hamilton J's decision on appeal, stating that *State (Healy) v Donoghue* applied only to the *trial* of persons charged with criminal offences and not to the earlier and ancillary stages of criminal proceedings. The Supreme Court held that while the procedure under s.207 constituted an exercise by the District Justice of his criminal jurisdiction, it was very much ancillary and preparatory. The court described what happened under the section and emphasised that the District Justice did not have the power to order the transfer; that could only be done by the Minister for Health. O'Higgins C.J. stated: "The procedure appears to be eminently fair and just and to be designed to serve both the common good and the needs of those afflicted with mental illness and disorders."⁵¹

The Supreme Court passed no comment on the fact that O. does not appear to have been remanded at the District Court hearing. As was explained above, a court ought to be explicit about why it chooses to act in such a way.

The Supreme Court's assertion that the procedure under s.207 is "very much ancillary and preparatory" is questionable. It runs contrary to the earlier Supreme Court decision in the Ballinasloe case, where it was stated that the s.207 procedure was the initial stage of a criminal proceeding which could only be disposed of according to law. The phraseology is deceptive because it gives the impression that the s.207 procedure is ancillary and preparatory to a full criminal trial. However, even before

⁵¹ [1977] IR 312 at 316.

statistics were published,⁵² it was unlikely that any trial ever took place (unless, perhaps, the patient became fit to plead at a later stage). Therefore, the s.207 procedure has profound implications for the patient. While technically speaking the patient is not found to be guilty of any offence, the decision comes as close to it as makes virtually no difference and results in detention in a highly secure environment. Is the Supreme Court being realistic when it says that s.207 proceedings are merely “ancillary and preparatory”? The court would probably reply that it meant that the proceedings were ancillary and preparatory to the final decision by the Minister for Health, but this does not reduce the force of the argument that the phraseology is deceptive.

On other grounds, it is dangerous to classify any particular part of a criminal proceeding as being “ancillary and preparatory.” It is preferable to consider criminal proceedings as a kind of continuum, beginning with the accused’s first appearance in court and ending with their sentence. Keane J. states in *Application of Neilan*:

A criminal trial - and indeed, the same could be said of a civil trial - is not a disjointed sequence of unrelated events: it is a continuum which begins with the arraignment of the accused and does not conclude until he has been either sentenced by the court or unconditionally discharged.⁵³

Mr. Justice Keane is referring only to the “trial” (so he talks of the arraignment as the starting-point) but his logic can be used to argue that the *proceedings* are also a

⁵² See below, p.162.

⁵³ [1990] 2 I.R. 267 at 285. See also Finlay J. in *State (Commins) v McRann* [1979] IR 133.

continuum which begins when the accused first appears in court on the charge.⁵⁴ Admittedly, the Supreme Court in *Gallagher (No. 1)*⁵⁵ disagreed with Keane J. but his argument is manifestly more realistic. Either way, even if one agrees with the Supreme Court decision in the *Gallagher* case, the case focused on the end of the continuum (the court's final order) rather than on its commencement. The Supreme Court does not specifically contradict Keane J's assertion that a trial is a continuum which begins with the arraignment of the accused.

The Supreme Court, in restricting the grant of legal aid in this case, does a disservice to the rights of poorer people. The whole idea of the system of criminal legal aid is supposed to be that a poor person should not have to pay for legal representation. As Claire Carney notes in her comprehensive study of the legal aid system⁵⁶, it is extraordinary that the eligibility clauses ("gravity of the charge"/ "exceptional circumstances")⁵⁷ are modelled on those of obsolete English statutes of 1903 and

⁵⁴ This would also fit with the Supreme Court's statement in the Ballinasloe case that the s.207 procedure was the initial stage of a criminal proceeding.

⁵⁵ [1991] 1 IR 31.

⁵⁶ Claire P. Carney, 'The Growth of Civil Legal Aid in Ireland' (1979) 14 Ir. Jur. (n.s.), Part I, p.61 and Part II, p.211. See also Gerry Whyte, 'And Justice for Some' (1984) 6 DULJ (ns) 88; Whyte, 'Constitutional Adjudication, Ideology and Access to the Courts' in Anthony Whelan (ed.), *Law and Liberty in Ireland* (Oak Tress Press, Dublin, 1993), p.149; James V. Woods, *District Court Practice and Procedure in Criminal Cases* (James V. Woods, Limerick, 1994), pp.551-563; Greer, 'Legal Services and the Poor in Ireland' (1969) 4 Ir. Jur. (ns) 270.

⁵⁷ S.2 Criminal Justice (Legal Aid) Act 1962: (1) If it appears to the District Court - (a) that the means of a person charged before it ... are insufficient ..., and (b) that by reason of the gravity of the charge or of exceptional circumstances it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence before it, the Court

1930.⁵⁸ The Supreme Court, which had been willing to classify legal aid as a constitutional right, in a sense⁵⁹, in *State (Healy) v Donoghue*, then restricts this right unnecessarily in *State (O.) v Daly (Ardee Case)*, taking a strict approach based on one interpretation of the wording of the statute, rather than looking behind the statute at the policy which it seeks to achieve (or ought to be seeking to achieve). The court restricts the *ratio* of *State (Healy) v Donoghue* to the trial of a criminal charge when it was open to it to state that the *Healy* case applied also to a s.207 proceeding.⁶⁰

The Ardee case decision also runs contrary to the spirit of other cases: In *Application of Woods*⁶¹, Walsh J. welcomed the extension of legal aid to habeas corpus cases, saying that this provided “a notable contribution to the cause of personal liberty.” McMahon J. stated in *O’Neill v Butler*⁶² that “where the interests of justice require that a defendant should have legal aid the Constitution requires that he be afforded the opportunity of being represented and it is the duty of the Justice on behalf of the State

shall ... grant ... a certificate for free legal aid.

⁵⁸ Carney, supra n.56, p.224.

⁵⁹ The Supreme Court considered the right to legal assistance to be part of the concepts of due course of law and fair trial: Article 38(1).

⁶⁰ This is an example of what Joseph Raz would call distinguishing in the “strong” sense where a rule is changed so that a rule which did apply to the present case no longer applies to it in its modified form, as distinct from the “tame” sense of distinguishing where a *ratio* is simply held not to apply to the facts in question: *The Authority of Law* (Clarendon Press, Oxford, 1979), 180 at 183-189. Similarly, Neil MacCormick says that a ruling is “revisable”: ‘Why Cases have *Rationes* and What These Are’, in Laurence Goldstein (ed.), *Precedent in Law* (Clarendon Press, Oxford, 1987), 155 at 165. See Rupert Cross and J.W. Harris, *Precedent in English Law* (Clarendon Press, 4th edition, Oxford, 1991).

⁶¹ [1970] IR 154 at 166.

⁶² [1979] ILRM 243.

to see that this opportunity is afforded.”⁶³ Similarly, Denham J. stated in *Cahill v Judge Reilly*:

I consider an indigent accused is entitled to apply for legal aid in the event of a possible custodial sentence. If a person does not know of his right to legal aid and consequently does not apply for legal aid then his constitutional right is violated.⁶⁴

In 1996, two men were released from detention on the basis that they had not been offered legal aid in the District Court.⁶⁵ It is also significant that the Supreme Court has ruled that the right of access to a solicitor is a right which is constitutional in origin.⁶⁶ Furthermore, Lardner J. distinguished the Ardee case in *Kirwan v Minister for Justice*.⁶⁷

In addition, there is a European Convention on Human Rights dimension to be

⁶³ At p.245 of the report. Contrast the decision in *O’Shaughnessy v Attorney General*, O’Keeffe P., 16 Feb. 1971: Lack of civil legal aid is not a contravention of property rights.

⁶⁴ [1994] 3 IR 547 at 551.

⁶⁵ *McSorley and Mulholland v Governor of Mountjoy Prison* [1996] 2 ILRM 331 (HC.) While the Supreme Court at [1997] 2 ILRM 315 allowed the appeal on various grounds, these did not relate to the importance of informing defendants of their right to legal aid.

⁶⁶ *People (DPP) v Healy* [1990] 2 IR 73. The case is concerned only with persons detained in Garda custody. The right to consult the solicitor is at the person’s own expense. See Kelly, *The Irish Constitution*, 3rd ed. By Gerard Hogan and Gerry Whyte, pp.610-611; Andrew Butler, ‘The Right to be Informed of the Right to a Lawyer - The Constitutional Dimension’ (1993) 3 Ir.Crim.L.J. 173; Butler and Ong, ‘Breach of the Constitutional Right of Access to a Lawyer and the Exclusion of Evidence - The Causative Link’ (1995) 5 Ir.Crim.LJ 156; *Murray v UK* (1996) 22 EHRR 29; Donncha O’Connell, ‘The Right to Silence and Access to a Lawyer’ (1996) ILT (ns) 185.

⁶⁷ [1994] 2 IR 417.

considered. Article 6(1) of the Convention sets out a person's right to a "fair and public hearing" and Article 6(3)(c) declares that every person who is charged with a criminal offence is entitled to free legal aid where the interests of justice so require. Admittedly, in ratifying the Convention in 1953, Ireland inserted a reservation on Article 6(3)(c).⁶⁸ But the courts can still have regard to the terms of the Convention, as illustrated by O'Higgins C.J.'s reference to it in *State (Healy) v Donoghue*:

[T]he existence of the Convention demonstrates clearly that it was then generally recognised throughout Europe that, as one of his minimum rights, a poor person charged with a criminal offence had the right to have legal assistance provided for him without charge.⁶⁹

Similarly, O'Hanlon J. has stated that judgements of the European Court of Human Rights should have persuasive effect in Ireland.⁷⁰ And since the European Court of

⁶⁸ Carney, *op.cit.*, p.215, fn.147; [1976] IR 325 at 351. The reservation stated that the Government did not "interpret Article 6(3)(c) of the Convention as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland."

⁶⁹ [1976] IR 325 at 351.

⁷⁰ *Desmond & Dedeir v Glackin & Others (No.1)* [1993] 3 IR 1 at 28-9. Compare *Norris v Attorney General* [1984] IR 36. O'Higgins C.J. states that the European Convention is not "... in any way relevant ..." (p.67). See also Henchy J. at p.69 ("persuasive influence"). Costello J. in *Heaney v Ireland* [1994] 2 ILRM 420 at 430 relies on two European Court of Human Rights decisions. Costello P. in *R.T.* [1995] 2 IR 65 at 79 states that in considering the safeguards for mental patients "regard should be had to the standards set by the Recommendations and Conventions of International Organisations of which this country is a member." Contrast *Croke v Smith (No.2)*, High Court, 27 and 31 July 1995 at pp.26-35, where Budd J. summarises various decisions on the status of the European Convention in Ireland and concludes: "[W]hile this Court can look to the European Convention and the United Nations principles as being influential guidelines with regard to matters of public policy, nevertheless in the circumstances of this case ... such Conventions may not be used as a touchstone with regard to constitutionality. The Court is at present bound to approach this issue wearing blinkers as to Conventions setting out internationally accepted norms and standards" (pp.34-5). Later, he says: "I have put out of my

Justice has increasingly begun to refer to the European Convention on Human Rights, this means that domestic courts will have to have regard to the Convention more often.⁷¹ In the famous *Airey* case⁷² the European Court of Human Rights held that the absence of legal aid was a breach of Article 6(1), the right to a “fair and public hearing.” It is interesting that in the Criminal Procedure Act 1967 the right to legal aid was removed for preliminary examinations of any charge except murder, but it was restored by the Criminal Procedure (Amendment) (Number 2) Act 1973, partly because of suspected conflict with the European Convention.⁷³ If legal aid must be provided for a preliminary examination, then why should it be unnecessary for proceedings under s.207 of the Mental Treatment Act 1945?⁷⁴ It is also arguable that the s.207 procedure is a preliminary examination (see the Ballinasloe case above).

On another point of statutory interpretation, the test of “gravity of the charge”/

considerations any temptation to be affected by [international conventions’] persuasive influence.” (p.131).

⁷¹ Case C-260/89 *ERT v Dimotiki* [1991] ECR I-2925; Case C-159/90 *S.P.U.C. Ireland Ltd. v Grogan* [1991] ECR I-4685; Grief, ‘The Domestic Impact of the European Convention on Human Rights as Mediated through Community Law’ [1991] Public Law 555.

⁷² *Airey v Ireland* (1979) 2 EHRR 305. Vincent Berger, *Case Law of the European Court of Human Rights*, vol.1, 1960-1987, Round Hall Press, Dublin, 1989, p.120. See Patrick Thornberry, ‘Poverty, Litigation and Fundamental Rights - A European Perspective’ (1980) 29 ICLQ 250; Whyte, *supra* n.56; Mel Cousins, ‘Access to the Courts: The European Convention on Human Rights and European Community Law’ (1992) 14 DULJ (ns) 51.

⁷³ Senator Mary Robinson was of the opinion that the legal aid section of the 1967 Act “would appear to contravene the Convention” - 75 Seanad Debates 438, 11 July 1973; Carney, p.213. See also Robinson, ‘The Strasbourg Connection’ in *The Closed Door - A Report on Civil Legal Aid Services in Ireland* (Free Legal Advice Centres and Coolock Community Law Centre, 1987), pp.27-29.

⁷⁴ Note the Attorney General’s scheme, which does not apply to s.207.

“exceptional circumstances” only applies to District Court proceedings. In other courts, less rigorous tests apply.⁷⁵ However, it is arguable that the District Court proceedings under s.207 are of such a special kind that the District Court test may not be applicable. Under s.207, the Judge of the District Court finds that there is prima facie evidence that the patient has committed an indictable offence. It is unlikely that the case will ever go for trial and so, as stated before, the decision comes as close to a finding of guilty of an indictable offence as makes virtually no difference. The Supreme Court should have recognised this and held that the patient did have a right to legal aid and did have a right to be informed of this.

The Supreme Court’s judgment in the Ardee case occupies only 3 pages of the law reports and it would have been preferable if there was a more detailed explanation given by the court of the grounds for the decision.⁷⁶ Like many judgments of the Irish Supreme Court, the judgment was too short. The issues it deals with deserved more thorough treatment.

Among other things, the above four cases on s.207 of the 1945 Act demonstrated the

⁷⁵ In the Circuit Court, the test is basically whether legal aid is essential in the interests of justice: s.3 of the 1962 Act.

⁷⁶ As has been stated concerning another case: “There are undoubtedly many theories as to the ingredients of an excellent judgement. A primary criterion must be that the reasoning withstands rational challenge. Part of this test involves giving adequate consideration to the detail of the issues, and taking all relevant materials into account. [C]ertain qualitative indicators, such as the length of the judgement, or the number of cases or academic materials referred to, may be examined.” - Richard Humphreys, ‘Constitutional Law - Bonjour Tristesse: Reasons and Results in Constitutional Adjudication’ (1992) 14 DULJ (ns) 105 at 113.

need for clarification and reform of the section by the Oireachtas, the District Court Rules Committee and the courts. The *McGrath* case was the only case where an argument was made about the section's constitutionality, based only on the right to freedom of expression, although it could also have been argued that the power s.207 vested in the Minister for Justice was an interference with the judicial power⁷⁷ or that the section interfered with patients' right to liberty.

Woods stated in 1994 that the Department of Health preferred a person's remand in custody to prison from where he or she could be transferred to the CMH under s.13 of the Lunatic Asylums (Ireland) Act, 1875, rather than the use of the s.207 procedure.⁷⁸

A fifth case on s.207 came before the courts in 1995: *R.T. v Director of Central Mental Hospital*.⁷⁹ R.T., who had been detained in 1977 in St. Brendan's Hospital, Dublin, on a temporary basis, was charged in 1978 with causing actual bodily harm to another patient in the hospital. T. was legally represented. The nature of T's mental

⁷⁷ See discussion in chapter 4 below of *State (O.) v O'Brien (Children Act Case)*, *Application of Neilan*, *Application of Ellis* and *Application of Gallagher*. See also *State (Sheerin) v Kennedy* [1966] IR 379: s.7 of the Prevention of Crime Act 1908 (8 Edw. 7, c.59) authorised the Lord Lieutenant to transfer "incorrigible" persons from a borstal to prison "with or without hard labour as the Lord Lieutenant may determine." The Supreme Court held that it was an unconstitutional exercise of the judicial power of the State for the executive to choose whether the imprisonment would be with or without hard labour

⁷⁸ This is described as "an alternative method of dealing with the circumstances for which s.207 was intended." The procedure had the advantage that the person would be assigned legal aid on the occasion of his or her appearance before the court - James V. Woods, *District Court Practice and Procedure in Criminal Cases* (James V. Woods, Limerick, 1994), p.633.

disorder is not stated. The district justice, sitting in St. Brendan's Hospital, made an order under s.207 and the Minister transferred T. to the CMH. T. showed gradual improvement over the years and from 1983 on, he was granted parole from the CMH to Dublin.⁸⁰ Correspondence took place in 1990 and 1991 between the Medical Directors of St. Brendan's and the Central Mental Hospital, the Inspector of Mental Hospitals and an officer in the Department of Health. The consensus was that T. should be discharged from Dundrum, but St. Brendan's was reluctant to take him back as there was no room for him and as there had been problems in managing him in the past. The Department of Health mentioned that the Minister could oblige St. Brendan's to accept T. back (by making an order under s.207(3)), but this option does not appear to have been pursued. It was only when a solicitor was consulted by T. in 1994 that real progress was made in resolving T's case. St. Brendan's conceded that T. would be transferred back, but T. then began to argue that he should no longer be detained in any hospital. T. made a habeas corpus application under Article 40.4 of the Constitution and also challenged the constitutionality of s.207 of the 1945 Act. The Attorney General was notified of the case and was represented at the hearing.

This was the second case where the constitutionality of s.207 was challenged. However, arguments of a non-constitutional nature were made first. It is remarkable that no reference is made in the T. case to the previous cases on s.207. No argument

⁷⁹ [1995] 2 IR 65.

⁸⁰ This parole consisted of allowing T. to leave the Central Mental Hospital for a certain number of nights each week. At the time of the High Court hearing, T. was on unaccompanied parole three nights a week (*Irish Times*, 14 January 1995). Parole is authorised by s.204 of the 1945 Act, for a maximum of forty-eight hours.

appears to have been raised as to why T. was not remanded on the charges, as had been stated by the Supreme Court in the Ballinasloe case. Instead, two new arguments of a non-constitutional nature were made in the T. case.

T. had been a temporary patient at the time of the transfer to Dundrum. Temporary patients can only be detained for a maximum of two years,⁸¹ so it was argued that after 18 months⁸² T's detention became invalid. Costello P. distinguished T's case from *Croke v Smith (No.1)*,⁸³ which concerned s.208 of the 1945 Act.⁸⁴ Section 207 clearly authorised detention in Dundrum until the person was transferred back, was discharged or died, whereas s.208 only authorised removal to a hospital for as long as was necessary for the person's treatment.

It was also argued that T's detention was unlawful because he was subject to "intolerable" conditions: he had been detained without conviction for sixteen years and he had been detained after he had recovered sufficiently to be transferred back to St. Brendan's. Reliance was placed on *Middleweek v Chief Constable of Merseyside*⁸⁵ and *R v Deputy Governor of Parkhurst Prison, ex parte Hague*.⁸⁶

⁸¹ An initial period of six months and a maximum of three six-month extensions - s.189(1)(a) 1945 Act, as inserted by s.18 of the 1961 Act. In the case of an "addict", the aggregate of extensions should not exceed six months (ibid.)

⁸² T's detention had only been extended twice, i.e. to a total of 18 months.

⁸³ [1994] 3 IR 525.

⁸⁴ See below pages 139ff.

⁸⁵ [1992] 1 AC 179.

Costello P. held that these two cases did not support T's submissions. The *Parkhurst Prison* case established that a prisoner detained under "intolerable" conditions might have a remedy in negligence, misfeasance or Judicial Review, but it was also held that an otherwise lawful imprisonment is not rendered unlawful by reason only of the conditions of detention.⁸⁷ In addition, the two English cases concerned intolerable physical conditions, not wrongful administrative actions as alleged in the T. case.

The emphasis in Costello P's discussion of the constitutionality of s.207 is on the constitutional right to liberty. Costello P. said that the object of detention under the 1945 Act is essentially benign — to provide for the person's care and treatment, for their own safety and for the safety of others. However, patients in mental hospitals are weak and vulnerable, so the State's duty to protect the citizen's rights becomes more exacting. He said that the Oireachtas must be particularly astute when depriving such patients of their liberty and must ensure that legislation contains adequate safeguards against abuse and error, having regard to the standards set by Recommendations and Conventions of which Ireland is a member.⁸⁸

Costello P. adopts the Department of Health's own criticisms of s.207 (as summarised in the Green Paper)⁸⁹ and he then lists another series of defects. He says that s.207 may be used to deal with a patient who commits a crime before or after

⁸⁶ [1992] 1 AC 58.

⁸⁷ Lord Bridge of Harwich - [1992] 1 AC 58.

⁸⁸ See Chapter 17 and Appendix of Green Paper; White Paper, Appendix 2; *Croke v Smith (No.2)*, High Court, Budd J., at pp.20-26.

⁸⁹ See below, p.137.

being detained in a mental hospital⁹⁰ and it therefore enables a patient who, because of mental illness, may have lacked mens rea, to be prosecuted. According to Costello P., this “might well amount to an abuse of the criminal process.”⁹¹ However, it is difficult to see how the charging of detained mental patients may be in itself an abuse of the criminal process. Many mental patients are perfectly capable of forming the necessary mens rea to commit offences. The fact that persons have been detained under the Mental Treatment legislation does not mean that such persons are not capable of forming mens rea, particularly as they may have recovered or may be nearing recovery at the time of the alleged criminal act. It also follows that detained mental patients are not necessarily unfit to plead. Costello P’s point is therefore somewhat misleading.

Costello P. continues with a stronger point of criticism concerning s.207: if the hospital authorities believed that a disruptive patient could not be transferred under s.208 (the section involved in the *Croke* case) then s.207 could be used by the authorities solely for the purpose of obtaining a transfer to the Central Mental Hospital and not for the purpose of making the patient amenable to the criminal law. This, again, would be an abuse of the criminal processes.⁹² This defect in s.207 is at the root of many of the problems which have arisen. Twenty six years before the *R. T.*

⁹⁰ Here again it would have been useful if Costello P. had referred back to the previous cases on s.207, in at least three of which the charge was brought *after* the person had been detained in the mental hospital. (It is not clear whether Charles McGrath was charged after he had been detained).

⁹¹ [1995] 2 IR 65 at 80.

⁹² [1995] 2 IR 65 at 80.

case, in the Ballinasloe case, the Supreme Court had held that the procedure under s.207 was the initial stage of a criminal proceeding which could only be disposed of according to law. If this case had been properly followed in subsequent cases, the procedure would perhaps have been changed long ago. In the Ballinasloe case, counsel for the Governor of the Central Mental Hospital argued that the charging of the patient was mere machinery incidental to effecting a transfer to Dundrum. This made it obvious that this mentality had prevailed within the hospital system since then, despite the clear warnings in the Supreme Court's judgment at the time.

The next problem was that the procedures in s.207 were based on a "patent illogicality."⁹³ Costello P. said that it did not follow that because a patient might be unfit to plead if placed on trial that he or she was suitable for transfer to the Central Mental Hospital. The Judge of the District Court was required by statute to certify something which might be quite untrue. This is a point which could also be applied to automatic detention on an insanity acquittal or a finding of unfitness to plead.

Finally s.207 was defective because there were no procedures for patients to review the Inspector of Mental Hospital's opinion, to procure their re-transfer or liberty, or to review their continued detention.

Costello P. concluded that the section not only fell far short of internationally accepted standards but was unconstitutional. The State had failed adequately to

⁹³ [1995] 2 IR 65 at 80.

protect the right to liberty of temporary patients, who had “a right to liberty, at most, eighteen months after the reception order which restricted their liberty was made.”⁹⁴ The President of the High Court said that the State was obviously searching for an ideal solution to the problems with mental health legislation, but this “prolonged search for excellence ... has had most serious consequences for the applicant.”⁹⁵ Quoting Voltaire, the President says “the best is the enemy of the good.”⁹⁶ In the light of these conclusions, Costello P. said that he did not need to express any opinion as to whether s.207 infringed other articles of the constitution.

Having found that s.207 was unconstitutional, Costello P. was obliged by Article 40.4.3 to refer the question of the validity of the section up to the Supreme Court by way of case stated.⁹⁷ Meanwhile, in the light of the medical evidence, the President said that he did not think he could admit T. to bail. He also commented that whatever

⁹⁴ Costello P. presumably meant to say “24 months” as he himself explained earlier at p.70 of the report that the original six month period could be extended by up to 18 months, making a total of 24 months.

⁹⁵ [1995] 2 IR 65 at 81.

⁹⁶ Voltaire, ‘La Bégueule’ in *Contes en Vers et en Prose II* (1772, reprinted by Classiques Garnier, Paris 1993), p.339; based on an old Italian proverb. This quote is given in French by Budd J. in *Croke v Smith (No.2)* at p.128.

⁹⁷ Article 40.4.3 states: “Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Supreme Court by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Supreme Court has determined the question so referred to it.” It is an arguable disadvantage of the ‘habeas corpus’ procedure under Article 40.4.

view the Supreme Court would take of the section, the end result was likely to be T's re-transfer to St. Brendan's and the making of a new reception order. Therefore, it should be explained to T. that his best interests might be served by availing of an immediate transfer to St. Brendan's.

After the High Court decision, T. was transferred back to St. Brendan's hospital. On 3 November 1995, the State applied to the Supreme Court for a decision as to whether the Case Stated should now go ahead. Counsel for the State said that the law would be changed in the future. The Supreme Court asked that Costello P's view be sought on the matter. Costello P. stated that in view of the changed facts he withdrew the Case Stated. This meant that the Case Stated lapsed.⁹⁸ R.T. was awarded his costs against the State.⁹⁹ It also appears that as a result of all of this s.207 technically remains on the statute book.¹⁰⁰

The State did not transfer back all the other patients who were detained in the Central Mental Hospital under s.207.¹⁰¹ By transferring one patient back to an ordinary

⁹⁸ "This is unfortunate as the Supreme Court could have delivered a definitive judgment on this controversial section" - Jarlath Spellman, 'A Lawyer's Comment on the White Paper on a New Mental Health Act' (1995) 1 MLJI 86 at 89, fn.12.

⁹⁹ Information provided by Ms. Muireann O Briain, SC, counsel for R.T.

¹⁰⁰ Note that in *Application No. 24196/94, O'Reilly v Ireland* (1996) DR 84-A 72 at 79, it is noted that Ireland cited the *R.T.* case to demonstrate that a provision of the MTA 1945 could be found unconstitutional by the High Court and therefore that a challenge to the constitutionality of another section of the Act would be an effective domestic remedy.

¹⁰¹ In November 1997, 11 patients were still being held in the CMH under s.207 - Department of Health, *Report of the Inspector of Mental Hospitals 1997*,

mental hospital, the State succeeded in postponing much-needed reforms in transfer procedures.¹⁰²

Proposals for reform of section 207:

The Henchy Committee reported that it had received many complaints as to the operation of section 207.¹⁰³ Transfers between designated centres (including the CMH) could be made by the Minister for Health on consideration of a medical report and a report from the Review Body.¹⁰⁴ The 1996 Bill proposes that a medical officer could order transfers between designated centres, with the consent of the Minister for Health, on such conditions and for such period as he or she considered proper.¹⁰⁵

It is unclear in the Henchy Committee report whether a patient could specifically apply for a review of his or her transfer.¹⁰⁶ It also stated that a court could, of its own

p.18.

¹⁰² Similarly, the State avoided many legal problems by releasing the applicant in *State (Toohey) v Governor Central Mental Hospital*, Supreme Court, 28 March 1968. The Supreme Court has been known to give judgments on moot points in the past - see O'Flaherty J. in *M.F. v Superintendent Ballymun Garda Station* [1991] 1 IR 185 at 200.

¹⁰³ Henchy Committee report, para. 13. The Committee was concerned mainly with persons with mental disorder appearing before courts on criminal charges. As a result, it stated that the repeal or amendment of s.207 in regard to other patients should be offered in a Mental Treatment Bill.

¹⁰⁴ Henchy Committee draft Bill, s.31(2). The transfer would be "in the interest of [the patient's] health or well-being or by reason of his behaviour or tendencies."

¹⁰⁵ Criminal Justice (Mental Disorder) Bill 1996, s.8(1).

¹⁰⁶ Henchy Committee draft Bill, s.22.

motion, grant a legal aid certificate, regardless of means, for a defendant where the issue of fitness to plead is raised or where a question arises whether he/she has a mental disorder.¹⁰⁷

The Health (Mental Services) Act 1981, which has never come into operation¹⁰⁸, would have repealed most of the Mental Treatment Act 1945, including s.207. Transfers to the Central Mental Hospital would only have been possible on the direction of a Review Board consisting of three persons, with an appeal to the High Court.

The reports of the Inspector of Mental Hospitals¹⁰⁹ began to note that a number of the patients detained under s. 207 were suitable for transfer back to district mental

¹⁰⁷ Henchy Committee, pp.52-55.

¹⁰⁸ According to the Department of Health, the Act has not been brought into operation because it has been overtaken by developments in international law and there have been other developments, such as community psychiatric services, in the mental health sector - *Green Paper*, para. 16.13. See also Tom Cooney, 'Psychiatric Detainees and the Human Rights Challenge to Psychiatry and Law: Where Do We Go From Here?' in Liz Heffernan (ed.), *Human Rights: A European Perspective* (Round Hall Press, Dublin, 1994) 126 at 130: "The Act ossified in the Department of Health. Psychiatrists complained that they were not adequately consulted so they intimated that they would not be prepared to work it." Cooney also mentions the recession, monetarism and opposition of individual Ministers to mental health tribunals. In Kelly's *Irish Constitution* (3rd ed. by Gerard Hogan and Gerry Whyte), it is stated that the 1981 Act has been left "on the legislative version of Death Row" - p.867; cited by Budd J. in *Croke v Smith (No.2)* at p.48. See also Jarlath Spellmann, 'Safeguards in the Mental Treatment Legislation under Scrutiny' (1996) 2 MLJI 80 at p.81, fn.12.

¹⁰⁹ See Department of Health, *Report of the Inspector of Mental Hospitals, 1988-89*, pp.50-53; 1990, p.38; 1991, p.5; 1992, pp.43-46.

hospitals, but that the hospitals were reluctant to accept them back.¹¹⁰ The Inspector and Assistant Inspector also noted that they had been advised that s. 207 was constitutionally suspect.

In 1992 and 1995, the Green and White Papers on Mental Health also contained criticisms of s.207:

This procedure is seriously defective for the following reasons:

- (a) the person does not have a proper trial for the offence or on the question of his or her fitness to plead;
- (b) the judge, if satisfied that there is prima facie evidence that the person has committed the offence, has no option but to grant the certificate;
- (c) no criteria are set out for the Minister's decision;
- (d) there is no limit to the length of the person's detention in the central mental hospital;
- (e) it is not clear whether the charge goes into abeyance once the certificate is signed or whether it can later be revived.¹¹¹

Points (a) and (e) of this list confirmed that it was the practice not to remand the patient on the charge. If the Supreme Court's instructions in the Ballinasloe case were being followed, then the patient would have had a proper trial later (at least on fitness to plead) and the charge would not have gone into abeyance once the

¹¹⁰ Analogous problems in the UK mean that sometimes regional secure units will not accept a patient until the unit is sure that it will be possible to transfer the patient down or up the security scale in due course, which has been referred to as a code of 'Do not enter box until exit is clear' - Mental Health Commission, *Third Biennial Report* (HMSO, London, 1989), para. 11.9; cited in Hoggett, p.21.

¹¹¹ Green Paper, para. 23.13; White Paper, para. 7.33.

certificate was signed. It is disturbing to think that a clear Supreme Court statement is being disobeyed with such regularity, although admittedly the Supreme Court itself seems to have ignored the statement in two subsequent cases.

The White Paper recommends that legal aid should be available for hearings before the Review Board and also appears to suggest that legal aid should be available for all challenges to detention in the courts.¹¹² The Paper states that the Government considers that s.207 should be repealed and in future a transfer to the CMH could be enabled by the signatures of two consultant psychiatrists¹¹³ for three months at a time, with reviews by the proposed Mental Health Review Board and a possible appeal to the High Court. The grounds for transfer would be that the patient for his or her own safety or the safety of others required psychiatric care in a secure environment. The Board would automatically review the continued detention of any person who was transferred from another hospital and who was detained in the CMH for a year and at two yearly intervals thereafter.¹¹⁴

It would be preferable for a new statutory system to require the consent of a review body before any transfer would take place, and to enshrine the principle of treatment in the least restrictive environment¹¹⁵ in the legislation.

¹¹² White Paper, paras. 9.7-9.8.

¹¹³ The consultant in clinical charge of the patient and the clinical director of the CMH or other special psychiatric centre. If the consultants disagreed, the Review Board would adjudicate on the matter.

¹¹⁴ White Paper, para. 7.34.

¹¹⁵ Principle 9.1 of UN Principles for the Protection of Persons with Mental

Information from the Eastern Health Board confirms that s.207 has been largely replaced by s.208 (see below), but unfortunately the material refers to the s.207 procedure as including a finding that the person has committed an offence, without specifying that this is only a *prima facie* finding.¹¹⁶ The material does not state whether any patients remain in the CMH under s.207 transfers which were made before policies changed.

Transfers of Detained Patients from Ordinary Mental Hospitals to the Central Mental Hospital under s.205 and s.208 of the Mental Treatment Act 1945

Section 205 of the Mental Treatment Act 1945¹¹⁷ authorises the Chief Executive Officer of a Health Board, acting on the advice of the resident medical superintendent of the appropriate mental hospital maintained by the Health Board, to transfer a patient detained in such hospital to any other institution maintained by the Board.¹¹⁸

Illness and the Improvement of Mental Health Care, 1991: Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others. But note the General Limitation Clause. See also Art. 7 of the Council of Europe Recommendation No. R (83) 2 on the legal protection of persons suffering from mental disorders placed as involuntary patients, 1983: a patient should not be transferred from one establishment to another unless his therapeutical interest and, as far as possible, his wishes, are taken into account. But this does not apply to placement decided pursuant to criminal proceedings - art.1.1.

¹¹⁶ Eastern Health Board FOI s.15 Book and Admission Policy of CMH.

¹¹⁷ As adapted by SI 108 of 1971.

¹¹⁸ The section does not state when the transfer would come to an end.

If a patient were detained in a hospital maintained by the Eastern Health Board, it might be possible to transfer him or her to the CMH under s.205. This possibility was mentioned in passing by Flood J. in *Croke v Smith (No.1)*.¹¹⁹

Section 208 of the 1945 Act applies if the Chief Executive Officer, acting on the advice of the resident medical superintendent of a mental hospital, is of opinion that a person detained in such hospital or in any other institution maintained by the Board requires treatment (including surgical treatment) not otherwise available. In such circumstances, the CEO may direct the person's removal to "any hospital or other place" where the treatment is obtainable. S.208(5) states that the person may be kept in the "hospital or other place" so long as is necessary for the purpose of his or her treatment. The person should then be taken back to the place from which he or she was removed unless a doctor certifies that his or her detention is no longer necessary.

Section 208 was not used for transfers to the CMH until 1992. Between that year and 1995 there were three transfers of this kind¹²⁰, involving two males and one female.¹²¹ By 1997, there were 8 patients detained in the CMH under s.208.¹²²

¹¹⁹ [1994] 3 IR 525 at 532. See below.

¹²⁰ M. Creaby et al, 'Section 207 of the Mental Treatment Act 1945: A Critical Review of its Use, 1955-1994' (1995) 1 MLJI 11 at 12.

¹²¹ The cases of the two males are mentioned in the following paragraphs. The female's alleged offences were repeated aggressive attacks, and her diagnosis was anti-social personality disorder.

¹²² Department of Health, *Report of the Inspector of Mental Hospitals 1997*, p.18.

In a case reported in the *Irish Times*¹²³, it was stated that in 1992 a man was arrested and questioned about the murder of a close relative. The man was committed to St. Brendan's Hospital on a person of unsound mind (PUM) order, i.e. for his indefinite detention. As there was no secure unit at St. Brendan's, he was then transferred to the CMH under s.208 of the 1945 Act.¹²⁴ He responded well to treatment. In anticipation of possible legal problems if the man was detained indefinitely at the CMH, he was transferred back to St. Brendan's in January 1993. In a letter accompanying the man's transfer back to St. Brendan's, he was described as showing no signs of psychosis. It was reported that health personnel were concerned that the Director of Public Prosecutions would choose not to prosecute the man, perhaps due to widespread concern over possible early release of persons found guilty but insane so as not to be responsible. The decision to return the man to St. Brendan's was criticised by Dr Art O' Connor of the CMH and Mr Des Kavanagh of the Psychiatric Nurses Association of Ireland. Presumably this man is the man who is mentioned in a report of the Inspector of Mental Hospitals as being detained in Dundrum under s.208 when the hospital was inspected on 13 March 1992.¹²⁵ The man may have been re-admitted later.¹²⁶

A detailed assessment of s.208 and its application to *temporary* patients is provided in

¹²³ *Irish Times*, 11 January 1993. See also McAuley pp.149-151.

¹²⁴ His diagnosis was schizophrenia – Creaby et al, loc.cit.

¹²⁵ Department of Health, *Report of the Inspector of Mental Hospitals 1992* (Dublin, 1995), p.42

¹²⁶ The present tense is used in describing his case in Creaby et al, p.12, thus giving the impression that the man was again detained in the CMH in 1995.

Croke v Smith (No.1).¹²⁷ Croke was detained as such a patient in St. Ita's Hospital, Portrane, Co., Dublin in 1993. He was reluctant to undergo electro-convulsive therapy (ECT).¹²⁸ Within a few days, he absconded and was found to have returned to his mother's house. Nursing staff were sent to his house and, as they tried to restrain him, Croke stabbed three of the nurses, one in a near fatal manner.¹²⁹ Croke was brought to a Garda station, and then back to the mental hospital. He was not charged with assault of the nurses. At a case conference, it was agreed that Croke should be transferred to the CMH as otherwise he would have to be locked up for very long periods while in St. Ita's. The CMH would provide secure accommodation combined with freedom of movement which was not available in St. Ita's.¹³⁰ Croke's diagnosis was schizophrenia.¹³¹ Eight months later, Croke made a habeas corpus application under Article 40.4 in the High Court, the respondents being the clinical director of the CMH and his assistant, the Eastern Health Board, Ireland and the Attorney General.¹³²

¹²⁷ [1994] 3 IR 525.

¹²⁸ *Croke v Smith (No.2)*, Budd J., High Court, 27 and 31 July 1995, p.2.

¹²⁹ Presumably the fact of the stabbings was admitted by Croke's counsel.

¹³⁰ At p.540 of the report, Blayney J. notes that originally Dr Smith, the clinical director of the CMH, had reservations as to whether s.208 applied to Croke's case because the treatment he would receive was available in St. Ita's and it was only the management of the treatment that would be different. However, Croke's counsel later conceded that the treatment which he would receive in the CMH was not available in St. Ita's since it required for its success a secure environment which did not exist in St. Ita's.

¹³¹ Creaby et al, *op.cit.*, p.12.

¹³² This was an unusual list of respondents. In most other cases, there is only one respondent, the Director of the CMH.

Flood J. in the High Court dismissed Croke's claim. He said that the applicant was receiving "special treatment" within the terms of s.208, the CMH was a "hospital" and the timespan of his detention was co-extensive with the duration of his treatment. It was not necessary for the original six-month period of detention to be extended in order to continue to detain a patient in the CMH under s.208. A problem could arise once the treatment in the CMH ended, but in such a situation a new temporary order could be made and the "common sense" in *Re Shuttleworth*¹³³ could be followed. The various protections afforded to patients against arbitrary and unwarranted detention under the 1945 Act, while not ideal, were adequate.¹³⁴

The Supreme Court agreed with Flood J. that the CMH was a "hospital" under s.208 of the 1945 Act. However, the court took a different view of the duration of a temporary patient's detention. Blayney J. (with whom the other four judges agreed)

¹³³ (1846) 9 QBD 651; 115 ER 1423. Lord Denman CJ stated at 662: "If the Court thought that a party, unlawfully received or retained, was a lunatic, we should still be betraying the common duties of members of society if we directed a discharge. But we have no power to set aside the order, only to discharge. And should we, as Judges or individuals, be justified in setting such a party at large? It is answered, that there may be a fresh custody. But why so? Is it not better, if she be dangerous, that she should remain in custody till the Great Seal or the commissioners act? Therefore, being satisfied in my own mind that there would be danger in setting her at large, I am bound by the most general principles to abstain from so doing: and I should be abusing the name of liberty if I were to take off a restraint for which those who are most interested in the party ought to be most thankful." See other similar cases cited in Hoggett at 78-9 and *R v Bournewood NHS Trust, ex p. L.* [1999] 1 AC 458; [1998] 3 WLR 107 (common law doctrine of necessity may justify detention.)

¹³⁴ [1994] 3 IR 525 at 537.

said that Croke had been detained under the temporary admission procedure in s.184 of the 1945 Act, and this detention had to be extended, as provided for by s.189, if it was to continue beyond six months.¹³⁵ In fact s.189 specifically stated that the extension procedure applied to any patient “including a person who would be so detained but for his being ... removed ... under section ... 208” of the Act. Section 208 only granted a power to “keep” a person in a hospital, but the power of detention came in this case from s.184. Contrary to Flood J’s views in the High Court, Blayney J. thought that the question of what would happen a patient whose treatment in the CMH had ended was important and, because the patient could not be returned to the original mental hospital if the six-month detention period had expired, this clearly demonstrated that the Health Board’s view of s.208 could not be correct.¹³⁶ Croke’s detention should have been extended under s.189, so that he could have objected to the extension as provided for by s.189(1)(b) as amended. The Supreme Court therefore ordered Croke’s release, but stated that its order did not in any way impede the making of a new temporary reception order, and possibly a consequential order under s.208 transferring Croke back to the CMH.

Croke (No.1) was an important test case for the State, as it had only begun using s.208 for transfers to the CMH in 1992, perhaps as a reaction to the various

¹³⁵ In the *R.T.* case, Costello P. rightly pointed out that while s.208 only allowed a person to be kept in the CMH “for as long as it is necessary for his treatment”, a person transferred under s.207 “may, notwithstanding any other provision of this Act be detained therein” until sent to a district mental hospital or other institution or discharged or death - [1995] 2 IR 65 at 77.

¹³⁶ [1994] 3 IR 525 at 544.

difficulties with s.207 (and in particular the delay caused by the necessity for an Inspector of Mental Hospitals report before the Minister's decision.)¹³⁷ The State could quite easily have charged Croke with the assault on the nurses. At a subsequent trial, he might have been found either unfit to plead or guilty but insane so as not to be responsible. However, it was considered more appropriate to use s.208. The decision not to charge Croke is quite remarkable. On the one hand, it can be regarded as evidence of a compassionate approach by the State: criminal law is not necessarily an appropriate mechanism for dealing with the treatment of persons with serious mental health conditions. For example, the Director of Public Prosecutions told McAuley that the trial of persons found unfit to plead in practice only takes place if there is a suspicion that the symptoms of unfitness were feigned.¹³⁸ On the other hand, the decision may demonstrate an unwillingness on the part of the State to expose itself to the risks inherent in the criminal process and a determination to detain Croke by the most open-ended procedure available.

The choice of the s.208 procedure involved a debatable interpretation of the section on at least two counts. It was reasonably doubtful that the section's references to "any hospital or other place" and "treatment (including surgical treatment) not available save pursuant to this section" would apply to a transfer from an ordinary mental hospital to the CMH. And, on top of this, to attempt to argue that s.208 allowed virtually indefinite detention, even if the patient was a temporary patient, was

¹³⁷ See Flood J., [1994] 3 IR 525 at 536.

¹³⁸ McAuley, p.142.

stretching the section's meaning far beyond what could have been intended by its original enactment.

At the time that the 1945 Act was passed, the CMH was known as the Central Criminal Lunatic Asylum. The hospital has special features which make it a highly secure environment primarily for offenders and alleged offenders.¹³⁹ And yet both the High Court and Supreme Court have held that the CMH comes within the term "any hospital or other place." Flood J. identifies two arguments by Croke as to why the CMH is not a lawful place of detention for temporary patients (i.e. is not a "hospital or other place"):

- (a) Dundrum was historically a criminal lunatic asylum and now holds offenders and alleged offenders
- (b) Section 207, not s.208, is the only appropriate means for transferring a patient from an ordinary mental hospital to the CMH.¹⁴⁰

While Flood J. is right to reject argument (b)¹⁴¹, he does not adequately address argument (a). He merely states that it is common case that the CMH is a "hospital", albeit a psychiatric hospital which caters for offenders and alleged offenders. Because "treatment not available" in St. Ita's is available in the CMH, Flood J.

¹³⁹ See above, chapter 2.

¹⁴⁰ [1994] 3 IR 525 at 535-6 (paraphrase).

¹⁴¹ He explains the restrictions in s.207 and concludes that it "cannot be of general application" and "certainly is not appropriate in a situation requiring immediate action" (p.536). However, he does not refer to the possibility that, if Croke had been charged with the assault on the nurses, he could have been remanded in custody to a prison, with an immediate transfer possible from prison to the CMH - see chapter 5 below.

concludes that Croke may be transferred there under s.208.¹⁴² In the Supreme Court, Blayney J. was equally dismissive of this argument. He said that the phrase “any hospital or other place” was unqualified. The fact that the CMH was virtually exclusively a hospital for mental patients detained in pursuance of the criminal law did not prevent it from coming within s.208.¹⁴³ The Supreme Court could quite easily have come to a different conclusion, and it would have been more in keeping with a contextual interpretation to hold that the CMH was *not* “any hospital or other place” under s.208.¹⁴⁴

Once the courts found that the CMH came within the phrase “any hospital or other place”, and once Croke’s counsel conceded that the treatment he would receive there was not available in St. Ita’s, the only issue that remained was the timespan of that treatment. As stated earlier, the State’s argument for virtually indefinite detention was an additional stretching of the meaning of s.208, and undoubtedly the Supreme Court was correct to hold that Croke’s detention became invalid once the original six month period expired and was not extended. Flood J’s reasoning on this point is not

¹⁴² [1994] 3 IR 525 at 536.

¹⁴³ [1994] 3 IR 525 at 540-1.

¹⁴⁴ An interesting analogy may be drawn with the interpretation of the phrase “fit person” in the Children Act 1908. Carroll J. held in *State (D. & D.) v Groarke* [1988] IR 187 that a Health Board was a body corporate and so it was a “fit person.” However, the Supreme Court reversed this decision ([1990] 1 IR 305), referring to the fact that the functions of Health Boards under the Health Act 1970 did not include the making of “fit person” applications. The Oireachtas later revised the law with s.1 of the Children Act 1989, which was later replaced by the Child Care Act 1991.

convincing, as he fails to address the relationship between s.189 and s.208(5).¹⁴⁵

On the day that Croke was released from the CMH (14 July 1994), the Eastern Health Board detained him in St. Ita's again, this time under a person of unsound mind order under s.172, i.e. an order specifying that he was unlikely to recover within six months and allowing for his indefinite detention. Croke requested that he be allowed to stay in St. Ita's, but his request was refused. On the same day, a programme manager with the Eastern Health Board¹⁴⁶ directed Croke's removal to the CMH under s.208 of the 1945 Act. Croke later brought an application under Article 40.4 of the Constitution, challenging his detention and the constitutionality of s.172 of the 1945 Act on two main grounds - firstly, that there was no provision for a judicial intervention and process when a patient is being detained and secondly, that the detention was indefinite and there was no independent review procedure. Budd J. delivered a detailed judgment on these points : *Croke v Smith (No.2)*.¹⁴⁷

Much of the content of this judgment is outside the scope of this thesis, as it concerns the issue of the lawfulness of detention of all mental patients, not just those who are offenders or alleged offenders and as no arguments were raised about the applicability of s.208 to Croke's case. However, it was an important opportunity to discover the courts' attitudes to a constitutional challenge to the mental health legislation which

¹⁴⁵ See p.140 and p.144 above.

¹⁴⁶ Under s.208 of the 1945 Act, as adapted, the decision should be made by the Chief Executive Officer of the Health Board, but presumably the CEO delegated this function.

might have relevance to future cases on criminal procedure and mental health.

Budd J. had no difficulty in finding that Croke had locus standi to challenge the constitutionality of his detention.¹⁴⁸ Budd J. also considered the role of the European Convention on Human Rights and the general principles of international law, concluding that while these were influential guidelines, they could not be used as a touchstone with regard to constitutionality. He reviewed the historical development of the Mental Treatment Acts, noting that at least under the 1867 legislation there was judicial intervention in that the signatures of two justices of the peace were required before a “dangerous lunatic” could be detained.¹⁴⁹ The respondents argued that the move away from judicial intervention, with the enactment of the Mental Treatment Act 1945, was to be welcomed as it showed that the emphasis was now on the care of the patient rather than on the need for a judicial decision.¹⁵⁰ Another possible problem alluded to by Budd J. was that if judicial intervention is required at an initial stage of the process of detention, the stress would be put on dangerousness and that had serious implications for the doctor-patient relationship.¹⁵¹ However, the judge

¹⁴⁷ High Court, 27 and 31 July 1995.

¹⁴⁸ The State had argued that Croke did not have locus standi because there was no argument in his application suggesting that he was a suitable person to be discharged from a mental hospital and he had not availed of the existing procedures for review of his situation, such as the making of representations to the President of the High Court or the Inspector of Mental Hospitals. A lengthy list of safeguards of mental patients’ interests is provided in Budd J’s judgment at pp.92-96.

¹⁴⁹ s.10 Lunacy (Ireland) Act 1867.

¹⁵⁰ *Croke v Smith (No.2)*, Budd J., High Court, 27 and 31 July 1995, p.103.

¹⁵¹ *Croke v Smith (No.2)*, Budd J., High Court, 27 and 31 July 1995, p.89.

referred to United States cases such as *Addington v Texas*¹⁵², *O'Connor v Donaldson*¹⁵³ and *Jackson v Indiana*¹⁵⁴ to illustrate how seriously the courts in that jurisdiction had taken the need for a judicial process before citizens could be detained in mental hospitals.

Budd J. quoted from many cases at length, e.g. he quoted *King v Attorney General*¹⁵⁵ to prove that there are certain basic norms and procedures which the State must observe, *In Re Solicitors Act 1954*¹⁵⁶ as an example of a power which was held to require judicial intervention and *State (Healy) v Donoghue*¹⁵⁷ to emphasise the need for a proper trial if a person is being deprived of his/her liberty.

Having been referred to *Re Philip Clarke*,¹⁵⁸ he acknowledged that he was bound by the decision of the Supreme Court but said that the decision solely concerned s.165 of the 1945 Act, which was not at issue in this case. Also, there had been changes since that case:

The certainties implicit in the judgment in Clarke's case in 1949 may be diluted by now with increasing knowledge about the psyche, changing patterns of

¹⁵² 441 US 323 (1979)

¹⁵³ 422 US 396 (1975)

¹⁵⁴ 406 US 435 (1972)

¹⁵⁵ [1981] IR 233.

¹⁵⁶ [1960] IR 239.

¹⁵⁷ [1976] IR 325.

¹⁵⁸ [1950] IR 235.

behaviour, conflicts between psychiatrists as to the nature of mental illness and awareness of the abuses of psychiatric treatment in other countries.¹⁵⁹

Budd J. relied heavily on the judgment of Costello P. in *R.T. v Director of Central Mental Hospital* and eventually concluded that s.172 of the 1945 Act was an unconstitutional interference with the patient's right to liberty as there were no adequate safeguards to protect the patient against an error in the sections' operation, there was no formal review procedure in respect of the opinion of the resident medical superintendent and of the Inspector of Mental Hospitals and there was no automatic review of long-term detention of a patient such as Croke. As he had decided the issue of constitutionality of s.172 on this ground, he opted to "exercise reticence" and did not express a view on the other ground put forward, namely that other sections of the Act were unconstitutional due to the lack of judicial or quasi-judicial intervention prior to the reception and detention of a patient. He then made a case stated to the Supreme Court (as required by Article 40.4.3 of the Constitution.) In the meantime, he said that he would hear the submissions of counsel in respect of the appropriate course to be adopted with regard to Croke.¹⁶⁰

Most of Budd J's judgment consists of summaries of counsel's arguments on both sides, accompanied by short comments on points of interest and contrast between cases. When he gets down to making decisions on issues, Budd J's reasoning is not entirely satisfactory. For example, on the question of the relevance of European and

¹⁵⁹ *Croke v Smith (No.2)*, Budd J., High Court, 27 and 31 July 1995, p.124.

¹⁶⁰ It is not known whether Croke remained in the Central Mental Hospital pending the Case Stated.

international law, he states that he is bound to wear blinkers as to their norms and standards¹⁶¹ but quotes extensively from such documents¹⁶² and relies heavily on the *R.T.* case, in which Costello P. treated European and international law as quite important. It is also regrettable that Budd J. gives the impression that he will address the major question of whether the detention of a patient is the administration of justice and then suddenly, in the last few pages of the judgment, decides that it is unnecessary to decide this point.

Nevertheless, the judgment treated the issue of detention of mental patients with the seriousness it deserved and Budd J's conclusion that s.172 of the 1945 Act was unconstitutional could have had far-reaching implications for mental health law. It might even have spurred the Government into enacting a new Mental Health Act.

But the potential contained in Budd J's judgment was extinguished by the judgment of the Supreme Court, delivered in 1996. The court adopted a condescending tone from the outset, pointing out that s.172 of the 1945 Act enjoyed a presumption of constitutionality and that it must be presumed that people who issue decisions under the Act will act in accordance with constitutional justice. The court twice reproduced the Supreme Court's view in *Re Philip Clarke*¹⁶³ that the 1945 Act "is of a paternal character, clearly intended for the care and custody of persons suspected of suffering

¹⁶¹ *Croke v Smith (No.2)*, Budd J., High Court, 27 and 31 July 1995, p.35.

¹⁶² *Croke v Smith (No.2)*, Budd J., High Court, 27 and 31 July 1995, p.18; pp.20-26. He states that he is doing this "because this matter is likely to be considered by the Supreme Court" (p.20).

from mental infirmity and for the safety and well-being of the public generally.”¹⁶⁴ The Supreme Court was obviously not impressed by Budd J’s view that “the certainties implicit in the judgment in Clarke’s case in 1949 may be diluted by now.”¹⁶⁵ While the Supreme Court quoted from Costello P’s judgment in *R.T. v Director of Central Mental Hospital*¹⁶⁶, it did not believe that the lack of automatic review of a patient’s detention interfered with the patient’s personal rights or right to liberty.¹⁶⁷ In fact, the Supreme Court stated that many of the sections of the 1945 Act vindicated and protected citizens’ rights.¹⁶⁸ On the use of s.208 to transfer Croke from St. Ita’s to the CMH, the court did not even refer to the previous controversy on this issue, as highlighted in *Croke (No.1)*, but simply concluded that the powers conferred by this section “do not constitute in any way an attack on [the patient’s]

¹⁶³ [1950] IR 235 at 247.

¹⁶⁴ The judgment of the Supreme Court in Clarke’s case was delivered by O’Byrne J. In the Supreme Court judgment in *Croke (No.2)*, this extract appears at p.112 and p.132 of the report. Spellmann states “*Philip Clarke’s* case could be said to represent a high point in the paternalistic view of the treatment of the mentally ill. The present Supreme Court appear to be harking back to that earlier time where our understanding of the management of mental illness was by institutional care and treatment” - supra n.108, p.81.

¹⁶⁵ *Croke v Smith (No.2)*, Budd J., High Court, 27 and 31 July 1995, p.124.

¹⁶⁶ See Supreme Court at pp.117-118 and p.123 - the court “must be particularly astute when depriving or continuing to deprive a citizen suffering from mental disorder of his/her liberty.”

¹⁶⁷ The court adds: “If, however, it were to be shown in some future case, that there had been a systematic failure in the existing safeguards, and that the absence of such a system of automatic review was a factor in such failure, that might cause this court to hold that a person affected by such failure was being deprived of his constitutional rights.” (p.131). While the facts of the *R.T.* case could be said to show such a “systematic failure”, unfortunately that case never reached the Supreme Court. Empirical evidence from authors such as Creaby would seem to indicate that there *has* been a “systematic failure” of this type, at least in the case of s.207 patients - see below pp.162ff.

personal rights.”¹⁶⁹ Nor did the court at any stage address the problems which arise in the relationship between the ordinary mental hospital (St. Ita’s) and the CMH. Throughout the judgment, the court referred to the safeguards provided for those detained under s.172 (e.g. the power of discharge under s.218) without mentioning that as Croke had been transferred to the CMH under s.208, the duration of his detention in the CMH was determined by the provisions of s.208(5).¹⁷⁰

The question of whether the 1945 Act involves the unconstitutional administration of justice arises at two stages in the judgment. The first issue concerns Croke’s argument that judicial intervention is needed *before* the patient can be detained; the second concerns his argument that *after* he has been detained his detention requires automatic periodic judicial or quasi-judicial review.

On the first issue, the Supreme Court quoted from the *Clarke* case and concluded that

such decisions cannot be regarded as part of the administration of justice but are decisions entrusted to them by the Oireachtas in its role of providing treatment for those in need, caring for society and its citizens, particularly those suffering from disability, and protection of the common good.¹⁷¹

Having drawn this conclusion, later on the same page the court quoted from Keane J’s judgment in *Application of Neilan*¹⁷² where he said that in any case where a court

¹⁶⁸ For example - [1998] 1 IR 101 at 114-5 and 119-120.

¹⁶⁹ [1998] 1 IR 101 at 119.

¹⁷⁰ Section 208(5) states that a person such as Croke may be kept in the CMH “so long as is necessary for the purpose of his treatment and shall then be taken back to the place from which he was removed unless it is certified by a registered medical practitioner that his detention is no longer necessary.”

¹⁷¹ [1998] 1 IR 101 at 114.

¹⁷² [1990] 2 IR 267 at 285.

finds that the executive has exercised a power in an unlawful manner, the decision can be set aside in a judicial review, but that is not a material consideration in determining whether the exercise of the function in question is properly regarded as part of the administration of justice. This begs the question - why did the Supreme Court quote this extract if it had already concluded that the power to detain a patient was not part of the administration of justice?¹⁷³ A more detailed examination of the nature of the administration of justice would have been appropriate at this stage.¹⁷⁴ The decision on this point is reminiscent of the wording of McCarthy J's judgment in *Gallagher (No.1)*¹⁷⁵ and may be criticised on many of the same grounds as will be used below in analysing the *Gallagher* case.

On the second issue (that periodic judicial or quasi-judicial intervention is required *after* the patient's detention), the Supreme Court relied heavily on the judgment of O'Flaherty J. in *Keady v An Garda Síochána*.¹⁷⁶ In that case, O'Flaherty J. quoted Kenny J's list of the characteristic features of the administration of justice in

¹⁷³ Admittedly, Keane J. stated *obiter* in the *Neilan* case that he believed that an involuntary reception order under the 1945 Act was plainly an executive function since it did not purport to interfere with or override the jurisdiction of any court established under the Constitution - [1990] 2 IR 267 at 286-7.

¹⁷⁴ However, the two issues of detention and review after detention are not clearly separated in the judgment, so some of the analysis of the administration of justice used later on in the judgment (at pp.129-132) may also be said to apply to the first issue.

¹⁷⁵ [1991] 1 IR 31 - the decision on release was the carrying out of the executive's role in caring for society and the protection of the common good.

¹⁷⁶ [1992] 2 IR 197

*McDonald v Bord na gCon (No.2)*¹⁷⁷ and emphasised that there must be a *contest between parties*. The tribunal of inquiry involved in the Keady case “was not a contest between parties; it was, as its name says, an inquiry.”¹⁷⁸ The Supreme Court in *Croke (No.2)* stated that the resident medical superintendent and the Minister for Health, in exercising the powers conferred on them by the 1945 Act,¹⁷⁹ were obliged to enquire into the mental health of the patient and the necessity for his/her detention under care and treatment. The Court believed that “the nature of this inquiry is not ‘a contest between parties’ and does not involve a dispute or controversy as to the exercise of legal rights or a violation of the law. It is simply an inquiry.”¹⁸⁰ No judicial intervention was necessary. Automatic review by an independent review board as provided for in the Health (Mental Services) Act 1981 “may be desirable”¹⁸¹ but the failure to provide for such review did not render the 1945 Act constitutionally flawed. The resident medical superintendent was obliged regularly and constantly to review a patient in order to ensure that he/she had not recovered and was a proper person to be detained. In so doing, the resident medical superintendent must act in accordance with the principles of constitutional justice. “There is no suggestion that

¹⁷⁷ [1965] IR 217.

¹⁷⁸ [1992] 2 IR 197 at 213.

¹⁷⁹ E.g. the power of discharge in s.218 and s.220; the Minister’s power of discharge under s.222. The court also appears to be referring to the role of the resident medical superintendent in *detaining* the patient as well. The two issues of detention and review after detention are not clearly separated in the judgment.

¹⁸⁰ [1998] 1 IR 101 at 129.

¹⁸¹ [1998] 1 IR 101 at 131.

such a review is not carried out.”¹⁸²

The reliance on the passage from O’Flaherty J’s judgment in the *Keady* case is questionable. A reading of that case reveals that there were many other factors which lead the court to conclude that the conduct of the relevant tribunal of inquiry was not the administration of justice. For example, a Garda who was dismissed did not lose any qualification by virtue of his or her dismissal and it was important that the Commissioner be entitled to enforce discipline as the police force’s essential function was to preserve law and order. None of these factors are present in the *Croke* case. Instead, a patient’s liberty is at issue, and there is in effect a constitutional presumption that a person should not be deprived of his/her liberty. The Supreme Court should have addressed in detail Keane J’s judgment in the *Neilan* case, where he held that the decision on release of a person detained in the CMH was an exercise of the judicial power, the contrasting Supreme Court decision in *Gallagher (No.1)* and Costello P’s decision that automatic periodic reviews were required in *R.T. v Director of the Central Mental Hospital*. Moreover, the Supreme Court could have made some reference to the European Convention on Human Rights, to the Green Paper and White Paper on Mental Health, or the O’Reilly case before the European Commission on Human Rights.¹⁸³

Ironically, even though the Supreme Court’s judgment in *Croke (No.2)* is shorter than

¹⁸² [1998] 1 IR 101 at 132.

¹⁸³ *Application No. 24196/94, O’Reilly v Ireland* (1996) DR 84-A p.72 and Friendly settlement of 3 December 1996.

Budd J's High Court judgement, it contains a more wide-ranging series of assertions which may make it more difficult to bring challenges against other elements of mental health legislation in the future. While Budd J. chose to "exercise reticence" on the question of whether other sections of the Act are unconstitutional due to lack of judicial or quasi-judicial intervention prior to the reception and detention of a patient, the Supreme Court specifically holds that the decisions on the detention of the patient are not part of the administration of justice. Other aspects of the court's decision may also be read as in effect overruling parts of Costello P's judgment in the *R.T.* case. The court's silence on the European Convention may be interpreted by some as an implicit rejection of arguments based on the Convention in future cases.¹⁸⁴

Two glimmers of hope are provided. The first is in the court's emphasis on the need for the resident medical superintendent to act in accordance with the principles of constitutional justice in constantly reviewing a patient's detention. There was no suggestion in the instant case that a review of Croke's detention was not carried out. In future cases, patients may be able to challenge the lack of reviews of their detention, or the lack of fair procedures in those reviews. While s.172 and similar sections still remain constitutional, a new line of case-law may develop on the need for proper regular reviews of patients' detention. Perhaps reference may even be made in future cases to empirical evidence about the operation of the mental treatment legislation and a court may refer to the second glimmer of hope in the *Croke (No.2)* case and hold that there has been a "systematic failure in the existing

¹⁸⁴ Perhaps counsel chose not to make arguments based on the European Convention in the Supreme Court.

safeguards.” Unfortunately, while there are many advantages in judicial law reform,¹⁸⁵ one of the great disadvantages is that it depends on the “adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer and the perceptive court.”¹⁸⁶

Meanwhile, the outdated mental treatment legislation remains in force and no new Mental Health Bill has been published.

One final curious point about the *Croke (No.2)* case is that on two occasions the court makes substantive errors in quoting from the applicable legislation. Generally, the court is careful to include amendments to the 1945 Act stated in the main body of the Mental Treatment Act 1961 but at the time the judgment was delivered it appears to have ignored s.42 of the 1961 Act and its second schedule. In the unreported version of the judgment at pp. 46-47, the court quotes the entire of s.238 of the 1945 Act¹⁸⁷,

¹⁸⁵ The courts deal with “flesh and blood” problems, they fill in the gaps in legislation, they interpret statutes and can sometimes act more speedily than the legislature. See Hall, ‘Law Reform and the Judiciary’s Role’ (1972) 20 Chitty’s LJ 77, (1972) 10 Osgoode Hall LJ 399; Mauro Cappelletti, *Giudici Legislatori?* (Giuffrè, Milan, 1984); William H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, Edmonton, Canada, 1986), pp.436-447; Darius Whelan, *The Comparative Method and Law Reform* (LL.M. thesis, University College Dublin, 1989), pp.180-231.

¹⁸⁶ Henry J. Friendly, ‘The Gap in Lawmaking - Judges Who Can’t and Legislators Who Won’t’ (1963) 63 Col. LR 787 at 791.

¹⁸⁷ Section 238 provided that where the Inspector of Mental Hospitals visited any mental institution, he or she should give special attention to the state of mind of any patient detained therein the propriety of whose detention he/she doubted or had been requested by the patient himself/herself or any other person to examine.

even though that section was repealed in 1961.¹⁸⁸ Similarly, at pp. 27-28 of the unreported version, the court fails to note that s.208(4) of the 1945 Act¹⁸⁹ was repealed in 1961. The court's use of the section and subsection involved contributes, if only slightly, to the court's view that there are so many safeguards built in to the mental treatment legislation that patients' constitutional rights are protected. Both of these Amendments were noted in the Index of Statutes available at the time of the *Croke (No.2)* decision.¹⁹⁰ In the official report of the case, these defects have been remedied.¹⁹¹ On a less serious note, the Supreme Court also fails to note the various adaptations of various sections of the mental treatment legislation brought about by S.I. No. 108 of 1971.¹⁹² This failure is common to all judgments on mental treatment issues.

Proposals for reform of s.208:

There is no specific reference to s.208 in the Henchy Committee report, but a system of transfers between designated centres ordered by the Minister for Health is

¹⁸⁸ Budd J. in the High Court at p.58 noted the repeal of s.208(4).

¹⁸⁹ Section 208(4) stated that where a person was removed from a mental institution under s.208, a report should be given to the Minister within 3 days.

¹⁹⁰ Since late 1996, the *Index of Statutes* has been replaced by the *Chronological Tables of the Statutes*.

¹⁹¹ [1998] 1 IR 101 at 127 (substitution of s.237 as amended for s.238) and 119 (s.208(4) omitted).

¹⁹² For example, at p.119 the Supreme Court quotes s.208(1) of the 1945 Act without the adaptations made by the 1971 Statutory Instrument.

proposed. The 1996 Bill proposes that a medical officer could order transfers between designated centres, with the consent of the Minister for Health, on such conditions and for such period as he or she considered proper.¹⁹³

The White Paper proposes that in future a transfer to the CMH could be enabled by the signatures of two consultant psychiatrists¹⁹⁴ for three months at a time, with reviews by the proposed Mental Health Review Board and a possible appeal to the High Court.

Again, it would be preferable for these transfers to require approval by a review body, and that the principle of treatment in the least restrictive environment be stated in the legislation.

Current Policy on Section 208:

Material obtained from the Eastern Health Board contains detailed policy on transfers under s.208.¹⁹⁵ The initial length of treatment in the CMH is 28 days, which may be extended to three months. The three month period may be renewed for further periods of three months, provided the referring service ensures that the legal requirements in relation to detention of the patient are met. The Inspectorate of

¹⁹³ Criminal Justice (Mental Disorder) Bill 1996, s.8(1).

¹⁹⁴ The consultant in clinical charge of the patient and the clinical director of the CMH or other special psychiatric centre. If the consultants disagreed, the Review Board would adjudicate on the matter.

Mental Hospitals must be informed of the proposed transfer and given copies of the application form and treatment plans on completion of each period of treatment under s.208.

Statistics

In a review of s.207 cases between 1955 and 1994, 112 admissions were identified, of which 91 files were available for examination.¹⁹⁶ More admissions took place in the 1960s and 1970s than in other decades. Cases included four murders, one manslaughter, 42 repeated aggressions, 11 single assaults, 22 grievous bodily harms, 4 arsons and 2 sexual offences. Some of the offences appear to have been of a relatively minor nature, such as slapping, punching, or absconding from the local hospital.¹⁹⁷ The mean duration of stay for the 76 patients who had been discharged was 8.2 years, with a range of 1 month to 29 years. Patients admitted between 1955 and 1959 spent on average 17.4 years in the hospital, whereas patients admitted between 1985 and 1994 stayed an average of 1.4 years. The mean duration of stay of the 15 patients who still remained in the hospital was 17 years. Reasons for ongoing detention included persistence of severe psychiatric illness, unwillingness of some patients to accept the transfer arrangements made for them, and placement difficulties arising out of the reluctance of local psychiatric hospitals to have patients back. As regards the 76 discharges, 58 were transferred back to their hospital of origin, 13 died

¹⁹⁵ CMH Admission Policy.

¹⁹⁶ M.Creaby, L. Hutchinson, M. O'Malley & A. O'Connor, 'Section 207 of the Mental Treatment Act 1945: A Critical Review of its Use, 1955-1994' (1995) 1 MLJI 11.

¹⁹⁷ It is not clear how absconding came to be classified as an indictable offence.

and five were released. There is no mention in the figures of any patients being remitted for trial, even though according to the Ballinasloe case¹⁹⁸ they ought to have been remanded on the charges. The authors of the study criticised the use of the section in cases which were either too serious or too trivial, the lack of legal representation at the time of committal, and the lack of review procedures for the patient, other than habeas corpus.¹⁹⁹

Other statistics concerning s.207 and s.208 patients may be found in some of the annual reports of the Inspector of Mental Hospitals. For example, at the end of 1978, 34 of the 99 patients in the CMH were detained under s.207²⁰⁰ but in 1992, 15 of the 87 CMH patients were s.207 patients.²⁰¹ By 1997, there were 11 s.207 patients and 8 s.208 patients in Dundrum.²⁰²

¹⁹⁸ *State (O.) v O'Brien (Ballinasloe Case)* [1971] IR 42.

¹⁹⁹ *Habeas corpus* had only lead to the release of two patients.

²⁰⁰ Department of Health, *Report of the Inspector of Mental Hospitals 1977-79* (Dublin, 1982), p.36

²⁰¹ Department of Health, *Report of the Inspector of Mental Hospitals 1992* (Dublin, 1995), p.42.

²⁰² Department of Health and Children, *Report of the Inspector of Mental Hospitals 1997*, p.18.

CHAPTER 4
INSANITY ACQUITTALS

Introduction	164
Consequences of an Insanity Verdict	166
Full Release	179
The Role of the Attorney General in Constitutional Litigation	184
The Children Act Case	185
<i>Ellis</i> in the High Court	196
<i>Neilan</i>	200
<i>Ellis</i> in the Supreme Court	206
<i>Gallagher (No.1)</i>	209
The European Convention on Human Rights	237
The Advisory Committee Procedure	239
Later Developments in the <i>Gallagher</i> Case	241
Proposals for Reform	252
Raising the Insanity Defence	254
The Court's Decision on the Defence	256
Appeals	258
Temporary Release	259
Transfer to another Hospital	260
Insanity in Contempt of Court Cases	267
The Insanity Defence in the District Court	272
Statistics	275

INTRODUCTION

The insanity defence has been the subject of enormous controversy for centuries, with most of the debate focusing on the question of the legal definition of insanity. As explained in the Introduction, this thesis will not deal with the criteria for establishment of the insanity defence, except to the extent that these criteria impact on procedural issues. There is, of course, a vast literature available elsewhere on the

insanity defence.¹

The main procedural issues which will be discussed in this chapter are the consequences of an insanity verdict and the question of release of insanity acquittees.² The constitutionality of the present system of automatic detention following a special verdict will be questioned, as will its compatibility with the European Convention. The cases in the 1990s on the issue of release - *Ellis, Neilan and Gallagher* - will be analysed in the light of the earlier case concerning the Children Act. A number of criticisms will be made of *Gallagher (No.1)*, particularly the Court's decision on the separation of powers and its lack of regard to the constitutional right to liberty. And while the court in *Gallagher (No.2)* rightly held that a person could not be detained on grounds of dangerousness alone, its willingness to continue detention based on a personality disorder is questionable.

Other topics will then be considered, such as raising the insanity defence, the burden of proof, appeals, transfers from the CMH to other hospitals, insanity in contempt of court cases and the insanity defence in the District Court. These topics deserve closer

¹ The chief Irish sources are: Finbarr McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Round Hall Press, Dublin, 1993), Roderick O'Hanlon, 'Not Guilty Because of Insanity' (1968) 3 Ir. Jur. (ns) 61, Niall Osborough, 'McNaghten Revisited' (1974) 9 Ir. Jur. (ns) 76, Osborough, 'The Answerability of the Offender: The Indicia of Responsibility', Society of Young Solicitors, Lecture 78, 1974. See also the other sources cited later in this chapter. Note also more recent cases such as *People (DPP) v Courtney*, Court of Criminal Appeal, 21 July 1994 and the O'Donnell trial, *Irish Times*, January to April 1996.

² As these issues require such detailed discussion, they will be dealt with before other procedural issues which would actually arise earlier in a trial.

attention than they have received to date. For example, the ability of the court to raise the insanity defence may need to be reconsidered.

CONSEQUENCES OF AN INSANITY VERDICT

While criminal “lunacy” had been recognised by the UK Parliament in 1800,³ the first legislation on this subject applying to Ireland was the Lunacy (Ireland) Act 1821.⁴ In the recitals at the beginning, the Act stated that it was “expedient that the custody of insane persons, charged with offences in Ireland, should be regulated in like manner as in England.”

Section 16⁵ provided as follows:

XVI. And whereas Persons charged with Offences in Ireland may have been or may be of unsound Mind at the Time of committing the Offence wherewith they may have been or shall be charged, and by reason of such Insanity may have been or may be found not guilty of such Offences; and it may be

³ Criminal Lunatics Act 1800, 39 & 40 Geo. 3, c.94. In *State (O.) v O'Brien (Children Act case)* [1973] IR 50 at 79, McLoughlin J. (dissenting) appeared to believe that the 1800 Act applied in Ireland. Similarly, Edward Ryan and Philip Magee, in *The Irish Criminal Process* (Mercier Press, Dublin and Cork, 1983) cite the 1800 Act as dealing with the procedure for fitness to plead (p.269, fn.4), the Henchy Committee draft Bill, Second Schedule, lists the 1800 Act as due for repeal, and McAuley gives prominence to the 1800 Act, stating it was ‘adapted’ by the 1821 Act. (pp.132, 144, 219-220). However, as Keane J. points out in *Application of Neilan* [1990] 2 IR 267, the 1800 Act was given the Royal Assent on 28 July 1800; the Act of Union came into force on 1 January 1801.

⁴ 1 & 2 Geo. 4, c.33; Robins, p.148.

⁵ Section 16 was repealed by the Trial of Lunatics Act 1883 (46 & 47 Vic., c.38).

dangerous to permit Persons in such Cases to go a large; be it therefore enacted, That in all Cases where it shall be given in Evidence on the Trial of any Person in Ireland, charged with Treason, Murder or any other Offence,⁶ that such Person was insane at the time of the Commission of such Offence, and such Person shall be acquitted, the Jury shall be required to find specifically whether such Person was insane at the Time of the Commission of such Offence, and to declare whether such Person was acquitted by them on account of such Insanity; and if they shall find that such Person was insane at the Time of the committing such Offence, the Court before whom the Trial shall be had, shall, if it shall be thought necessary or proper, order such Person to be kept in strict Custody, in such place, and in such Manner as to the Court shall seem fit, until the Pleasure of the Lord Lieutenant or other Chief Governor or Governors of Ireland for the Time being, shall be known; and it shall thereupon be lawful for the Lord Lieutenant or other Chief Governor or Governors of Ireland for the Time being, to give such Order for the safe Custody and Care of such Person, during the Pleasure of the Lord Lieutenant or other Chief Governor or Governors of Ireland for the Time being, in such Place and in such Manner as shall seem fit; and in all cases where any Person before the passing of this Act has been acquitted of any such Offences, on the Ground of Insanity at the Time of the Commission thereof, and has been detained in custody as a dangerous Person by order of the Court before whom such Person has been tried or otherwise, and shall remain in Custody at the Time of the passing of this Act, it shall be lawful for the Lord Lieutenant or other Chief Governor or Governors of Ireland for the Time being, to give the like Order for the safe Custody and Care of such Persons as the Lord Lieutenant or other Chief Governor or Governors of Ireland is or are by this Act enabled to give in the Cases of Persons who shall hereafter be acquitted on the Ground of Insanity.

The Act did not define “insanity” or “unsound mind”, but it stated clearly that people could be found not guilty if they were insane and that, if they were to be detained, it was due to the dangerousness of their being “at large.” A court was only obliged to detain the person “if it shall be thought necessary and proper”, so detention was not automatic.

⁶ Note that this Act applied to Treason, murder or any other offence whereas the previous UK Act of 1800, *supra* n.3, had only applied to Treason, murder or felony. The 1800 Act was not amended until 1840; Walker, p.80.

The Trial of Lunatics Act 1883⁷ provided at section 2 for the special verdict of “guilty but insane so as not to be responsible ...”:

2. (1). Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such trial is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

(2) Where such special verdict is found, the Court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the Court shall direct till the pleasure of the Lord Lieutenant shall be known; and it shall be lawful for the Lord Lieutenant thereupon, and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to the Lord Lieutenant may seem fit.⁸

The Law Reform Commission, in its Consultation Paper on Sentencing, implied that the 1883 Act is restricted to treason, murder or felony⁹ but this is not stated in the

⁷ 46 & 47 Vic., c.38.

⁸ The wording refers to Her Majesty, but in Ireland the Act was to be read with ‘Lord Lieutenant’ substituted for Her Majesty: s.3(1) of the Act.

⁹ Law Reform Commission, *Consultation Paper on Sentencing* (Dublin, 1993), p.48. The relevant paragraph of the Paper is unclear on this point. It is headed “Insane offenders in cases of murder, treason or felony”, so perhaps the Commission only wished to deal with such cases, without necessarily believing that the 1883 Act is only confined to such cases. The Commission’s approach may perhaps be partly explained by the facts that s.1 of the Criminal Lunatics Act 1800 (39 & 40 Geo.3, c.94) provided for a special acquittal on the grounds of insanity in trials for treason, murder or felony, in *State (O.) v O’Brien (Children Act case)* [1973] IR 50 at 79, McLoughlin J. (dissenting) appeared to believe that the 1800 Act applied in Ireland, and the Henchy Committee draft Bill, Second Schedule, listed the 1800 Act as an enactment which needed to be repealed. However, as Keane J. points out in *Application of Neilan* [1990] 2 IR 267, the 1800 Act was given the Royal Assent on 28 July 1800; the Act of Union came into force on 1 January 1801. In any event, even if the 1800 Act had applied in

Act.

In practice, courts ordinarily order that the person be detained in the Central Mental Hospital. If the court's order does not specify the CMH, the Minister for Justice will then formally order the person to be detained in Dundrum under the 1845 Act which established the hospital.¹⁰

The verdict under the 1883 Act constitutes an acquittal in law and as a result there is a general consensus that the wording of the verdict ought to be changed to 'not guilty by reason of mental disorder' or some other similar wording.¹¹ McAuley disagrees, arguing that "the seeming illogicality of the *status quo* is preferable to the factually misleading implications of the current English formula and the Henchy proposal based on it."¹² The general consensus is to be preferred as it clearly reflects the person's lack of culpability for their actions.

As the verdict is an acquittal, the person's detention in the CMH is not a "sentence."

Ireland, s.1 would have been repealed by s.4 and the Schedule to the 1883 Act.

¹⁰ s.8 Central Criminal Lunatic Asylum (Ireland) Act 1845, 8 & 9 Vic., c.107; Justice FOI s.16 Book, pp.91, 92.

¹¹ Henchy Committee draft Bill, s.13 and s.17; Criminal Justice (Mental Disorder) Bill 1996, s.4. In Canada, the wording was changed to 'not criminally responsible on account of mental disorder' in 1991 - Criminal Code, s.16. Kinlen J. has said that "guilty but insane" is an "absolutely daft thing" to say about a person - *Irish Times*, 7 July 1994 (Brendan McElligott trial.)

¹² McAuley, p.111. He argues that the 1883 verdict is more consistent with the fact that the accused is liable to detention after it.

However, it may be a “punishment.”¹³

In England and Wales, since 1991, a wide range of options is open to the trial judge in “insanity” cases.¹⁴ It has been found that the majority of those found “not guilty by reason of insanity” are sent to local hospitals rather than special hospitals and that the length of detention is relatively low.¹⁵ The options have recently been supplemented by the “hospital and limitation direction” under the Crime (Sentences) Act 1997.¹⁶

In diminished responsibility cases in England and Wales, the defendant is convicted of manslaughter and the trial judge has wide discretion as to sentence, including detention in prison, a hospital order or a suspended sentence.¹⁷ Some people found

¹³ In *O’Callaghan*, Ó Dálaigh CJ said that all deprivations of liberty are a punishment - [1966] IR 501 at 509.

¹⁴ Criminal Procedure (Insanity and Fitness to Plead) Act 1991 [UK]. In murder cases, a hospital order must be made restricting discharge without limitation of time. In non-murder cases, the court may make a hospital order restricting discharge either for a specified or unlimited time, a guardianship order, a supervision and treatment order or an order for absolute discharge. See Hoggett, pp.110-113 and list of options at p.109.

¹⁵ R.D. Mackay, ‘Fact and Fiction about the Insanity Defence’ [1990] Crim L R 247; R.D. Mackay, *The Operation of the Criminal Procedure (Insanity) Act 1964* (Leicester Polytechnic Law School Monographs, 1991); R.D. Mackay, *Mental Condition Defences in the Criminal Law* (Clarendon Press, Oxford, 1995), pp.100-105.

¹⁶ Nigel Eastman & Jill Peay, ‘Sentencing Psychopaths: Is the ‘Hospital and Limitation Direction’ an Ill-Considered Hybrid?’ [1998] Crim LR 93.

¹⁷ Susanne Dell, *Murder into Manslaughter - The Diminished Responsibility Defence in Practice* (Oxford University Press, Oxford, 1984); S. Dell, ‘Detention of Diminished Responsibility Homicide Offenders’ (1983) Br J Criminology 50; S. Dell and A. Smith, ‘Changes in the Sentencing of Diminished Responsibility Homicides’ (1983) 142 Br J Psychiatry 20; Mackay, *Mental Condition Defences*, op.cit., pp.181-3.

guilty of manslaughter on grounds of diminished responsibility are given life sentences on the basis of their dangerousness¹⁸ and these are likely to be detained longer than their special hospital counterparts.¹⁹

Automatic Detention after the Special Verdict:

The 1883 Act clearly states that, when a special verdict of guilty but insane so as not to be responsible is found, the court “shall order the accused to be kept in custody as a criminal lunatic.” This automatic detention undermines the status of insanity as a “defence” and deters defendants from raising the issue at all in the first place. The detention which follows the special verdict is of a peculiar nature and does not fit neatly into the standard model of a criminal trial.²⁰

The court is not given any options, and this would seem to be an unjustified interference with the right to liberty. There is no presumption of constitutionality for this 1883 British statute, so it may be challenged on the basis that it assumes a

¹⁸ *R v Chambers* [1983] Crim L R 688

¹⁹ Dell, *op.cit.* (1983) Br J Criminology 50 at 57.

²⁰ “The defense fuses criminal law with a species of administrative law, shifting the defendant from a criminal process to a civil-medical one which explicitly incorporates elements of preventive detention. In substance, defendant may make out his defense only if he authorizes the court to protect the community from him” - Abraham Goldstein, *The Insanity Defense* (Yale University Press, 1967), p.19; “[O]ne cannot but be struck with the incongruity of involving criminal courts in the matter at all. What are red judges doing performing functions which, in the case of measles or mumps, we assign to general practitioners and supporting medical staff?” - A.W.B. Simpson, ‘The Butler Committee’s Report: The Legal Aspects’ (1976) 16

necessity for detention even if such detention is unnecessary if, for example, the person has fully recovered and is no longer a danger to himself, herself or others.²¹ It may also be referred to as a “patent illogicality.”²² The statute authorises preventative detention, which was found unconstitutional in *O’Callaghan and Ryan*.²³ While these two cases concerned pre-trial detention, it has also been held that preventative detention is not permissible after a trial has taken place. In *People (DPP) v Jackson*²⁴, the applicant had pleaded guilty to two rape charges and received two life sentences. The trial judge, in sentencing, said that he wanted to protect women from the applicant. On appeal, Hederman J. held that preventative detention is not known to our judicial system, reducing the sentences to fifteen years and eighteen years, to run concurrently.²⁵ Similarly, in *People (DPP) v Carmody*²⁶, the Court of Criminal

Brit. J. Criminol. 175 at 176.

- ²¹ The 1883 Act involves a presumption of dangerousness which is particularly inappropriate in cases where physical illnesses cause temporary insanity - McAuley, p.118.
- ²² In *R.T. v Director of Central Mental Hospital* [1995] 2 IR 65 at 80, Costello P. said the procedures in s.207 of the Mental Treatment Act 1945 were based on a “patent illogicality.” He said that it did not follow that because a patient might be unfit to plead if placed on trial that he or she was suitable for transfer to the Central Mental Hospital. The Judge of the District Court was required by statute to certify something which might be quite untrue.
- ²³ Note that detention of a person “when it is reasonably considered necessary to prevent his committing an offence” is permitted by article 5(1)(c) of the European Convention and this was used to justify a “bridging detention” pending further consideration in a case concerning an applicant with an impaired mental capacity: *Eriksen v Norway*, European Court of Human Rights, 27 May 1997.
- ²⁴ Hederman J., Court of Criminal Appeal, 26 April 1993.
- ²⁵ The Court did not specifically state that it found that the trial judge had attempted to impose a period of preventative detention.
- ²⁶ [1988] ILRM 370

Appeal reduced high sentences for burglary as the trial judge said he was motivated by a desire to protect innocent people. McCarthy J. did not explicitly extend the *O'Callaghan* principle to the applicants' cases, but relied on the technical argument that there were no appropriate facilities in the State for preventative detention of habitual criminals.²⁷

Byrne and Binchy question the constitutionality of automatic detention after the special verdict:

In *Ryan*, the Court identified as (unconstitutional) *punishment* the detention of a person charged with an offence who was likely to commit an offence if granted bail It is difficult to see, therefore, how the compulsory order of detention of a person found guilty but insane lacks this punitive quality.²⁸

In the *Neilan* case, Keane J. was so concerned about the inherent risks of compulsory automatic detention that he suggested that in all cases where the special verdict was found, a medical report should be presented within two weeks so that the person could be set at liberty if they had recovered from their mental condition.²⁹

²⁷ Section 10 of the Prevention of Crime Act 1908 provided for such detention, but McCarthy J. referred to *Ryan* and *Magee*, supra n.3, pp.392-3, who state that the appropriate facilities are not available in the State.

²⁸ Raymond Byrne and William Binchy, *Annual Review of Irish Law 1990* (Round Hall Press, Dublin, 1991), p.167. For a contrary view, see David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell, Dublin, 1997), p.184, fn.84. See also *Gregory and Others v Windle and Others* [1994] 3 IR 613 it was held that the jurisdiction of the District Court, irrespective of conviction, to bind a person over to keep the peace, did not constitute preventative detention or preventative justice and James V. Woods, *District Court Practice and Procedure in Criminal Cases* (James V. Woods, 1994), pp.412-417.

²⁹ [1990] 2 IR 267.

Arguments based on the constitutional guarantee of equality in Article 40.1 could also be made here. In most cases, if a person is acquitted of a crime, he or she is released. However, this does not happen to the person where a special verdict has been found. Normally, one is only admitted to a mental hospital if one is certified as needing treatment. Again, this does not happen in the case of such a person. There is an essential link missing from the chain of events. The person is automatically admitted to the mental hospital on the basis of a mental disorder which existed at the time of the "criminal act", but which may no longer exist. No proof of continuing mental disorder and/or danger to self or others is required. This would appear to be unequal treatment of those in equal circumstances, when this position is compared with the ordinary case of civil commitment.

It has been held in Canada that automatic detention at the pleasure of the Lord Lieutenant after an insanity verdict violates two sections the Canadian Charter - section 7, the right to liberty, and section 9, the freedom from arbitrary detention.³⁰

Lamer CJC said:

The automatic detention required under s.542(2) clearly deprives the appellant of his right to liberty.... Because s.542(2) provides for no hearing or other procedural safeguards, I need not proceed any further to conclude that the deprivation of liberty is not in accordance with the principles of constitutional justice.³¹

He also said that he could not imagine a detention being ordered on a more arbitrary

³⁰ *R. v Swain* (1991) 63 CCC (3d.) 481.

³¹ (1991) 63 CCC (3d.) 481 at 533.

basis.³² Legislation was later enacted abolishing automatic detention.³³

In the USA, up to 1984 if a defendant successfully mounted an insanity defence to a federal charge, he or she was found not guilty and it was up to the state authorities to institute civil commitment proceedings if appropriate. Even since the Insanity Defense Reform Act of 1984, which established a federal commitment procedure, detention is not automatic and the court may decide to release the defendant.

Another problem with automatic detention under the 1883 Act is that this power cannot be exercised by the District Court, an issue which is discussed at page 274 below.

When the special verdict is found by the jury, the person is categorised as “guilty but insane.” It is possible that a constitutional argument could be made that this interferes with the person’s constitutional right to a good name³⁴ as the special verdict is in fact an acquittal.

Automatic detention in the CMH probably also breaches Article 5(1)(e) of the European Convention, for the same reasons as were stated earlier concerning

³² Ibid., p.535.

³³ See the new Part XX.1 of the Canadian Criminal Code, added by S.C. 1991, c.43, s.4.

³⁴ Article 40.2.2 of the Constitution. See *State (Vozza) v Floinn* [1957] IR 227, where the stigma of a procedurally defective finding of guilt was held to necessitate certiorari of the order.

detention of those found unfit for trial.³⁵

Under the European Convention, the person must be informed promptly of the reasons for his or her detention.³⁶

The Henchy Committee proposed that detention on a verdict of not guilty by reason of mental disorder should not be automatic. The court would be obliged to order detention in a designated centre if it was satisfied, having considered a medical report and any other evidence adduced that the person was in need of in-patient treatment in a designated centre or that there was a substantial risk that, if set at liberty, the person would be dangerous to himself or others.³⁷ It is remarkable that the Henchy Committee's Bill would allow detention on grounds of dangerousness alone and this would probably be unconstitutional in light of the *Gallagher (No.2)* case.³⁸ If the court released the person, it could require the person to undergo out-patient treatment.³⁹

The Fianna Fáil Bill of 1996 is substantially similar to the Henchy Committee draft

³⁵ Above, chapter 2; Sutherland and Gearty, 'Insanity and the European Court of Human Rights' [1992] Crim LR 418; McAuley, p.121; Estella Baker, 'Human Rights, McNaghten and the 1991 Act' [1994] Crim LR 84; Faye Boland, 'Insanity, the Irish Constitution and the European Convention on Human Rights' (1996) 47 NILQ 260.

³⁶ Article 5(2); *Van der Leer v Netherlands* (1990) 12 EHRR 567.

³⁷ Henchy Committee draft Bill, s.13(4) and s.17(4).

³⁸ *Application of Gallagher (No.2)* [1996] 3 IR 10; p.241ff. below.

³⁹ Henchy Committee report, para. 15.

Bill, but crucially it does not allow detention on grounds of dangerousness alone.

Instead, it refers to the court being satisfied that

because of his mental condition there is a risk that, if set at liberty, he will be dangerous to himself or others.⁴⁰

The 1996 Bill also differs in referring to “risk” rather than “substantial risk.”

The White Paper did not contain specific proposals on disposal of those acquitted on grounds of mental disorder, but referred to the fact that legislation was being prepared by the Minister for Justice.⁴¹ It also stated that insanity acquittees might, in future, be referred to other psychiatric centres as well as the Central Mental Hospital.⁴²

Cases where the insanity defence fails, or is not raised:

If the defendant has a mental disorder which falls short of an insanity defence, or if the issue of insanity is not raised, and if the defendant is convicted of the crime, an Irish court may take the mental condition into account in sentencing, but does not have the power to order that the person be sent to a mental hospital. Courts frequently make recommendations regarding treatment, but these are not binding. The person may be transferred from prison to the CMH by the Minister for Justice.⁴³ The

⁴⁰ Criminal Justice (Mental Disorder) Bill, 1996, No. 20 of 1996, s.4(2)(b). Emphasis added.

⁴¹ White Paper, paras. 7.25-7.27.

⁴² Ibid., para. 7.40.

⁴³ See chapter 5 below.

lack of power of the courts to order a convicted person to be sent directly to a psychiatric hospital for treatment has been criticised by the European Committee for the Prevention of Torture.⁴⁴

The Henchy Committee recommended that a court should be able to sentence a person with violent personality disorder to a special unit.⁴⁵ The White Paper proposes powers for the courts to order medical reports and assessments at sentencing stage. A consultant psychiatrist could detain the person for treatment and inform the court of this. The judge would adjourn the case until the person had recovered sufficiently to face sentence.⁴⁶ In addition, the court itself could remand a convicted

⁴⁴ Council of Europe, *Report to the Irish Government on the visit to Ireland by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 September to 5 October 1993*, Strasbourg/Dublin, 13 December 1995. CPT/Inf (95) 14. See also Council of Europe, *Response of the Irish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993*, Strasbourg/Dublin, 13 December 1995. CPT/Inf (95) 15 and Council of Europe, *Follow-up report of the Irish Government in response to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993*, Strasbourg/Dublin, 19 September 1996. CPT/Inf (96) 23.

⁴⁵ Henchy Committee draft Bill, s.27. The draft Bill contains no other provisions concerning persons convicted of crimes, except in the case of those found guilty of manslaughter on grounds of diminished responsibility. The Fianna Fáil Bill does not deal with disposal options for persons convicted of crimes, even in cases of diminished responsibility.

⁴⁶ White Paper, para.7.18. The tone of the White Paper is very cautious on this point. It notes that a majority of respondents to the Green Paper did not favour providing the courts with power to refer mentally disordered defendants or offenders to the psychiatric services for assessment and treatment, but also notes that practice in other European countries differs, and that the Committee on the Prevention of Torture's report was critical of

person to custody for treatment, which would be provided in prison or, in severe cases, on transfer from prison to a special psychiatric centre.⁴⁷

FULL RELEASE

The question of who decides when to release a person who has been found ‘guilty but insane so as not to be responsible’ has been the subject of much controversy in Irish case-law. For the twelve months from February 1990 to February 1991, while the Irish courts dealt with the question, it seemed as though this was the only topic in criminal procedure and mental health which was of any consequence. For a short time it seemed as if these cases would generate sufficient political will to cause a general reform of the law, but now that the controversy has died down, the impetus for change has abated and the Government Bill has not yet been published.

The controversy centred around ten words in s.2(2) of the Trial of Lunatics Act 1883. The Act stated that when a person was found ‘guilty but insane so as not to be responsible,’ the court was obliged to order him or her to be kept in custody as a criminal lunatic “*till the pleasure of the Lord Lieutenant shall be known.*”⁴⁸

the inability of Irish courts to refer an accused or convicted person to hospital for psychiatric assessment or treatment. See Council of Europe, *supra* n.44.

⁴⁷ White Paper, paras. 7.20 and 7.38. This proposal appears to be designed primarily for cases where an appeal is pending, as it mentions the fact that bail would have been refused.

⁴⁸ The wording refers to Her Majesty’s pleasure, but in Ireland the Act was to be read with ‘Lord Lieutenant’ substituted for Her Majesty: s.3(1) of the Act. Emphasis added.

It is useful to summarise in chronological order the various legal provisions dealing with the adaptation of pre-1922 British statutes and the respective roles of the executive and the courts, as these provisions have been the subject of detailed discussion in the Irish case law. The Provisional Government (Transfer of Functions) Order, 1922⁴⁹ assigned the administration of law and justice to the Ministry of Home Affairs and administration of lunatic asylums (including Dundrum) to the Ministry of Local Government. Article 2 of the Constitution of Saorstát Éireann 1922 stated that all powers were derived from the people. Article 51 declared that the executive authority of the Irish Free State was vested in the King and exercisable by the Representative of the Crown (in accordance with Canadian law, practice and usage).⁵⁰ The Article also stated that there would be an Executive Council to “aid and advise” in the government of the State.⁵¹ Article 64 conferred the exercise of the judicial power on the courts. Article 73 of the 1922 Constitution continued all previous British laws in force unless they conflicted with the Constitution. Section 11 of the Adaptation of Enactments Act 1922 (20 December 1922) stated that all references to the Lord Lieutenant exercising executive functions in previous British statutes would be construed as references to the corresponding Minister, Official, Department or

⁴⁹ Statutory Rules and Orders, UK, 1922, No. 315, 1 April 1922.

⁵⁰ The Governor General was the Representative of the Crown.

⁵¹ In practice, the effective executive power rested with the Executive Council: John M. Kelly, *The Irish Constitution*, 3rd ed. by Gerard Hogan and Gerry Whyte (Butterworths, 1994), p. 1133. Article 51 was radically altered by the Constitution (Amendment No.27) Act 1936, so that the King ceased to have a role except in connection with Ireland’s membership of the Commonwealth. See also the Executive Powers (Consequential Provisions) Act 1937.

Authority in the new State.⁵² The Local Government (Temporary Provisions) Act 1923 provided that mental hospitals were the responsibility of the Minister for Local Government.⁵³ The Ministers and Secretaries Act 1924 assigned responsibility for care of the insane (including insane criminals) to the Department of Local Government and Public Health (s.1(iv).) The Department of Justice, under the same Act, became responsible for law, justice, public order and police (s.1(ii).)

A number of provisions of the 1937 Constitution are of relevance. Article 6 states that:

- (1) All powers of Government, legislative, executive and judicial, derive, under God, from the people
- (2) These powers of Government are exercisable only by or on the authority of the organs of State established by this Constitution.

Other Articles vest the legislative power in the Oireachtas (Art. 15.2.1⁵⁴), the executive power in the Government (Art. 28) and the judicial power in the courts

⁵² The exact wording: "Every mention or reference ... shall ... be construed as a mention of or reference to the Minister, official, department, authority in Saorstát Éireann exercising in Saorstát Éireann functions corresponding to the functions exercised in respect of the area now comprised in Saorstát Éireann by such Minister, official, department or authority of the Government of the late United Kingdom or the late British Government in Ireland prior to the 6th of December 1921."

⁵³ This Act provided for the establishment of "county schemes," under the control of the Minister for Local Government. These schemes dealt with lunatic asylums amongst other issues.

⁵⁴ It appears that Article 15.2.1 was originally not intended as part of the separation of powers, but instead was intended to exclude the possibility of legislation from the UK having effect in Ireland - David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell, Dublin, 1997), pp.261-3.

(Art. 34.1). Article 49 transfers all former executive powers, functions, rights and prerogatives to the Government⁵⁵ using the following wording:

1. All powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Éireann immediately before 11 December 1936,⁵⁶ whether in virtue of the Constitution then in force or otherwise, by the authority in which the executive power of Saorstát Éireann was then vested are hereby declared to belong to the people.
2. It is hereby enacted that, save to the extent to which provision is made by this Constitution or may hereafter be made by law for the exercise of any such power, function, right or prerogative by any of the organs established by this Constitution, the said power, function, right or prerogative shall not be exercised or be capable of being exercised in or in respect of the State save only by or on the authority of the Government.

Article 50 again continued all previous laws in force (including pre-1922 British laws) unless they conflicted with the Constitution. Article 13.6 vested the right of pardon and the power to commute or remit punishment in the President, while also stating that the power of commutation or remission may, except in capital cases, be conferred by law on other authorities. The Constitution (Consequential Provisions) Act 1937 adapted all Acts in the light of the 1937 Constitution. The Taoiseach was given the “final” say on which persons or bodies took over which powers and functions (s.4(2)). The Government was empowered to make special adaptations and modifications (s.5). The functions of the Minister for Local Government under the Central Criminal Lunatic Asylum (Ireland) Act 1845⁵⁷ were later specifically

⁵⁵ See Kevin Costello, ‘The Expulsion of Prerogative Doctrine from Irish Law: Quantifying and Remediating the Loss of the Royal Prerogatives’ (1997) 32 *Ir. Jur. (ns)* 145.

⁵⁶ This was the date the 27th Amendment of the 1922 Constitution, *supra* n.51, came into force and the day after the abdication of Edward VIII.

⁵⁷ 8 & 9 Vic., c.107.

transferred to the Minister for Health⁵⁸

The controversy which arose in time was whether the ten words (“till the pleasure of the Lord Lieutenant shall be known”) should be adapted to make the decision on release up to the courts, or up to the Executive. It is helpful to divide the post-1971 case-law into two categories as in the chart on page 184. The cases on the left are cases where it was stated that the decision on release was up to the courts; those on the right are cases where it was stated that the decision was up to the Executive. It is worth noting that in 1967 a somewhat similar issue had arisen concerning the power of the Lord Lieutenant under s.13 of the Lunatic Asylums (Ireland) Act 1875.⁵⁹

⁵⁸ SR & O No. 58 of 1947.

⁵⁹ *State (C.) v Minister for Justice* [1967] IR 106. See chapter 5 below. Morgan comments that the *C.* case “is plainly distinguishable” from the cases concerning release of insanity acquittees “since in *C.* a court was indisputably in the middle of exercising the judicial function at the time the intervention occurred.” - Morgan, p.183, fn.77.

Release of Persons found Guilty But Insane so as not to be responsible	
Decision up to Courts	Decision up to Executive
<ul style="list-style-type: none"> • Possibility raised: Majority of Supreme Court in <i>State (O.) v O'Brien (Children Act case)</i> (1971) • Supreme Court in <i>O'Mahony</i> (1985) • Keane J. in <i>Neilan</i> (April 1990) (⇒ Part of Trial of Lunatics Act 1883 unconstitutional) 	<ul style="list-style-type: none"> • McLoughlin J. (dissenting) in <i>State (O.) v O'Brien (Children Act case)</i> (1971) • O'Hanlon J. in <i>Ellis</i>, Feb. 1990 [S.C. reversed on procedural points, June 1990] • Johnson J. and S.C. in <i>Gallagher</i>, Dec. 1990 and Feb. 1991. (⇒ 1883 Acts stands) • S.C. in <i>Ellis</i>, July 1991 (“without any possible delay”)

The Role of the Attorney General in Constitutional Litigation

An issue which arises in the case-law concerning the release of insanity acquittees is the question of the necessity for the Attorney General to be notified of any case in which the constitutionality of a statute is in issue.

The principle that the Attorney General should be notified was established in 1926⁶⁰ and is now contained in the Rules of the Superior Courts 1986. It is unclear whether

⁶⁰ Rules of the Superior Courts 1926, Order 60. See Anthony Collins & James O'Reilly, *Civil Proceedings and the State in Ireland* (Round Hall Press, Dublin, 1990), p.148.

the principle necessarily applies to a statute passed prior to 1937.⁶¹

In *Re Philip Clarke*, Dixon J. in the High Court adjourned the case to allow the Attorney General to be notified. He said “as the liberty of the individual is involved, I feel I should give this further opportunity for serving notice.”⁶²

It is difficult to know with certainty whether the Attorney General has been involved in any particular case as it might not necessarily be mentioned in the court report or in an unreported judgment. But it appears that the Supreme Court decided constitutional issues - in the Children Act case⁶³ and the McGrath case⁶⁴ - without the Attorney General being involved. And at High Court level, the Attorney General was not involved in the *Neilan* case.⁶⁵

The Children Act Case

The possibility of unconstitutionality of the ten words was first raised by the decision

⁶¹ In *State (D.C.) v Midland Health Board*, High Court, 31 July 1986, Keane J. said that the principle did not apply to a pre-constitutional statute, but in *State (D.) v Groarke* [1988] IR 187, the court refused to determine the issue.

⁶² [1950] IR 235 at 237.

⁶³ *State (O.) v O'Brien* [1973] IR 50

⁶⁴ *State (McGrath) v Governor of Dundrum Central Mental Hospital*, Supreme Court, 31 July 1970.

⁶⁵ *Application of Neilan* [1990] 2 IR 267. As this case was decided by Keane J. and involved an 1883 Act, he may have been applying the principle in his own previous decision in *State (D.C.) v Midland Health Board*, supra n.61.

of the majority of the Supreme Court in *State (O.) v O'Brien (Children Act case)*⁶⁶ O. had been convicted of murder in 1956 and, being sixteen years old and therefore a “young person”, had been sentenced to be detained “until the pleasure of the Government be made known concerning him.” This sentence was supposedly authorised by s.103 of the Children Act 1908,⁶⁷ which said that “the court shall sentence the child or young person to be detained during [His Majesty’s or the Lord Lieutenant’s] pleasure ... in such place ... as [the Chief Secretary] may direct.”⁶⁸ A year later, it was certified that O. had become “insane” and he was transferred to the CMH.⁶⁹ While this case is not a case concerning mental health as such, it is interesting that O’s mental health was not in issue but he was certified “insane” within such a short period afterwards. The report does not the nature of O’s illness. After a few unsuccessful attempts to have appeals or habeas corpus applications heard, O. eventually succeeded in obtaining a habeas corpus order from the Supreme

⁶⁶ [1973] IR 50. This case will be referred to as the Children Act case to distinguish it from other cases with an O. in the title. For a recent case describing the implications of *Gallagher (No.1)* for young persons convicted of murder, see *People (DPP) v Sacco & Anor.*, O’Donovan J., 23 March 1998; approved in *People (DPP) v V.W.*, Court of Criminal Appeal, O’Flaherty J., 13 July 1998.

⁶⁷ 8 Edw. 7, c.67

⁶⁸ The justification for the sentence was that a young person could not be sentenced to death. S.108 refers to “His Majesty’s pleasure” and “such place ... as the Secretary of State may direct” but s.133 stated that powers which could be exercised by His Majesty “may” be exercised as to Ireland by the Lord Lieutenant and that in the Act’s application to Ireland the words “Chief Secretary” should be read in lieu of “Secretary of State.”

⁶⁹ O. was transferred under s.2 of the Criminal Lunatics (Ireland) Act 1838, 1 & 2 Vic., c.27, which is discussed in chapter 5 below.

Court in 1969, thirteen years into his detention. The report notes⁷⁰ that one of the earlier hearings was adjourned to enable the Attorney General to be notified. Counsel for the Attorney General appeared at a later hearing. However, when the case was heard in the High Court and Supreme Court, no counsel were listed for the Attorney General.⁷¹ This does not appear to be consistent with the principle that the Attorney General should be a party to all constitutional litigation, a principle which has been adopted since 1926.⁷² O's main arguments were that his sentence was unconstitutional because it conflicted with the principle of equality of citizens, no terminal date was fixed and the duration of his sentence was determined by the executive and not by the judiciary. No point was raised at High Court level about the inconsistency between "until" in the court's order and "during" in s.103.

In the High Court, O'Keeffe P. said that he had been unimpressed by O's arguments at first. He believed that s.103 was "in ease of children and young persons in that it exempted them from the sentence of death."⁷³ He would not have considered it unconstitutional if he had been free to form a view unfettered by authority. However, the relevant authority, *Deaton v Attorney General*⁷⁴, required him to hold s.103 to be unconstitutional. In the *Deaton* case, the Supreme Court had stated that the selection of punishment was an integral part of the administration of justice and could not be

⁷⁰ [1973] IR 50 at 53.

⁷¹ [1973] IR 50 at 54 and 57-78.

⁷² See above, p.184.

⁷³ [1973] IR 50 at 55.

⁷⁴ [1968] IR 170.

committed to the hands of the Executive.⁷⁵

O’Keeffe P. did not change the wording of s.103; he simply declared it to be unconstitutional. He admitted that the section would be constitutional if it required the imposition of a life sentence (which the Executive could then commute or remit), but he said that the mere fact that the result desired by the Executive might be achieved in another way did not enable him to say that s.103 was constitutional. He regretted having had to come to this conclusion, but ordered O’s immediate release.

The majority of the Supreme Court dismissed the appeal by the Governor of the CMH, but the judgments differ in important respects. The most comprehensive judgment is that of Walsh J., with whom Budd J. agreed.⁷⁶ Walsh J. said that the sentencing formula used by the trial judge was inappropriate for the case; it was part of the formula employed following a verdict of insanity. He contrasted the insanity wording with the Children Act wording. The insanity verdict was not a sentence but instead the person was ordered to be detained “till the pleasure of the Lord Lieutenant shall be known.” Under the Children Act, the person has been convicted, punishment

⁷⁵ *Deaton* concerned s.108 of the Customs (Consolidation) Act 1876 which provided that an offender should “forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the Commissioners of Customs.” The Supreme Court found the words to be unconstitutional. Morgan points out that the usual “check list” of characteristics of the judicial function was not used in the *Deaton* case and contrasts the *Deaton* view with U.S. authorities - Morgan, op.cit., pp.186-195.

⁷⁶ Fitzgerald J. agreed that the appeal should be dismissed, but did not state whether he preferred the reasoning of Walsh J. to that of Ó Dálaigh C.J.

is to be given and His Majesty or the Lord Lieutenant was required to determine the term of the punishment. Walsh J. said of the insanity formula:

The validity of this particular formula has to be considered by this Court in another case and it is unnecessary to deal with it in detail at the moment.⁷⁷

Turning to the Children Act wording, he found the words employed by the trial judge were an incorrect adaptation of the Children Act.⁷⁸ Was the power exercised by “His Majesty” of an executive or a judicial nature? In English constitutional law, the King exercised some powers of a judicial character, e.g. all civil jurisdiction of the courts was derived from him; the royal prerogative of mercy and commutation of sentences. However, the 1922 Constitution clearly vested the exercise of all judicial powers in the courts (Article 64.) The King’s only remaining judicial powers were those specifically mentioned in the Constitution.⁷⁹ This meant, for example, that any purported commutations or remissions of sentences by the Crown or its representative since 1922 had been invalid. And, in the instant case it meant that the words “during His Majesty’s pleasure” in the Children Act were inconsistent with the 1922 Constitution and therefore had not been carried forward by that Constitution or the 1937 Constitution.⁸⁰ The words could be deleted from the Children Act so that the

⁷⁷ [1973] IR 50 at 63.

⁷⁸ He says that even if they were a correct adaptation, the sentence would be unconstitutional due to *Deaton’s* case.

⁷⁹ There was a right of petition to the King, i.e. the Privy Council (Article 66) and judges were appointed by the representatives of the Crown on the advice of the Executive Council (Article 68.)

⁸⁰ Walsh J. said that even if the words had been part of the law of Saorstát Éireann they would not have been carried forward by the 1937 Constitution as they were so clearly inconsistent with the provisions of that Constitution

Act would now say “the court shall sentence the child or young person to be detained and ...” The detention would be for an indeterminate period, but it could be remitted under Article 13.6 of the Constitution or brought to an end at any time by the court. The matter could even be reviewed from time to time by the court.

Walsh J. explained that he believed there was nothing unconstitutional about indeterminate sentences⁸¹ The Oireachtas could by Act expressly state that a person was to be sentenced to be detained during the pleasure of the court or until such time as the court sought fit to release such person.⁸² The power of commutation was not capable of being exercised in respect of an indeterminate sentence.⁸³

O. still stood validly convicted, but his sentence was unconstitutional. He could not now be sentenced as he was over 17, so he should remain unsentenced. O. had already served a far longer term of imprisonment than he would have served if he had been sentenced to death and the death sentence had been commuted to penal servitude for life. Walsh J. said it was “disturbing” that O’s detention in Dundrum had continued for so long and he recommended a change in the law so that a person like

with regard to the exercise of the judicial power and the change in national status brought about by the Constitution - [1973] IR 50 at 71 and 75.

⁸¹ [1973] IR 50 at 72-3.

⁸² See Kelly, *supra* n.51, p.94: “This presumably could be construed as the ‘conferring by law on other authorities’ (viz. the courts) of the commuting or remitting power.” It is not clear whether in such a situation the power of remission would be exercisable by the courts alone or would remain exercisable by both the executive and the courts. Therefore, it is submitted that it would be preferable to state specifically in any future statutory reforms that the power of remission would be vested in the courts alone.

⁸³ [1973] IR 50 at 76.

O. could be transferred to an ordinary mental hospital after the expiration of what would have been regarded as the ordinary period of imprisonment if he had not become insane.⁸⁴

Ó Dálaigh C.J., in a much shorter judgment, dealt with constitutional considerations and statutory considerations. On the constitutional issues, the Chief Justice agreed that the determination of the length of sentence for a criminal offence was essentially a judicial function. However, rather than investigating the status of s.103 of the 1908 Act under the 1922 Constitution, the Chief Justice moved directly to the 1937 Constitution. Under Article 49, all Saorstát Éireann powers and functions belonged to the people and were exercisable by the Government, save to the extent to which provision was made for the exercise of such power or function by any of the organs established by the Constitution. The judicial power of the State was vested in the Courts (Article 34) and so the Courts were the repository of the judicial power previously vested in the Lord Lieutenant. This meant that the Children Act should be read as authorising the court to determine the length of the young person's sentence. Ó Dálaigh C.J. did not agree that the words should be deleted from the section as he believed the section was constitutional as it stood.⁸⁵ O. could be returned for the imposition of a lawful sentence, but this would be futile as he had already served 16 years, which was much in excess of any reasonable sentence for him.

⁸⁴ [1973] IR 50 at 66.

⁸⁵ In *Application of Gallagher (No.1)* [1991] 1 IR 31 at 37, McCarthy J. criticised an argument based on Ó Dálaigh C.J.'s reasoning as "an unacceptable straining of language."

McLoughlin J. dissented, taking an entirely different approach. It is not entirely clear whether he believed O. should return to Dundrum or even whether the appeal should be upheld, but he stated that s.103 of the Children Act was merely a recognition of the right to the exercise of the prerogative of mercy which was now vested in the President by Article 13.6. The word “pleasure” referred to this royal prerogative, which was an executive function. McLoughlin J. also noted the reference to “pleasure” in the Trial of Lunatics Act 1883 and said that this was another example of the royal prerogative.⁸⁶ He did not seem to think that there was much material difference between the insanity formula and the Children Act formula.

Of the four judgments in the Children Act case, Walsh J’s is undoubtedly the most comprehensive and well-argued. He rightly examines the situation under the 1922 Constitution closely before moving on to consider what happened with the enactment of the 1937 Constitution. His arguments about the unconstitutionality of the Children Act are convincing. However, the solution he adopts – merely deleting the words “during His Majesty’s pleasure” – is not satisfactory. It is surely stretching the meaning of the section to say that on deletion of these words the end result would be that the courts will be able to bring the detention to an end at any time. The more logical solution would have been to delete the entire sentencing formula as being

⁸⁶ The Supreme Court now believes that no royal prerogatives have survived. See *Byrne v Ireland* [1972] IR 241, *Webb v Ireland* [1988] IR 353, *Howard v Commissioners of Public Works* [1993] ILRM 665; Kelly, *supra* n.51, pp.1132-1137.

unconstitutional, thus requiring the Oireachtas to enact a new sentencing formula.⁸⁷ It was unhelpful of the other Judges in the Supreme Court to deliver separate, contradictory judgments without any attempt at reconciliation. Budd J. specifically agreed with the judgment of Walsh J., but Fitzgerald J. did not state whether he preferred the reasoning of Walsh J. to that of Ó Dálaigh C.J. The result is contradictory and uncertain.

It is likely that Morgan would not agree with Walsh J. so readily. Morgan's general thesis is that the Irish courts have enunciated a separation of powers doctrine which is too strict, with scant discussion of its underlying character and objectives. In the particular context of criminal sentencing, he points out that the usual "check list" of characteristics of the judicial function has not been used in the case-law and contrasts the Irish view with U.S. authorities.⁸⁸ He believes that there is a tension between the Children Act case and judicial refusal to review actual periods of sentences served⁸⁹, a point which is discussed below at page 231.

On the question of comparisons between the insanity sentencing formula and the Children Act formula, Walsh J's is again the most useful judgment. As already stated, he said that the insanity verdict is not a sentence and that the validity of the formula would have to be considered by the Supreme Court in another case. By way

⁸⁷ After all, that is what was ordered in *Deaton's* case.

⁸⁸ Morgan, *op.cit.*, pp.186-195.

⁸⁹ *Ibid.*, p.190, citing *Murray and Murray v Ireland* [1991] ILRM 465 and *People (DPP) v Tiernan* [1988] IR 250.

of contrast, McLoughlin J., in his dissenting judgment, said that the reference to “pleasure” in the 1883 Act was an example of the royal prerogative and did not seem to think there was much material difference between the insanity formula and the Children Act formula.

Walsh J’s statement that the validity of the insanity formula would have to be considered in another case appears to have led to concern in legal circles that all sentences under the Trial of Lunatics Act 1883 were unconstitutional. Rather than resolving the matter through a change in legislation, a decision appears to have been taken to alter the practice of the courts in sentencing people under the 1883 Act. From around 1972 on, persons found “guilty but insane so as not to be responsible ...” were ordered to be detained “till further order of this Court.”⁹⁰ It is not known at what level the decision was taken, but it would have been preferable if the decision had been taken in public (either in the Oireachtas or in the courts.) It is also unclear what became of insanity acquittees who had been detained under the previous regime: was there detention now unconstitutional, and could they now apply to the courts for their release? A close reading of the Children Act case should have shown that the issues were by no means straightforward and a mistake made in the sentencing formula could have very serious consequences for large numbers of legal cases.

Evidence that official thinking was that the courts should decide on release of people

⁹⁰ Keane J. confirms that it was presumably the decision in the Children Act case which prompted the change in the form of order upon a finding of “guilty but insane” - *Application of Neilan* [1990] 2 IR 267 at 281.

with mental illness is provided by a 1983 amendment of the procedure in court martial.⁹¹

The Supreme Court, in *People (DPP) v O'Mahony*⁹², stated in passing that it was the courts which determine the length of detention of a person found "guilty but insane ... so as not to be responsible." The *O'Mahony* case concerned whether there was a defence of diminished responsibility known to Irish law and in the course of the unanimous judgment of the Supreme Court, Finlay C.J. said:

Under our law a person found not guilty by reason of insanity can only be detained so long as the court is satisfied that his mental condition persists in a form and to the extent that his detention in an appropriate institution is necessary for the protection of himself or of others. He is not, in the view of our law, a criminal nor has he been convicted of a crime.⁹³

The Supreme Court therefore approved of the practice of sentencing people to be detained until further court order. It is of interest that the court emphasised that the insanity verdict is a finding of "not guilty by reason of insanity." Perhaps the court was influenced by O'Hanlon's article in the 1968 volume of the *Irish Jurist*.⁹⁴

It was from February 1990 to February 1991 that the issue of the release of those detained in Dundrum became extremely controversial. As far as the courts were

⁹¹ See s.203 of the Defence Act 1954, as substituted by s.6 of the Courts Martial Appeals Act 1983; Keane J. in *Application of Neilan* [1990] 2 IR 267 at 287-8.

⁹² [1985] IR 517; [1986] ILRM 244.

⁹³ [1985] IR 517 at 522-3.

⁹⁴ Roderick O'Hanlon, 'Not Guilty Because of Insanity' (1968) 3 Ir. Jur. (n.s.) 61. Professor O'Hanlon later became a Judge of the High Court.

concerned, there was really only one issue: should the decision be made by the courts or by the government? But as far as the general public were concerned, the issue was whether a person found guilty but insane so as not be responsible could be released very soon after he or she had been sent to Dundrum.⁹⁵

Ellis in the High Court

The case of Patrick Ellis concerned a discussion of plans for an armed robbery. It was said that Ellis and James Cogan, a 17-year-old fellow supermarket worker, were planning the robbery in a field at Baldonnel, Co. Dublin, on 18 June 1986. Ellis claimed in his statement to Gardaí that he was being blackmailed into helping a gang to carry out an armed robbery. They were threatening to reveal details of his personal life to other members of his family if he failed to co-operate. An argument began and Ellis claimed later that Cogan had lost his temper and hit him. Dr. James Behan, a consultant psychiatrist, said that Ellis had a migraine attack associated with a form of epilepsy and was “in an automatous state.” Ellis killed Cogan using an iron bar. Cogan suffered 24 injuries to the head and neck. It appears that the State did not call any psychiatric evidence at the trial, which took place in June 1987. The trial judge,

⁹⁵ The general public’s concerns in this area are related to the general fear of faking insanity defences. The notion that insanity defences are easily feigned has always had an important influence on policy in the area, even though there is empirical evidence to the contrary and indeed evidence that defendants with mental illnesses will actually feign *sanity*. See Perlin at pp.236-247. Perlin believes that the fear of feigned insanity defences is an example of a “sanist” myth. On “sanism”, see Perlin, 383-392; Perlin, ‘On “Sanism”’ (1992) SMU L.Rev. 373; Perlin & Dorfman, ‘Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence’ (1993) 11 Behav. Sci. & L. 51.

O'Hanlon J., refused to let the defence of automatism go to the jury, but instead told the jury that if they accepted Dr. Behan's evidence the correct verdict to return would be guilty but insane so as not to be responsible.⁹⁶ This was the verdict that the jury returned. O'Hanlon J. ordered Ellis to be detained in the CMH (or other institutions) "until further order of this Court."

When Ellis arrived in Dundrum, the hospital staff could find no evidence of mental illness, epilepsy or migraine. Within a year, he had filed a motion in the Central Criminal Court seeking his release from Dundrum. It would appear that the motion was on notice to the Director of Public Prosecutions, because when it was heard, it was counsel for the DPP who appeared. This is important from a procedural point of view, as the cases under s.207 of the Mental Treatment Act 1945 had been brought as habeas corpus actions in the High Court, being opposed by counsel for the Governor of the CMH. Furthermore, the Attorney General was not named as a notice party in Ellis's motion. This motion was heard on 28 July 1989⁹⁷ and three medical witnesses from the CMH testified that Ellis was not mentally ill. Dr. Charles Smith said "We haven't discovered an illness which was alleged at his trial." There were no arguments about the form of the original order at this hearing. O'Hanlon J. ordered Ellis's temporary release for six months on a trial basis.

⁹⁶ As the defendant had put his mental condition in issue, this is a case where one of the exceptions to *R. v Swain* (1991) 63 CCC (3d.) 481 would apply; below, p.254.

⁹⁷ *Irish Times*, 29 July 1989

At the end of the six month period, there were two hearings on 2nd and 9th February 1990. Interestingly, counsel for the family of the victim, James Cogan, made submissions at the hearing on 2nd February. Counsel asked that the court should not make a final order but should “retain seisin of the case.”⁹⁸ However, on 9th February, counsel for the DPP submitted that the family had no *locus standi* to be heard. Counsel said that the DPP understood the interests of the victim’s family, but felt if they had submissions they should be channelled through the office of the DPP who would decide if they should be put before the courts. Again, no arguments were raised on the validity of the trial judge’s order. However, at the second hearing, O’Hanlon J. delivered a written judgment in which he concluded that Ellis should in fact be returned to Dundrum until a Government decision could be made on his release.

O’Hanlon J’s judgment is reported in *Application of Ellis*.⁹⁹ He stated that this application was one of great seriousness and importance. He reviewed the historical development of the insanity defence, saying that it was unlikely that patients would recover their sanity when the McNaghten rules were the only rules used. However, the widening of the definition of insanity in the *Doyle* case¹⁰⁰ had changed matters considerably. In hindsight, perhaps this change would have been better effected by legislation. The present case highlighted the necessity for the Oireachtas “to examine

⁹⁸ The fact that counsel for the victim’s family was permitted to address the court in *Ellis* was raised in *Application of Maguire* [1996] 3 IR 1 at 8.

⁹⁹ [1990] 2 IR 291 at 294.

¹⁰⁰ *Doyle v Wicklow County Council* [1974] IR 55.

as a matter of real urgency whether legislation is now needed to define the nature and scope of the plea of insanity and, possibly, of diminished responsibility, as a defence in criminal trials.”¹⁰¹ O’Hanlon J. summarised the decisions in *State (C.) v Minister for Justice*¹⁰² and *State (O.) v O’Brien (Children Act case)*.¹⁰³ Relying heavily on the distinctions drawn by Walsh J. in the Children Act case between the formula used in the Trial of Lunatics Act and that used in the Children Act, O’Hanlon J. stressed that the verdict under the Trial of Lunatics Act 1883 was an acquittal. He cited UK cases supporting this view: *Felstead v The King*¹⁰⁴ and *R v Taylor*.¹⁰⁵ Once the court made the appropriate order under the 1883 Act, the court was *functus officio* (had discharged its official duty.) There was nothing unconstitutional about the power vested in the Executive to decide when the patient’s detention should begin and when it should come to an end. This power could be reviewed by the courts if it was abused. As a result, the unofficial decision taken in 1972 to change the wording of all court orders under the Trial of Lunatics Act was erroneous. O’Hanlon J. ordered that Ellis should be kept in Dundrum “till the pleasure of the Government of Ireland shall be known.” He believed that he had no jurisdiction to decide whether Ellis should be released and that such application should be made to the Government. He directed that Ellis should be transferred from Mullingar Garda station to Dundrum forthwith.

¹⁰¹ [1990] 2 IR 291 at 295.

¹⁰² [1967] IR 106.

¹⁰³ [1973] IR 50.

¹⁰⁴ [1914] AC 534.

¹⁰⁵ [1915] 2 KB 709. O’Hanlon J. also referred to *R v Machardy* [1911] 2 KB 1144. In that case, it was held that the insanity verdict was a conviction. However, the contrary view was taken in the two later cases.

The Judge moved very suddenly from a decision that the practice since 1972 was erroneous to a new order detaining Ellis. He did not address issues such as whether it was legally possible for a court to change its own order made some two years beforehand or whether it was possible to find that a person had been detained erroneously but still refuse the person's application for habeas corpus.

O'Hanlon J. made no comment in his written judgment on the legality of submissions from counsel for the victim's family. However, in a newspaper report the Judge was quoted as stating that such counsel should not be permitted to address the court.¹⁰⁶

The High Court judgment caused a certain amount of concern in government circles and it was reported that the Minister for Justice and the Attorney General were investigating its implications.¹⁰⁷ Ellis served notice of appeal to the Supreme Court.

Neilan

While Ellis's appeal was still pending, Keane J. delivered his judgment in the case of Francis Neilan.¹⁰⁸ Neilan had been found guilty but insane so as not to be responsible

¹⁰⁶ *Irish Times*, 10 February 1990

¹⁰⁷ *Irish Times*, 10 February 1990

¹⁰⁸ *Application of Neilan* [1990] 2 IR 267. It is interesting that the *Neilan* case received very little media attention, and it has been noted in the USA that many changes in insanity jurisprudence involve "unknowns" - Perlin, pp.333-4. McAuley finds it unnecessary to refer to *Neilan* at any stage in his book.

at his murder trial in 1983. The usual post-1972 order was made, ordering him to be detained “till further order of this Court.” Informal applications for Neilan’s temporary release were made over the years by medical staff at the CMH. Keane J. acceded to these requests in chambers. In time, a permanent transfer from Dundrum was sought, as Neilan’s mental condition was improving. Keane J. decided that this should be heard upon notice to the DPP. Neilan’s counsel submitted that the decision on release was up to the courts and that it would not be appropriate to make an order similar to that made by O’Hanlon J. in the *Ellis* case. Counsel for the DPP did not take any particular position as to the form of order which should be made, but presented the court with a number of options.

Keane J. provided a good summary of the law concerning verdicts in cases of mental disorder, more comprehensive than any of the other cases on this area. He said that there will always be difficulty with the notion of the Oireachtas conferring powers of a non-judicial nature on the courts. The *Deaton* case¹⁰⁹ and *McDonald v Bord na gCon*¹¹⁰ could be contrasted with *Attorney General for Australia v The Queen*¹¹¹. But he said that he had found it possible to decide the present case irrespective of what the law may be on that particular matter.

The Judge referred to the *O’Mahony* case but rightly stated that it did not resolve the issue of the form of order as that issue had not been before the court. He then

¹⁰⁹ [1963] IR 170

¹¹⁰ [1965] IR 217

summarised the judgments in the Children Act case, emphasising Walsh J's comments on the differences between the Children Act formula and the "insanity" formula. Keane J. stated that it was settled law that the verdict under the Trial of Lunatics Act was in substance an acquittal. It followed that the court did not impose a penalty for the commission of a crime. He then summarised the nature of the judicial power generally, referring to textbooks on constitutional law and various well-known precedents.¹¹² An essential characteristic of the administration of justice was the right to decide disputed issues of fact and, by such a decision, determine what were the legal rights of the parties to the dispute. Moving on to the nature of the order under the Trial of Lunatics Act, he said that, if the executive was constitutionally entitled to make the decision on release, it was obliged to make that decision in accordance with constitutional principles. The decision might involve the resolution of a disputed issue of fact and it affected the legal rights of the person in a fundamental sense, while also having implications for the community. Counsel for the DPP offered evidence to assist the court, but their adversarial role had ceased for practical purposes. A criminal trial was a continuum which began with the arraignment of the accused and did not conclude until he or she had been either sentenced by the court or unconditionally discharged.¹¹³ Until one of these

¹¹¹ (1956) 94 CLR 254; [1957] AC 288.

¹¹² E.g. *McDonald v Bord na gCon (No.2)* [1965] IR 217, *Lynham v Butler (No.2)* [1933] IR 74, *State (Shanahan) v Attorney General* [1964] IR 239, *In Re Solicitors Act 1954* [1960] IR 239. The textbooks referred to were the then current editions of Kelly, supra n.51, James P. Casey, *Constitutional Law in Ireland*, 2nd ed. (Sweet & Maxwell, London, 1992) and Michael Forde, *Constitutional Law of Ireland*, (Mercier Press, Cork, 1987.)

¹¹³ See also Finlay P. in *State (Commings) v McRann* [1979] IR 133 at 135: "A criminal matter within the meaning of Article 37 can be construed as a procedure associated with the prosecution of a person for a crime. It may be

alternatives happened, the court retained its seisin of the case. The fact that the original order made by the court of trial allowed of the exercise of no discretion by the court was immaterial. In deciding on release, the executive would have to adjudicate between conflicting views.

Applying the criteria for identifying the judicial power of the State to an order releasing a person from Dundrum, Keane J. concluded that it was normally part of the administration of justice and to assign the determination of any of the matters in issue to the executive was inconsistent with the separation of powers enjoined by the Constitution. He contrasted this type of order with the right of pardon and the power to commute or remit punishment. The latter right and power were privileges or concessions, but a person's release from Dundrum was a constitutional entitlement if detention was no longer required by considerations of the public welfare or the person's own safety. This type of order could also be contrasted with involuntary reception orders ("civil commitment") and orders under s.165 of the Mental Treatment Act 1945.¹¹⁴ Keane J. believed that these were plainly executive functions and ones legitimately entrusted to the executive since they did not purport to interfere with or override the jurisdiction of any Court established under the Constitution.

As the ten words ("till the pleasure of the Lord Lieutenant shall be known") were

a preliminary investigation of such a charge, it may be the trial itself, it could be an appeal from the trial or, presumably an application for bail pending trial or appeal."

¹¹⁴ S.165 states that a member of the Garda Síochána may take into custody a person who is believed to be of unsound mind where he or she is of opinion that it is necessary for the public safety or the safety of the person concerned that he or she should be taken into custody

inconsistent with the Constitution, Keane J. held that they should be deleted from the Act. He referred to the difference in the approaches of Walsh J. and Ó Dálaigh C.J. in the Children Act case, and decided that Walsh J's was the correct statement of the law. He criticised Ó Dálaigh C.J. for overlooking the fact that under the 1922 Constitution and the 1937 Constitution, the administration of justice is expressly recognised as the exclusive prerogative of the courts.

Keane J. went on to decide that Neilan should be released from Dundrum, but should stay overnight for at least one night a week in St. Brigid's hospital, Ballinasloe, until further order of the court.

He added some general observations: There should be no further applications in chambers in cases such as this; the law in this area was in urgent need of statutory reform as highlighted in the report of the Henchy Committee; some of the wording in the old statutes was "offensive" in referring to people with mental illness and, in all cases where a person is found guilty but insane so as not to be responsible, a medical report should be presented within two weeks so that the person can be set at liberty if they have recovered from their mental condition.

Like other cases on this issue, it is significant that Neilan's application was an application to the Central Criminal Court on notice to the DPP, rather than a High Court habeas corpus action. The Attorney General was not involved at any stage, even though the case involved the issue of the constitutionality of a statutory

provision. This again conflicts with the principle that the Attorney General should be a party to all constitutional litigation.¹¹⁵

Keane J's summary of the law is admirably comprehensive and his reasoning that the ten words are unconstitutional is persuasive (see pages 219ff. below). However, Keane J. does not adequately justify his decision that he has jurisdiction to continue hearing Neilan's case and to reach a decision on its merits. As was stated in the discussion of the Children Act case above, it is not satisfactory to delete the words "during the pleasure of ..." and then stretch the meaning of the remaining words so that the courts can bring the detention to an end at any time. Keane J. does not even specify that that is what he is doing, but if he was following Walsh J's approach in the Children Act case, as appeared to be his intention, then this would be the next step in the logic. It would have been preferable if Keane J. had found the words to be unconstitutional and required the Oireachtas to enact a new dispositional formula. Keane J. should have found that the change of practice since 1972 was invalid as it involved the substitution of new words for the unconstitutional words in the 1883 Act. Therefore, the original order detaining Neilan was invalid and he should be released from his unconstitutional detention.

The Judge's final observations are welcome and appropriate, but at one stage in these observations his reasoning is questionable. In recommending that where a person is

¹¹⁵ See above, p.184. As this case was decided by Keane J. and involved an 1883 Act, he may have been applying the principle in his own previous decision in *State (D.C.) v Midland Health Board*, supra n.61.

found guilty but insane so as not to be responsible a medical report should be presented within two weeks, he states:

In many cases, such as the present, the accused has already recovered from the mental condition, since, were that not so, he would presumably be unfit to plead.¹¹⁶

This is strange because it implies that the test of “insanity” is the same as that for fitness to plead, which is not the case (see chapter 2 above.)

Ellis in the Supreme Court

The *Neilan* judgment did not receive much media attention, but the next development on the question, the Supreme Court’s judgment in Patrick Ellis’s appeal in June 1990¹¹⁷, was a more “newsworthy” event.

The Supreme Court directed that the Attorney General should be added as a notice party. Counsel for the Attorney General argued that O’Hanlon J. could not rescind his 1987 order as it had been acquiesced in by all of the parties, and that having regard to the course of the proceedings it was not appropriate for the Supreme Court in this case to decide on the constitutionality of the ten words in the 1883 Act. Alternatively, counsel argued that a detention order “until further order of the court” was the correct order and such a conclusion could be reached without declaring any part of the Act unconstitutional.

¹¹⁶ [1990] 2 IR 267 at 289.

Counsel for the DPP argued that O'Hanlon J. was correct, but that the order should perhaps have referred to the Minister for Justice instead of the Government of Ireland. Counsel for Ellis submitted that the original order of 1987 should stand and Ellis should be released.

The Supreme Court's unanimous judgment, delivered by Finlay C.J., is extremely short and terse. The Court stated that arguments on the constitutionality of the 1883 Act would have to wait until another case came along. In the instant case, there were a number of reasons why O'Hanlon J's most recent decision should not stand. The constitutional guarantee of fair procedure had been breached in a "major" way as O'Hanlon J's decision was founded on legal issues on which Ellis and his counsel had not had an opportunity to be heard. A rescission of the 1987 order would, in this case, be unjust due to the lapse of time and the events which had occurred from 1987 to 1990. (The Court admitted that a judge has, in certain circumstances, an inherent right to correct his or her own order which he or she believes to have been made in error.) Finally, the failure to involve the Attorney General in the proceedings raised significant doubts as to their validity. O'Hanlon J's most recent order was set aside and he was directed to decide on the evidence whether Ellis should be released.

The Supreme Court's point concerning fair procedures cannot be refuted. It is remarkable that on 2 February 1990 O'Hanlon J. heard no arguments about the validity of his 1987 order and yet a week later he returned with a reserved judgment finding that his previous order was erroneous. It would have been much more

¹¹⁷ *Application of Ellis* [1990] 2 IR 291 at 300.

straightforward if O'Hanlon J. had called counsel back in and asked for their views on the validity of his 1987 order.¹¹⁸ While O'Hanlon J's most recent decision was in breach of fair procedures and this meant that Ellis's appeal must succeed, the Supreme Court could have allowed O'Hanlon J. to reconsider the issue of the validity of the 1987 order, having heard arguments of counsel. The court does not follow this course, though. The lapse of time, acquiescence and justice points become relevant here. The lapse of time in question is not very long - only three years. Acquiescence to an error does not change the fact that it is an error. And "justice" would normally require that errors should be corrected. The court's point about failure to notify the Attorney General could have been remedied by requiring the Attorney General to be joined in the rehearing of the legal issues in the High Court.¹¹⁹ It is strange that the Supreme Court itself had previously decided constitutional issues - in the Children Act case¹²⁰ and the McGrath case¹²¹ - without the Attorney General being involved.¹²²

¹¹⁸ Normally, a Judge should not introduce additional issues into a case apart from those specifically pleaded. However, it would seem to be different if a Judge believes that there may be an error in his or her own previous order. The Judge would not be telling the parties to argue that the 1883 Act was unconstitutional. Instead, he would be asking for their views on the validity of an unofficial change in court practice which occurred around 1972. The change in practice was actually contrary to the wording of the Act. O'Hanlon J. made the 1987 order in accordance with the current practice but now, with hindsight, he had doubts as to the validity of the practice. While those doubts remained, it would be impossible for him to adjudicate on the issue of Ellis's release.

¹¹⁹ In *Re Philip Clarke* [1950] IR 235 at 237, Dixon J. in the High Court adjourned the case to allow the Attorney General to be notified. He said "as the liberty of the individual is involved, I feel I should give this further opportunity for serving notice."

¹²⁰ *State (O.) v O'Brien* [1973] IR 50

¹²¹ *State (McGrath) v Governor of Dundrum Central Mental Hospital*, Supreme Court, 31 July 1970.

In essence, the Supreme Court preferred to avoid or “dodge”¹²³ the issue of release of people detained in Dundrum than to allow the question to be addressed for once and for all. A week later, O’Hanlon J. reheard the issue of Ellis’s release. Due to the wording of the Supreme Court’s decision, he could not reopen the issue of the validity of his 1987 order. He heard evidence from Dr. Art O’Connor of the CMH and decided that Ellis should be released, the case to be reviewed again in a year’s time.¹²⁴

Gallagher (No.1)

John Gallagher’s repeated applications for release from Dundrum have been the subject of much controversy and debate¹²⁵ and there are some similarities between the Gallagher case and the Hinckley case in the USA.¹²⁶ Gallagher suffered head injuries

¹²² See also p.184 above.

¹²³ David Gwynn Morgan, *Irish Times*, 23 June 1990

¹²⁴ *Irish Times*, 23 June 1990

¹²⁵ See *Irish Times* 23 January 1990, 15 December 1990, 13 February 1991, 14 February 1991, 16 May 1991, 25 July 1991, 5 November 1991, 8 November 1991, 22 November 1991; 405 Dáil Debates 284, 13 February 1991; R.T.É., Wednesday Report, 30 October 1991; *Sunday Tribune*, 3 November 1991.

¹²⁶ Hinckley shot Ronald Reagan in 1981 and was acquitted on grounds of insanity in 1982. The acquittal led to numerous changes in Federal and state law, e.g. the Insanity Defense Reform Act 1984. Empirical evidence has shown that in some states the “reform” has made little difference but in others there has been a drop in the number of insanity acquittals. The literature on Hinckley and its aftermath is vast, but the key text is Henry J. Steadman et al, ***Before and After Hinckley: Evaluating Insanity Defense Reform*** (Guildford Press, New York and London, 1993). The Gallagher case is similar in the level of public interest which it has generated over the

in a car accident in 1979, when he was about 11 years of age. He was “going out with” Anne Gillespie since she was 15 and he was 17. He was taking slimming tablets. Gallagher was acting aggressively towards Gillespie and she wanted to leave him. In September 1988, when he was 20 and she was 18, he had a fight with a man who danced with her at a wedding and later dripped blood from a wound over her. A few days later, she complained to the Gardaí that he had raped her. He signed himself into a psychiatric hospital and she withdrew her complaint. After two days in the hospital, he signed himself out. Twice in one night, he stood on a bridge and threatened suicide. He sent a “love tape” to her but she refused to see him. He went home and got a rifle and killed Anne and her mother Annie (aged 56) in the grounds of Sligo hospital. He also attempted to shoot at Patrick Maguire, the uncle and brother-in-law of the two women, but the gun did not discharge. He then drove wildly around Donegal, handcuffed himself to the steering wheel and drove his car off a pier. He was rescued by firemen and by Gardaí who were pursuing him.

At his murder trial¹²⁷ in July 1989, there was conflicting psychiatric evidence. On the one hand, it was stated that the slimming tablets could produce psychosis and delusions of persecution. Dr. Desmond McGrath said that handcuffing himself to the wheel showed his judgment and emotional control had been gravely impaired. Dr.

years, the perception that he “beat the rap” and the reluctance of the courts and the executive to release him.

¹²⁷ Gallagher was originally charged with murder of Anne and Annie Gillespie and attempted murder of Patrick Maguire. However, the attempted murder charge was withdrawn from the jury by the trial judge (*Gallagher v Director of the Central Mental Hospital*, Barron J., 16 December 1994, at p.1)

Art O'Connor asserted that there was no evidence of mental illness.¹²⁸ The jury found him guilty but insane so as not to be responsible, by a 10-2 majority. Johnson J. ordered that he be detained in Dundrum "until further order of this court."

In January 1990, six months after the verdict, Gallagher applied to Johnson J. for his release. A petition was organised objecting to these proceedings.¹²⁹ The proceedings were adjourned a number of times. The Attorney General was joined as a notice party. Full arguments were heard on the constitutionality of the 1883 Act, having regard to the *Ellis* case and the *Neilan* case. Johnson J. held in December 1990 that the 1883 Act was not unconstitutional and that Gallagher should be detained at the pleasure of the Government. The relatives of the Gillespies instructed counsel to appear before Johnson J. to express their views in relation to any possible release. Their right of audience never came to be determined. There is no written record of Johnson J's judgment available, but he was reported as saying that a person found guilty but insane so as not to be responsible was innocent of the crime.¹³⁰ He agreed with O'Hanlon J's judgment in the *Ellis* case. In his view, the court had served its purpose after making an order following a verdict. He did not consider it part of the trial that the judge should continue to monitor what was essentially a health matter. The Central Mental Hospital had contacted him in the previous month to ask if the court needed to sanction an outing by Gallagher. This was not a function of the court

¹²⁸ Five years later, Dr O'Connor said that Gallagher had a personality disorder, including immaturity and egocentricity, but not mental illness: *Gallagher v Director of Central Mental Hospital*, Barron J., 16 December 1994, p.5.

¹²⁹ *Irish Times*, 23 January 1990

and he asked would the court have to give clearance if Gallagher developed acute appendicitis and needed surgery.¹³¹ The opposition called for reform of the law on insanity.¹³²

The Supreme Court unanimously agreed with Johnson J.¹³³ Counsel for Gallagher had argued that the court should follow the reasoning of Keane J. in the *Neilan* case. Counsel for the Attorney General said that the decision on release should be up to the courts, as had been argued by counsel for the Attorney General in the *Ellis* case, but that there was no need to find the 1883 Act unconstitutional. They argued that the Act could be read in such a way that the power of release had become vested in the People and was now vested in the judiciary under the Constitution.¹³⁴ If the argument as to vesting were not upheld, the Attorney General would accept that the ten words were unconstitutional.

McCarthy J. quoted from Keane J's judgment in *Neilan* and said that there was a link missing from his chain of logic. The verdict under the 1883 Act was an acquittal and the trial was concluded. The executive, "armed with both the knowledge and the resources to deal with the problem," decided on the future disposition of the person.

¹³⁰ *Irish Times*, 15 December 1990.

¹³¹ Parole is authorised by s.204 of the 1945 Act. Transfers to hospitals for surgical treatment are authorised by s.208.

¹³² Fine Gael statement, *Irish Times*, 15 December 1990.

¹³³ *Application of Gallagher (No.1): Gallagher v DPP* [1991] 1 IR 31. 12 February 1991.

¹³⁴ This was similar reasoning to that of Ó Dálaigh C.J. in the Children Act case.

The Attorney General's argument was an unacceptable straining of language. If the decision on release was the administration of justice, then the ten words would have to be unconstitutional. But it was not the administration of justice; it was the carrying out of the executive's role in caring for society and the protection of the common good. The court ordered the detention of the person, but the executive provided the place of detention and would release him or her when it was safe to do so. The executive's role was similar to that of the executive under s.165 of the Mental Treatment Act 1945, which had been found to be constitutional in *Re Philip Clarke*.¹³⁵

McCarthy J. said that detained people could apply to the executive for their release and fair and constitutional procedures would need to be used by the executive in inquiring into the matter. Those detained under post-1972 orders were still validly detained, but could apply to the executive for their release. In a key passage towards the end of his judgment he stated as follows:

When the special verdict is returned, the court has no function of inquiry into the mental state of the former accused; that role is given to the executive. Pursuant to sub-s.2, the only order that could lawfully be made was an order that the accused be kept in custody as a criminal lunatic in such place and in such manner as the court should direct; immediately after the making of the order, or "thereupon" as stated in the sub-section, the role of the executive arose - to provide an appropriate place for the safe custody of the accused in such place and in such manner as the executive thought appropriate, until such time as the executive was satisfied that having regard to the *mental health* of the accused it was, for both public and private considerations, safe to release him.

¹³⁵ [1950] IR 235. Budd J. later expressed doubts as to the *Clarke* decision in *Croke v Smith (No.2)*, High Court, 27 and 31 July 1995, p.124, but on appeal, the Supreme Court endorsed the *Clarke* case - [1998] 1 IR 101 at 112 and 132.

In that sense, the role of the executive, on the making of the judicial order, became like unto the role of the executive in s.165 of the Mental Treatment Act, 1945. When the constitutional validity of that section was challenged in *In Re Philip Clarke* [1950] I.R. 235, as permitting detention without the intervention of the judicial power, the challenge was rejected. No criticism has been levied against the Supreme Court of Justice in *Clarke's case*.

If and when a person detained pursuant to s.2, sub-s.2 of the Act of 1883 seeks to secure his release from detention, as in the instant case, he may apply to the executive, as has been done in the instant case, for his release on the grounds that he is not suffering from any *mental disorder* warranting his continued detention in the public and private interests; then the executive, in the person of the Government or the Minister for Justice, as may be, must inquire into all of the relevant circumstances. In doing so, it must use fair and constitutional procedures. Such an inquiry and its consequence may be the subject of judicial review so as to ensure compliance with such procedures.¹³⁶

This passage is important because it has influenced the terms of reference of the advisory committees which have been set up to advise the Minister on applications for release. It is also important that McCarthy J. refers to “mental health” in the first paragraph and “mental disorder” in the second paragraph. This question was debated in *Application of Gallagher (No.2)*.¹³⁷

The Supreme Court does not mention anything about acquiescence, justice, or lapse of time, even though these points were very significant in the *Ellis* case.

The court's judgment does not address in detail Keane J's discussion of the issue in the *Neilan* case. For example, McCarthy J. compares the executive's role in insanity cases with s.165 of the Mental Treatment Act 1945, without addressing Keane J's belief that the power under s.165 is plainly an executive function because it does not

¹³⁶ [1991] 1 IR 31 at 38. Emphasis added.

purport to interfere with or override the jurisdiction of any court established under the Constitution.

The court makes no attempt to define what constitutes the administration of justice. On the role of the executive, the court provides limited analysis of its functions, merely stating that the executive is armed with the resources and knowledge to deal with the problem, and the executive's role is to care for society and protect the common good.¹³⁸

The court decides that the decision on release is up to the executive "in the person of the government or the Minister for Justice, as may be." It is arguable that the Minister for Health could have been the Minister specified.¹³⁹ It would have been helpful if a clear decision was made as to whether the Minister or the Government as a whole should deal with the matter, as the constitutional and statutory provisions are by no means clear on this point.¹⁴⁰

In dismissing the appeal from the judgment of Johnson J., the court was presumably authorising the alteration of the wording of the original 1989 order. This means that

¹³⁷ [1996] 3 IR 10. See below, pages 241ff.

¹³⁸ On problems in defining the role of the executive, see Morgan, *op.cit.*, chapter 12.

¹³⁹ The Central Mental Hospital is administered by the Eastern Health Board. The final decision under s.207 of the Mental Treatment Act 1945 is made by the Minister for Health.

¹⁴⁰ Article 28.2 allows the executive power of the State to be exercised "by or on the authority of the Government," thus permitting delegation by the Government. See also the Ministers and Secretaries Act 1924; Morgan, *op.cit.*, pp.272-3.

the original order was improper and invalid. Normally, an invalid order for detention infringes a person's rights to liberty and fair procedures and would lead to his or her release from detention, but the court chooses not to take such an approach. Furthermore, the court states that all other people who had been detained under these invalid orders are still lawfully detained. This conclusion is also questionable.

The next day, a question was raised in the Dáil as to when the law on insanity would be updated in the light of the Gallagher case and the Minister of State at the Department of Justice said that draft legislation was at an advanced stage.¹⁴¹ A spokesperson for the Department of Justice said that statistics were being compiled in relation to the number of cases covered by the 1883 Act.¹⁴²

In July 1991, Gallagher applied to the executive for his release and his case was heard by a three-member committee established by the Minister for Justice (for convenience, this will be referred to as the first advisory committee). The Committee consisted of a barrister, a psychiatrist and a general medical practitioner. The terms of reference were

To advise the Minister for Justice as to whether or not the Applicant is suffering from any mental disorder warranting his continued detention in the public and private interests (including the question of whether he would be a potential danger to any member of the public if released) having regard to any relevant information, material or submissions as may be tendered to or come to the notice of the Committee, including any information, material or submissions tendered by or on behalf of the applicant.¹⁴³

¹⁴¹ 405 Dáil Debates 284, 13 February 1991.

¹⁴² *Irish Times*, 14 February 1991.

¹⁴³ *Gallagher v Director of the Central Mental Hospital*, Barron J., 16
216

In September, the advisory committee reported to the Minister, Mr. Ray Burke, that it had concluded Gallagher was suffering from a mental disorder which warranted his continued detention. In November, the Minister (and possibly the Government as well) decided not to release Gallagher, saying that his continued detention in both the public and private interest was warranted.¹⁴⁴ The Minister again promised reform of the law. Writing in 1993 about this first committee, McAuley said:

[T]here is a suspicion that Gallagher is perceived by the government as the type of defendant who should be convicted of manslaughter and have his sentence reduced on the basis of a plea of diminished responsibility, and that the decision to continue his detention for the time being was motivated more by a concern to ensure that defendants of this type are seen not to be able to escape their just desserts by means of the insanity plea than by a dispassionate assessment of his state of mental health.¹⁴⁵

Gallagher's later legal challenges are discussed below at pages 241ff.

Meanwhile, in July 1991, Patrick Ellis's case came up for review before O'Hanlon J. Ellis had been released in June 1990, subject to review in a year's time. If O'Hanlon J. had not set a date for review at that time, it is unclear whether Ellis's position would have been reconsidered. At the review, O'Hanlon J. cited the *Gallagher* decision to rescind the court order releasing Ellis.¹⁴⁶ This meant that Ellis was

December 1994, p.3. See also Justice FOI s.16 Book, p.91.

¹⁴⁴ *Irish Times*, 8 November 1991.

¹⁴⁵ McAuley, p.123. Similarly, see the decision in *Jones v US* 463 US 354 at 364 (1983) in which the US Supreme Court quoted a US Congressional Committee report expressing the fear that "dangerous criminals, particularly psychopaths, [may] win acquittals of serious criminal charges on grounds of insanity yet still escape hospital confinement" and went on to uphold a restrictive release regime for insanity acquittees.

¹⁴⁶ *Irish Times*, 20 July 1991.

returned to detention in Dundrum.

O'Hanlon J. could have taken a different approach to Ellis's case at this stage. It is submitted that the reasoning should have gone as follows: O'Hanlon J. had already made a finding of fact that Ellis's detention in Dundrum was not medically necessary.¹⁴⁷ The Supreme Court had earlier directed him to decide on the issue of release, on grounds of justice, acquiescence, lapse of time, failure to join the Attorney General and breach of fair procedures. While the *Gallagher* judgment meant that the wording of the order in Gallagher's case was altered, and so presumably was the wording of all other post-1972 orders, Patrick Ellis had been validly released before the Gallagher judgment. The Supreme Court had specifically authorised the decision on release to be made by O'Hanlon J. The *Gallagher* judgment changed the law, but only for those who applied for release after the judgment was delivered. Admittedly, there are some problems with this line of reasoning as O'Hanlon J. may have been more concerned about his legal competence to deal with the issue of periodic *reviews* of Ellis's detention, which reviews would be taking place *after* the Gallagher judgment.

Ellis appealed, but the Supreme Court said that things had changed since its previous decision in his case. For the sake of consistency in the law, it had to follow the *Gallagher* case and the decision on release was up to the executive "without any

¹⁴⁷ *Irish Times*, 23 June 1990.

possible delay.”¹⁴⁸ Ellis applied to the executive for release, an advisory committee recommended his release and the Minister directed his release. The victim’s father expressed shock and disbelief.¹⁴⁹ Ellis later pleaded guilty to charges of sexually assaulting a fifteen year old boy.¹⁵⁰

The decision in *Gallagher (No.1)* and the resulting advisory committee procedure may be criticised on a number of grounds, and these will now be considered.

Separation of Powers:

The Supreme Court’s decision on the separation of powers issue is not convincing.¹⁵¹ It is important to recall the emphatic nature of the decision in the Children Act case in 1971. The court clearly held that the selection of punishment and the determination of length of sentence were integral parts of the administration of justice. A similar ruling was made in *State (Sheerin) v Kennedy*.¹⁵² There, s.7 of the Prevention of

¹⁴⁸ *Irish Times*, 26 July 1991.

¹⁴⁹ *Irish Times*, 22 November 1991.

¹⁵⁰ *Irish Times*, 2 May 1996. This subsequent charge contributed to the public perception that release of insanity acquittees should be restricted.

¹⁵¹ Compare Tom O’Malley - “By holding that the insanity verdict was, in effect, an acquittal and that the consequent committal to the CMH, as required by statute was not a sentence, the court could proceed easily to the conclusion that the decision on release was an executive decision, although subject to judicial review” - Book review, (1993-1995) 28-30 *Ir.Jur.(ns)* 426 at 428.

¹⁵² [1966] IR 379.

Crime Act 1908¹⁵³ authorised the Lord Lieutenant to transfer “incorrigible” persons from a borstal to prison “with or without hard labour as the Lord Lieutenant may determine.” The Supreme Court held that it was an unconstitutional exercise of the judicial power of the State for the executive to choose whether the imprisonment would be with or without hard labour.¹⁵⁴ Keane J., in the *Neilan* case, rightly examines the issue of the nature of the judicial power in great detail before concluding that the decision on Neilan’s release is an exercise of that power. He relies heavily on authorities such as *McDonald v Bord na gCon (No.2)*¹⁵⁵, which have been followed by the Supreme Court in *Goodman International v Hamilton (No.1)*.¹⁵⁶ The difference between the order made under the 1883 Act and most other judicial orders after criminal trials is that the person has been acquitted in the case of an order under the 1883 Act. But even though they have been acquitted, the Judge then orders them to be detained for an indeterminate amount of time. It is surely unconstitutional for the executive to decide when the detention should come to an end, given the circumstances.

As was stated at page 190 above, Walsh J. said in the Children Act case that there

¹⁵³ 8 Edw. 7, c.59.

¹⁵⁴ See also *State (Woods) v Attorney General* [1969] IR 385. For criticism of Sheerin and Woods, see Morgan, *op.cit.*, p.188. Contrast *State (Boyle) v Governor Curragh Military Detention Barracks* [1990] ILRM 242: A mere administrative decision, necessitated by the insufficiency of prison accommodation, to transfer a prisoner from prison to military detention, subject to rules corresponding with those in force in prisons, was not an exercise of the judicial power. See s.2 Prisons Act 1972.

¹⁵⁵ [1965] IR 217.

¹⁵⁶ [1992] 2 IR 542.

was nothing unconstitutional about indeterminate sentences.¹⁵⁷ The problem with the 1883 Act is that the duration of the indeterminate detention is left to the executive. This is not a grant of a power of remission of sentence under Article 13.6 of the 1937 Constitution, as remission is a concession but a person's release from Dundrum is a constitutional entitlement if detention is no longer required by considerations of the public welfare or the person's own safety (see Keane J. in the *Neilan* case.)¹⁵⁸ Interestingly, even if the Supreme Court had decided in the *Gallagher* case that the decision on release was up to the courts it is possible that the executive would still have the power to remit this "punishment."¹⁵⁹ In fact, the courts are obliged to exercise care not to interfere with the executive's power of remission of sentences. The Court of Criminal Appeal has, on this basis, quashed a sentence of seven years' imprisonment where the judge directed that after three years the prisoner should be brought back to the court so that the judge might consider whether to suspend the rest

¹⁵⁷ However, there may be some doubt about the constitutionality of mandatory sentences in some cases: Law Reform Commission, supra n.9, p.311; *U.S. v Ortega Lopez* 684 F. Supp. 1506, 1513 CD CAL (1988.)

¹⁵⁸ [1990] 2 IR 267.

¹⁵⁹ This would only apply if it was held that an order for detention in Dundrum was a "punishment imposed by any court exercising criminal jurisdiction" (Article 13.6 of 1937 Constitution). In *O'Callaghan*, Ó Dálaigh CJ said that all deprivations of liberty are a punishment ([1966] IR 501 at 509). The power to remit is vested in the President and was conferred by law on "other authorities", namely the executive, by s.23 of the Criminal Justice Act 1951 (No.2). The power was later delegated to the Minister for Justice, Equality and Law Reform by the Criminal Justice Act 1951 (Section 23) (Delegation of Powers) Order 1998 (SI No. 416 of 1998.) In any future statutory reform of the law, the Oireachtas could specifically provide that in the case of insanity acquittees, the power of remission would be vested in the courts alone.

of the sentence.¹⁶⁰ However, Walsh J. has said in the Supreme Court that such sentences in no way encroach upon the executive power of remission.¹⁶¹ On the other hand, it has been held that remission of finer should only be granted by the Minister for Justice in exceptional circumstances.¹⁶²

In his detailed study of the separation of powers in Ireland, Morgan agrees with the *Gallagher (No.1)* judgment.¹⁶³ Morgan's approach can only be understood in the context of his general critique of the strictness of the Irish doctrine of separation of powers. He notes that Keane J's decision in the *Neilan* case fits with the general Irish judicial tendency towards a strict separation of powers and that in fact the decision in *Gallagher (No.1)* goes against the trend, admittedly in rather extreme circumstances.¹⁶⁴ He goes on to say that *Gallagher (No.1)* "cannot be regarded as involving a rolling-back of recent developments."¹⁶⁵

¹⁶⁰ *People v Cahill* [1980] IR 8. See also *People (DPP) v Fagan*, Court of Criminal Appeal, 7 November 1977 (ex tempore), *People (DPP) v O'Toole*, Court of Criminal Appeal, 26 May 1978 (ex tempore), Morgan, op.cit., pp.188-189; Raymond Byrne and William Binchy, *Annual Review of Irish Law 1987* (Round Hall Press, Dublin, 1988), pp.160-1.

¹⁶¹ *People (DPP) v Aylmer*, Supreme Court, 18 Dec. 1986. McCarthy J. agreed that there was no invalidity in the original sentence. However, Henchy, Griffin and Hederman JJ. reserved the question of the validity of the original sentence on various procedural grounds.

¹⁶² *Brennan v Minister for Justice* [1995] 1 IR 612.

¹⁶³ Morgan, op.cit., pp.182-5 and p.198.

¹⁶⁴ *Ibid.*, p.185 and p.198.

¹⁶⁵ *Ibid.*, p.198.

He believes that Keane J's judgment in *Neilan* is "carefully reasoned"¹⁶⁶ but he queries it as follows:

[W]hy does a court have to retain seisin - it may be for several years - even though the nature and purpose of the process has shifted radically from the administration of justice with which it commenced before the court[?]¹⁶⁷

He cites the *Philip Clarke*¹⁶⁸ case, submits that "no one would doubt" that detention under the Mental Treatment Act 1945 is an exercise of the executive function¹⁶⁹ and concludes that detention of an insanity acquittee should be treated in a similar fashion.¹⁷⁰

While Morgan welcomes the fact that *Gallagher (No.1)* goes against the trend, this writer does not agree that the disavowal of the trend was justified. The answer to Morgan's query may be that a court must retain seisin because the constitutional right to liberty is at issue. Keane J. emphasises that a person's release from the CMH is a

¹⁶⁶ Ibid., p.183, fn.81.

¹⁶⁷ Ibid., p.185

¹⁶⁸ [1950] IR 235

¹⁶⁹ Contrast arguments made in the High Court in *Croke v Smith (No.2)*, High Court, Budd J., 27 and 31 July 1995, p.10 and pp.67-88; Tom Cooney & Orla O'Neill, *Psychiatric Detention: Civil Commitment in Ireland* (Baikonur, Wicklow, 1995.)

¹⁷⁰ Ibid., p.185: "No one would doubt that [detention under the Mental Treatment Act 1945] is an exercise of the executive function. Should there be any difference where s/he is detained after the commission of what would, in the case of a sane person, be a crime? The answer, it is submitted, is in the negative. The reason is that the prisoner is not being detained because of the crime in respect of which there has been - to use the language of the passage from *Neilan* quoted earlier - 'in substance an acquittal'. The crime was only significant in bringing the insanity to public notice."

constitutional entitlement if detention is no longer required by considerations of the public welfare or the person's own safety.¹⁷¹ Morgan himself concedes that

the argument ... that the courts should decide questions of personal liberty..., while it may not be justifiable on pure separation of powers grounds, ... is in line with the view taken in Ireland in regard to bail.¹⁷²

He notes elsewhere that there is a growth of fondness for individual rights as against administrative needs¹⁷³ and there is a "blunderbuss-like approach" in Ireland.¹⁷⁴

Morgan points out that due to the strictness of the Irish doctrine of separation of powers, the Irish legislature could not establish a sentencing tribunal which might include social scientists or doctors.¹⁷⁵ This important point affects any possible future

¹⁷¹ *Application of Neilan* [1990] 2 IR 267.

¹⁷² Morgan, op.cit., p.199. Earlier, Morgan cites a passage from Howard, 'An Analysis of Sentencing Authority' in P.R. Glazebrook (ed.), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens and Sons, London, 1978), p.413, which includes the following: "The restriction of personal liberty is in our society pre-eminently a matter for the judiciary and not for administrative discretion, however expert or enlightened." The mention of bail refers back to earlier discussion of *State (Lynch) v Ballagh* [1986] IR 203 and *O'Mahony v Melia* [1989] IR 335 at Morgan, op.cit., pp.169-171.

¹⁷³ Ibid., p.63: "[T]he growth of fondness for individual rights as against administrative needs has led ... to the recent, rapid and rather free-wheeling march of the doctrine of legitimate expectations." See also p.157 ("an example of the Irish judiciary's characteristic preference for individual rights over and against the smooth running of government administration which may benefit large numbers of people"); p.291, fn.42 ("the zeitgeist in favour of rights rather than privileges.")

¹⁷⁴ Ibid., p.197: The U.S. approach to arrest or search warrants "shows a concern for civil liberty and a flexibility which is preferable to the blunderbuss-like approach which has been adopted in Ireland."

¹⁷⁵ Ibid., p.198, citing Casey, 'The Judicial Power in the Irish Constitution' (1975) 24 ICLQ 305 at 314-5. Morgan believes that this is based on a

reform of the law concerning insanity acquittees. If *Gallagher (No.1)* is correctly decided, then it is permissible that the decision on release should be made by a non-judicial tribunal.¹⁷⁶ If it is not, then the decision may only be made by a court.¹⁷⁷

The Right to Liberty:

The constitutional right to liberty was not properly discussed in any of the post-1971 cases on release of people detained under the special verdict. The only explicit reference is the brief reference by Keane J. in the *Neilan* case.¹⁷⁸ It is useful to review this constitutional right in more detail. Article 40.4.1° of the 1937 Constitution provides:

No person shall be deprived of his personal liberty save in accordance with law.

While “law” was originally interpreted as meaning any ordinary legislation,¹⁷⁹ it was

narrow view of sentencing, whereby factors to be taken into account are confined mainly to circumstances relating to the offence itself. The alternative, broader, view would include matters relevant to the offender and society or the impact on the nation generally, including the offender’s chances of rehabilitation. See also his comments on the possibility of an Irish Parole Commission at pp.194-5, where another matter is mentioned - factors which come into existence, or become known, after the time of trial, such as conduct in prison. Morgan argues that the constitutionality of an Irish Parole Commission might be upheld.

¹⁷⁶ At present the decision is made by the executive, following advice from an ad hoc tribunal. A new statutory tribunal might be given the power to make the actual decision in its own right.

¹⁷⁷ While the primary constitutional provision which would lead to this result would be Article 34.1, which vests the judicial power in the courts, it must also be noted that if this is classified as a criminal matter there is no possibility of conferring any part of the function on another person or body under Article 37.1.

¹⁷⁸ [1990] 2 IR 267 at 287.

¹⁷⁹ See for example *R (O’Connell) v Military Governor of Hare Park Camp*
225

later interpreted very differently. In *King v Attorney General*, Henchy J. said that “save in accordance with law” meant “without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution.”¹⁸⁰ In the context of bail applications, the Supreme Court has on two occasions categorically stated that the likelihood of commission of future offences while on bail is not admissible as a ground to refuse bail and thus refused to recognise a concept of preventative detention. In *O’Callaghan*, Ó Dálaigh C.J. said that the Attorney General’s submission sought to punish the applicant in respect of offences neither completed nor attempted. He continued:

I say ‘punish’, for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon.¹⁸¹

In *Ryan*, Finlay C.J. stated:

An intention to commit a crime, even of the most serious type, is not in our law a crime in itself The courts cannot create offences or crimes, though the Oireachtas may. Are they, however, to be permitted to detain a person because he is suspected of an intention, which even if proved in a full criminal trial, could not lead to his punishment? If such a power did exist in the courts, why should its exercise be confined to cases where the suspect is an applicant for bail?

How can such an intention be proved, and by what standard of proof must it be established? ...

The criminalising of mere intention has been usually a badge of an oppressive or unjust legal system.¹⁸²

The courts have also rejected the concept of preventative detention in the *Jackson*,

[1924] IR 104; [1935] IR 243; Majority in *State (Ryan) v Lennon* [1935] IR 170.

¹⁸⁰ [1981] IR 233 at 257.

¹⁸¹ *People (Attorney General) v O’Callaghan* [1966] IR 501 at 509.

¹⁸² *Ryan v DPP* [1989] IR 399 at 407.

Carmody, Bambrick, and M.C. cases.¹⁸³ And this rejection was confirmed in one of the later cases concerning Gallagher's detention - *Application of Gallagher (No.2)*.¹⁸⁴

Rejection by the Irish courts of preventative detention of all forms may be compared with preventative detention in England and Wales¹⁸⁵ and Australian legislation enacted specifically to detain certain offenders with personality disorders.¹⁸⁶

The net effect of Article 40.4.1° is that there is a presumption that somebody should be at liberty and the courts will closely examine the legality of any deprivation of liberty. Similar constitutional presumptions are the presumption of innocence¹⁸⁷ and

¹⁸³ *People (DPP) v Jackson*, Hederman J., Court of Criminal Appeal, 26 April 1993; *People (DPP) v Carmody* [1988] ILRM 370; *People (DPP) v Bambrick* [1996] 1 IR 265; *People (DPP) v M.C.*, Central Criminal Court, Flood J., 16 June, 1995 at p.16.

¹⁸⁴ [1996] 3 IR 10. See below, pp.241ff.

¹⁸⁵ Nigel Walker (ed.), *Dangerous People* (Blackstone Press, London, 1996.)

¹⁸⁶ See Community Protection Act 1990 (Vic.) concerning Gary David (also known as Gary Webb) and Community Protection Act 1994 (NSW) concerning Gregory Kable; C.R. Williams, 'Psychopathy, Mental Illness and Preventative Detention: Issues arising from the David Case' (1990) 16 Monash ULR 161; D. Wood, 'A One Man Dangerous Offenders Statute - The Victorian Community Protection Act 1990' (1990) 17 Melb. ULR 497. The 1994 Act was declared unconstitutional in *Kable v DPP for NSW* (1996) 138 ALR 577. See D.A. Fairrall, 'Imprisonment without conviction in New South Wales: *Kable v DPP*' (1995) 17 Sydney LR 573; J.Miller, 'Casenote - *Kable v DPP*' (1997) 21 Crim. LJ 92. But preventative sentencing was upheld in *R v Carr* [1996] 1 VR 585. See generally L. Waller & C.R. Williams, *Brett, Waller and Williams: Criminal Law: Text and Cases*, 8th ed. (Butterworths, Sydney, 1997), pp.686-693.

¹⁸⁷ *O'Leary v Attorney General* [1993] 1 IR 102 (HC); [1995] 1 IR 254 (SC).

the presumption that the welfare of a child is to be found within the family.¹⁸⁸ The Supreme Court decision in *Gallagher (No.1)* and the terms of reference of the advisory committees which considered the question of release of Patrick Ellis and John Gallagher do not appear to emphasise any such right to liberty (see page 216 above). The test is mainly couched in medical terms. The Supreme Court stated in *Gallagher (No.1)* that the executive's decisions on release could be reviewed by the courts to ensure their compliance with fair and constitutional procedures. However, there is a great difference between leaving the decision up to the courts and having the courts review the executive's decisions. A review of a decision is normally based on narrow grounds of procedure or fairness. The court will not substitute its view for the view of the body being reviewed unless there are compelling reasons to do so. The failure of Gallagher's various challenges to the procedure in the executive's decisions in his particular case demonstrates the difficulties faced by any person attempting to seek a judicial review of this type. A further factor is the courts' tendency only to override a medical decision if it is obviously wrong.¹⁸⁹ The question of the test for the release of detained people in these circumstances is no mere semantic argument. It is quite likely that in certain cases if the test was expressed in constitutional terms, the person would be released, whereas if it were expressed in medical terms the person's detention would continue.

¹⁸⁸ *In Re J.H.* [1985] IR 375 at 395.

¹⁸⁹ *Daniels v Heskin* [1954] IR 73; *O'Donovan v Cork County Council* [1967] IR 173; *Dunne v National Maternity Hospital* [1989] IR 91; David Tomkin and Patrick Hanafin, *Irish Medical Law* (Round Hall Press, Dublin, 1995), pp.72-78.

The criteria for release are unduly medically-focused:

A medically-focused assessment of potential danger to members of the public is open to some extent to Finlay C.J.'s criticism of detention based on intention to commit a crime: "How can such an intention be established, and by what standard of proof must it be established?" The terms of reference of the advisory committees refer to "continued detention in the public and private interests (including the question of whether [the patient] would be a potential danger to any member of the public if released)" but psychiatric predictions of dangerousness are notoriously imprecise.¹⁹⁰ It is also possible that any medical professionals would be unduly cautious due to the risk of negligence actions from third parties who are injured due to the person's release¹⁹¹, or from relatives of discharged patients who commit suicide.¹⁹²

¹⁹⁰ See McAuley, p.3 and p.7, Cooney & O'Neill, p.113, Hoggett, p.74, Perlin pp. 165-171 and sources cited therein. Even the American Psychiatric Association has admitted that two out of three predictions of long-term future violence made by psychiatrists are wrong - *Barefoot v Estelle* 463 US 880 at 920 (1983). Note that a quarter of people surveyed said that they would fear for their safety if confronted by somebody with schizophrenia – Press Release, Eli Lilly & Co. (Ireland) Ltd / Edelman Healthcare Communications, Dublin, 8 December 1998.

¹⁹¹ See *Tarasoff v Regents of University of California* 529 P 2d 553, 118 Cal. Repr. 129 (1974) and 17 Cal. 3d. 425, 131 Cal. Rptr. 14, 551 P. 2d. 334 (1976); Kyle, 'From Tarasoff to Bradley: Courts Struggle to Apply the Duty to Control Mental Patients (1984) 14 Cumb. L. Rev. 165; Tomkin and Hanafin, supra n.189, pp.57-8; *Holgate v Lancashire Mental Hospitals Board* [1937] 4 All ER 294; Brenda Hoggett, *Mental Health Law*, 4th ed. (Sweet & Maxwell, London, 1996), pp.168-9. See also the various inquiries after homicides committed by released mental patients in the UK as summarised at the Institute of Mental Health Law website (www.imhl.com) and reviewed in Jill Peay (ed.), *Inquiries after Homicide* (Duckworth, London, 1996.)

¹⁹² *Healy v North Western Health Board*, Flood J., High Court, 31 January 229

The executive may be influenced by inappropriate considerations:

The executive, in deciding on release of a detained person, may be influenced by inappropriate financial¹⁹³ or operational considerations concerning the choice between continued detention in a hospital or supervision in the community. It is of the very nature of executive decision-making that these are the kind of criteria which are accorded a high degree of importance. While there is no mention of such criteria in *Gallagher (No.1)* or the terms of reference of the Ellis and Gallagher advisory committees, there is always the danger that such issues would become unnecessarily important, either in submissions to advisory committees, or behind the scenes in government Departments.

General undue judicial deference to executive decisions on release:

One of the reasons that the courts seem willing to hand over the decision on release to

1996; Jarlath Spellman, 'Implications of Recent Decisions on Pre-Discharge Assessment Process of Psychiatric Patients' (1996) 2 MLJI 25.

¹⁹³ It is possible that the State or the police may be sued if they release a mental patient too soon and as a result fail to protect a potential victim of the patient. In *Osman v Ferguson* [1993] 4 All ER 344, the Court of Appeal held, in a case where a teacher pleaded guilty to manslaughter on grounds of diminished responsibility, that for public policy reasons no action could be brought against the police for negligence in the investigation and suppression of crime. But the European Court of Human Rights later held that this violated the right of access to the courts under Article 6(1) and that in certain cases, but not the instant case, Article 2, concerning the right to life, might imply a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual: *Osman v UK* [1999] 1 FLR 193.

the executive in the case of persons detained under the 1883 Act is probably the fact that decisions on release of persons convicted of crimes have for long been a matter for the executive. But this practice in itself is open to question. While statistics on sentencing in Ireland are notoriously inadequate,¹⁹⁴ there is considerable evidence that most prisoners only serve a small part of their sentences. For example, the average person who has been sentenced to “life” imprisonment actually only serves eight to ten years in prison.¹⁹⁵ In *People (DPP) v Tiernan*¹⁹⁶, the appellant, who had received a 21-year sentence for rape, argued that this should be reduced as it was far in excess of the conventional period a person who was sentenced to life imprisonment might expect to serve. The Supreme Court refused to uphold this ground of appeal:

What is described in this ground as the conventional period a person who has been sentenced to life imprisonment might expect to serve is a matter of a policy pursued by the Executive at given times and subject to variation at the discretion of the Executive. It cannot, therefore, in my view, properly be taken into consideration by a court in imposing sentence.¹⁹⁷

Similarly, Marie and Noel Murray, a married couple who had served ten years of a life sentence for capital murder, applied for temporary release in order to exercise their unenumerated constitutional right to beget children. Again, a clear statement

¹⁹⁴ Law Reform Commission, *supra* n.9, pp.259-264; Paul O’ Mahony, *Crime and Punishment in Ireland* (Round Hall Press, Dublin, 1993), David Rottman, *Crime in the Republic of Ireland: Statistical Trends and their Interpretation* (Economic and Social Research Institute, Paper No. 102, Dublin, 1980), *Report of the Committee of Inquiry into the Penal System* (Chair: T.K. Whitaker, Pl. 3391, Stationery Office, Dublin, 1985).

¹⁹⁵ 399 Dáil Debates 2020-2056 (12 June 1990), 372 Dáil Debates 1777 (13 May 1987), Law Reform Commission, *supra* n.9, p.310.

¹⁹⁶ [1988] IR 250.

¹⁹⁷ Finlay CJ, [1988] IR 250 at 256.

was made by Finlay C.J.:

The length of time which a person sentenced to imprisonment for life spends in custody and as a necessary consequence the extent to which, if any, prior to final discharge, such a person obtains a temporary release is a matter which under the constitutional doctrine of separation of powers rests entirely with the executive. So also does the regulation of the conditions under which convicted persons are detained subject to the statutory regulations for the administration of prisons

The exercise of these powers of the executive is of course subject to supervision by the courts which will intervene only if it can be established that they are being exercised in a manner which is in breach of the constitutional obligation of the executive not to exercise them in a capricious, arbitrary or unjust way.

It is not, however, in my view, permissible for the court to intervene merely on the grounds that it would, having regard to the practical considerations arising with regard to the running of prisons or the security of the detention of prisoners, have reached a different conclusion on the appropriateness of special arrangements for association or of temporary release.¹⁹⁸

This passage means, in effect, that it will always be presumed that the executive's decisions on detention or release are valid. The constitutional presumption of liberty does not feature very highly in the Chief Justice's wording. However, Finlay C.J. does attempt to salvage the situation somewhat in a subsequent, rather cryptic, paragraph.¹⁹⁹

¹⁹⁸ *Murray and Murray v Ireland* [1991] ILRM 465 at 472-3. The High Court decision is reported at [1985] IR 733.

¹⁹⁹ The paragraph appears to re-emphasise the constitutional right to beget children: "The finding of the learned trial judge that the grant of temporary release, as a right, was clearly incompatible with the restriction on their liberty which is constitutionally permitted by their imprisonment is, in my view, a correct conclusion of law once it is understood (as I have no doubt it was intended to be understood) as meaning the grant of a temporary release, not as an exercise by the executive of its discretion, but rather as the granting of a right defeasible only by very special circumstances." - [1991] ILRM 465 at 473.

Such judicial deference to the executive's decisions on release is also illustrated by the case of Anthony Fox, who was suffering from reactive depression while serving a sentence for control of an explosive substance. Barrington J. referred to this as "the most distressing aspect of this case", and agreed with psychiatrists that Fox had suffered substantially more from confinement than a court could reasonably have expected when imposing sentence. However, the judge refused to intervene to reduce the sentence, stating that these were matters which the Minister for Justice might take into consideration in deciding whether to remit a portion of Fox's sentence or to release him on parole.²⁰⁰

Occasionally, the courts have intervened in the area of sentencing and perhaps there is scope for further movements in this direction. A good example is *Cox v Ireland*²⁰¹, where the Supreme Court considered the constitutionality of automatic forfeiture of public office on criminal conviction. The Court declared s.34 of the Offences against the State Act 1939 to be unconstitutional, as it failed as far as practicable to protect the constitutional rights of the citizen and was, accordingly, impermissibly wide and indiscriminate.²⁰²

²⁰⁰ *State (Smith and Fox) v Governor Curragh Military Detention Barracks* [1980] ILRM 208 at 215. "Parole" presumably means temporary release. The Supreme Court dismissed an appeal in an *ex tempore* judgment in 1981.

²⁰¹ [1992] 2 IR 503.

²⁰² The relevant constitutional rights were the unenumerated personal right to earn a living, equality and property rights. See Richard Humphreys, 'Constitutional Law - Techniques of Analysis: Blacklists and Short-cuts' (1991) 13 DULJ (ns) 118. The *Cox* case has led Flood J. to hold that the selection of punishment is subject to a constitutional principle of proportionality - *People (DPP) v W.C.* [1994] 1 ILRM 321.

Both the Irish Law Reform Commission²⁰³ and a Select Committee of the British House of Lords²⁰⁴ have called for the abolition of mandatory life sentences for murder, one of the reasons being that the life sentence involves a transfer of power from the judiciary to the executive.²⁰⁵ Problems also arise with sentences for offences other than murder. The executive's power of remission would be uncontroversial if it were restricted to the percentages laid down in the Prison Rules²⁰⁶ or to the occasional case of commutation or remission under the Criminal Justice Act 1951.²⁰⁷

²⁰³ Law Reform Commission, *supra* n.9, pp.310-320. See Tom O'Malley, 'Sentencing Murderers: The Case for Relocating Discretion' (1995) 5 *Ir.Crim.LJ* 31.

²⁰⁴ House of Lords, *Report of the Select Committee on Murder and Life Imprisonment* (session 1988-89, HL 78); Ashworth, 'Reforming the Law of Murder' [1990] *Crim. L.Rev.* 75; 527 *HL Debates* 1563-1608; Ashworth, 'Life in the Lords' [1991] *Crim. L.Rev.* 401.

²⁰⁵ It has also been argued that abolition of mandatory life sentences for murder reduces the need for a diminished responsibility defence – L. Waller & C.R. Williams, *op.cit.*, p.682.

²⁰⁶ Rules for the Government of Prisons 1947 (S.I. No. 320 of 1947), as authorised by s.1 of the Prisons (Ireland) Act 1907 (7 *Edw. 7, c.19*) : a maximum of 25% remission for a sentence of imprisonment in excess of one month; 25% for males on sentences of penal servitude; 33.33% for females on sentences of penal servitude. These types of remission are sometimes referred to as "statutory remission." Law Reform Commission, *supra* n.9, p.362. See also Raymond Byrne, Gerard Hogan & Paul McDermott, *Prisoners' Rights: A Study in Irish Prison Law* (Co-op Books, Dublin, 1981), pp.103ff.

²⁰⁷ The power to commute or remit a sentence is vested in the President by Article 13.6 of the Constitution and has been conferred by law on "other authorities", namely the executive, by s.23 of the Criminal Justice Act 1951 (No.2). Section 23 also allows the Government to delegate these functions to the Minister for Justice. In *Towards an Independent Prisons Agency: Report of Expert Group* [Chair: Dan McAuley] (J/41, Stationery Office, Dublin, 1997), pp.70-71, it is reported that in practice the powers of commutation and remission (other than the so-called statutory remission

However, only 8.6% of those serving custodial sentences were discharged on remission of sentence in 1994 (5.3% of dispositions.)²⁰⁸ A far greater number were released under the temporary release scheme, 69.7% on full temporary release and 4.0% on temporary release (42.8% and 2.5% of dispositions.) The temporary release system is authorised by s.2 of the Criminal Justice Act 1960²⁰⁹ and was originally intended to be exercised only sparingly, but it is now used continuously. As part of the system, the Minister is entitled to suspend, wholly or in part, the currency of the sentence of a person released.²¹⁰ There is no formal *judicial* sentence review procedure as was proposed by the Whitaker Report²¹¹ and is required by the European Convention on Human Rights.²¹² The Sentence Review Group advises the Minister on cases of long-term offenders who have served seven years or more in custody.²¹³

referred to in Prisons Rules) are rarely used. They involve taking a decision to “wipe a prisoner’s slate clean.” Examples of where they might be used would be where a prisoner is being discharged on grounds of ill-health or where a person has been free in the community for many years having served a life sentence and wishes to go abroad, where temporary release conditions may not be appropriate. The Group recommends that these powers should remain with the Minister.

²⁰⁸ Department of Justice, Equality and Law Reform, *Prisons and Places of Detention: Annual Statistics for 1994* (Dublin, 1998), p.27. This represents 463 out of 5,414 discharges and 8,818 dispositions.

²⁰⁹ See also the Prisoners (Temporary Release) Rules, 1960 (SI No. 167 of 1960).

²¹⁰ s.5 Criminal Justice Act 1960.

²¹¹ Whitaker Report, *supra* n.194, p.15: “A first judicial review should take place after a prisoner has completed five years of sentence, further judicial reviews to follow at intervals to be determined by the review body.”

²¹² Article 5(4); *Thynne, Wilson and Gunnell v U.K.* (1991) 13 EHRR 666; Law Reform Commission, *supra* n.9, p.316; *Weeks v U.K.* (1988) 10 EHRR 293.

²¹³ See Justice FOI s.16 Book, pp.85-90 and information leaflet pp.107-110.

Decisions on such cases are invariably taken by the Minister personally.²¹⁴ The widespread use of remission and temporary release are further evidence of executive interference with the length of sentences. While the Irish judiciary continue to turn a “blind eye” to this, the Law Reform Commission has called for express guidelines on commutation, remission and temporary release.²¹⁵ The Commission has rightly stated that temporary release “may ... render the sentencing system a farce”; temporary release can operate at cross-purposes to the sentencing process and the possibility of remission may influence the sentencing judge to impose a longer sentence to counteract its effects.²¹⁶ In 1988, the official statistics revealed that 1,472 of 1,504 full temporary releases were granted without Probation and Welfare Officer supervision,²¹⁷ but in subsequent years this subdivision mysteriously disappeared from the statistics.²¹⁸ As O’Mahony has said:

[I]t is likely that the majority of decisions to release early have little or no sound penological basis and represent an arbitrary curtailing of sentence in reaction to the accommodation pressures and the need to provide prison space for new committals.²¹⁹

In 1997, the Expert Group recommended that the power of temporary release of short-term prisoners (who have served less than five years of their sentence) should

²¹⁴ *Towards an Independent Prisons Agency*, supra n.207, p.72.

²¹⁵ Law Reform Commission, supra n.9, p.365.

²¹⁶ Law Reform Commission, supra n.9, p.365.

²¹⁷ *Annual Report on Prisons and Places of Detention 1988*, Table 14(i), p.124.

²¹⁸ See 1989, p.126, 1990, p.91, 1991, p.113, 1992, p.121, 1993, p.123, 1994, p.54.

²¹⁹ O’Mahony, supra n.194, pp.108-9.

be delegated to the proposed Prisons Agency, subject to the Minister making rules governing such releases.²²⁰ However, long-term prisoners' cases would be dealt with by the proposed statutory Parole Board, with the final decision resting with the Minister.

It is important to note that there may occasionally be legitimate political reasons for early release of prisoners, as for example happened with the recent ceasefires and the political settlement on this island, but these exceptional cases should not be allowed to distract from the main issue concerning ordinary, non-political, prisoners.

The European Convention on Human Rights

The Supreme Court has held in *Gallagher (No.1)* that patients may apply to the executive for their release, but this would appear to conflict with Article 5(4) of the European Convention on Human Rights which states:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.²²¹

²²⁰ *Towards an Independent Prisons Agency*, supra n.207, pp.72-73. The Group noted that under these rules the Minister for Justice, Equality and Law Reform could, for example, exceptionally, reserve the right of release in relation to particular categories of prisoner (e.g. paramilitary prisoners).

²²¹ Similarly, see article 8 of Council of Europe Recommendation No. R (83) 2 on the legal protection of persons suffering from mental disorders placed as involuntary patients, 1983; Principle 17 of UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991. Principle 17.3 differs in specifically requiring the review body periodically to review cases at reasonable intervals, even when the patient has not applied for such review.

The Article specifically refers to court proceedings, thus placing in doubt the legality of review by the executive.²²² The European Court of Human Rights has held that the availability of habeas corpus proceedings is not sufficient to satisfy the Convention.²²³ It has also been argued that the right of review may not be dependent on the patient's taking the initiative to apply.²²⁴ The Court has also emphasised that decisions on reviews must be issued speedily.²²⁵ It appears that review proceedings need not be held in public²²⁶ and may not require the full application of the principle

²²² The European Court of Human Rights has held that a "court" need not necessarily signify a court of law of the classic kind, but the relevant body must be independent of the executive and of the parties and must exhibit appropriate guarantees of a judicial procedure - *De Wilde, Ooms & Versyp v Belgium (Vagrancy Cases)* (1979-80) 1 EHRR 438 at paras. 76-78, cited with approval in the mental patient case of *X. v. United Kingdom* (1981) 4 EHRR 188 at para.53.

²²³ *X. v United Kingdom* (1981) 4 EHRR 188; Larry Gostin, 'Human Rights, Judicial Review and the Mentally Disordered Offender' [1982] Crim LR 779.

²²⁴ In *Winterwerp v Netherlands* (1979) 2 EHRR 387 at para.66, the Court stated that Article 5(4) does not require that persons committed to care under the head of 'unsound mind' should themselves take the initiative in obtaining legal representation before having recourse to a court. This has been relied upon to support the argument that recourse to a court should not be dependent on the patient's taking the initiative to apply - Gostin, supra n.223 [HR, JR & the MDO] p.792. On the other hand, in *X. v UK* (1981) 4 EHRR 188 at para. 52, the Court refers to a patient's right to take proceedings at reasonable intervals, "at any rate where there is no automatic periodic review of a judicial character," and the White Paper states at para. 5.8 that a review on application only would meet this country's obligations under the European Convention.

²²⁵ *E. v Norway*, Judgment of 29 August 1990, Series A, No.181: A delay of eight weeks in pronouncing the decision concerning a review by a newly-detained patient violated Article 5(4). Less haste is required in the case of further applications for periodic review, but a delay of four months is unreasonable: *Koendjiharie v Netherlands* (1990) 13 EHRR 820.

²²⁶ There is no reference to such a requirement in Art.5(4).

of 'equality of arms.'²²⁷

A significant feature of the European Convention case-law is that many of the cases on Article 5(1)(e), concerning detention of those of unsound mind, have concerned people who were detained as part of the criminal process. This case-law refocuses the emphasis in such cases away from regarding the person primarily as a person who came before the criminal courts and towards regarding them primarily as a mental patient.²²⁸ It is arguable that there ought to be more convergence of the criteria for detention and release in civil and criminal cases, although there is US case-law which permits significant differences between the civil and criminal regimes.²²⁹

The Advisory Committee Procedure

A detailed summary of the Advisory Committee procedure is included in material

²²⁷ *Sanchez-Reisse v Switzerland* (1987) 9 EHRR 71.

²²⁸ See also White Paper, para. 7.14.

²²⁹ In *Jones v US* 463 US 354 (1983), the Supreme Court upheld the constitutionality of different, more restrictive, rules for persons found not guilty by reason of insanity as opposed to those civilly committed, and limited the decision in *Addington v Texas* 441 US 418 (1979) to civil cases. This contrasts with the earlier decision of the New Jersey Supreme Court in *State v Krol* 68 NJ 236 (1975) that insanity acquittees are entitled to the same sort of commitment and release system as individuals subject to the involuntary civil commitment process. Some of the reasoning in *Jones* has been eroded by *Foucha v Louisiana* 504 US 71; 112 S Ct 1780 (1992) - see p. 248 below.

available from the Department of Justice, Equality and Law Reform.²³⁰ The publication states: “Should the Minister reject the advice [of the Advisory Committee], he must be in a position to offer a reasonable explanation for doing so.”²³¹ It also states that the applicant’s legal representatives are entitled to see all documents considered by the Committee and the Committee’s advices, and points out that the European Court of Human Rights has ruled that a person who has been found not guilty by reason of insanity may only be detained as long as the mental disorder justifying his or her detention persists.²³²

The question whether legal aid was available as part of the advisory committee procedure arose in *Kirwan v Minister for Justice*.²³³ Lardner J. said that while he unreservedly accepted the Ardee case decision,²³⁴ he noted that it was made on the particular facts of that case which in his view were distinguishable from the present case. The decision whether to release the applicant which the executive was required to make was of great importance for the public and for the applicant. The interest and safety of the public was or might be affected by it, as was or might be the liberty of the applicant. It was necessary for the advisory committee procedure to comply with the constitutional requirement of fairness. The judge believed that an applicant who was without the requisite means to procure the collection of the relevant information

²³⁰ Justice FOI s.16 Book, pp.91-2.

²³¹ Justice FOI s.16 Book, p.92.

²³² *Ibid.*, loc.cit.

²³³ [1994] 2 IR 417.

²³⁴ *State (O.) v Daly (Ardee Case)* [1977] IR 312; above, chapter 3.

and to formulate and present the appropriate submissions to the committee was necessarily, as a matter of fairness, entitled to legal aid to enable him to do so. He therefore granted a declaration that the applicant was entitled to legal aid for the advisory committee procedure. This eminently sensible decision was a positive step in the recognition of the rights of mental patients, but it also highlighted the continuing injustice caused by the Ardee case, which Lardner J. could not interfere with as it was a Supreme Court decision.

Later Developments in the *Gallagher* Case

In July 1993, Gallagher applied for leave to seek judicial review of the first advisory committee's decision. His solicitor stated in an affidavit that the hearings conducted by the advisory committee were not fair on the following grounds: Gallagher was permitted to be present for only a small part of the hearings; he was not permitted by himself or his legal advisors to cross-examine the witnesses interviewed; he was not permitted to call evidence on his own behalf but he was permitted merely to have his legal advisors make submissions on his behalf; he was not notified of the evidence given to the committee in support of the contention that he was suffering from a mental disorder; and the proceedings proscribed by the committee were not proscribed by law. O'Hanlon J. gave leave to seek judicial review.²³⁵

This judicial review did not come up for hearing but it "was concluded upon the basis

²³⁵ *Irish Times*, 27 July 1993

that a second Committee should be set up to deal with his case.”²³⁶ This second Committee met on four occasions between January and March in 1994. The committee concluded that Gallagher still had a personality disorder which made him a potential danger to the public if released. He had progressed since his admission to the CMH and the Committee recommended that he be given structured training and counselling. His case should be reviewed after an appropriate interval, e.g. one year.²³⁷ Gallagher made another Article 40.4.2 application (habeas corpus), in which he represented himself.²³⁸ The application was based on the argument that a personality disorder did not constitute mental illness and did not justify his detention in the CMH. In a short judgment delivered on 16 December 1994²³⁹, Barron J. summarised the evidence of Dr Art O’Connor, consultant forensic psychiatrist attached to the CMH, to the effect that Gallagher had a personality disorder, which was a mental disorder, but not mental illness. Dr O’Connor believed that there was a substantial and serious risk that Gallagher could repeat his crimes.

Barron J. did not deal with the question raised in the application as to whether a personality disorder was sufficient to justify the detention. Instead, he ruled that

It is not for this Court to determine the merits of this application; to determine whether or not the Applicant should be released from detention; to determine what, if any, conditions should be imposed upon such release if in fact it is

²³⁶ *Gallagher v Director of Central Mental Hospital*, Barron J., 16 December 1994, p.3.

²³⁷ *Ibid.*, p.4.

²³⁸ *Irish Times*, 8 December 1994.

²³⁹ *Gallagher v Director of Central Mental Hospital*, supra n. 143.

granted.²⁴⁰

These were all matters for the consideration of the Government through the Minister for Justice on the recommendation of the Committee. Barron J. ordered that the matter should be remitted to the Government for its further consideration. He noted that “the Committee have given the Applicant a very fair hearing and have made recommendations which, if implemented, might have been expected to result in an early release of the Applicant.”²⁴¹

He took the opportunity to state two reservations concerning the case. Firstly, the CMH did not have the facilities which were expected by the Committee to be provided for the applicant and it was not an answer to say that the CMH’s facilities were every bit as good as any other psychiatric hospital in the country. Secondly, Dr O’Connor’s views were based on an incorrect hypothesis that the applicant was not legally insane at the time of the killings. Since the jury had returned a verdict under the 1883 Act, certain facts had to be accepted as true: that Gallagher had been taking slimming tablets, that he meant no harm to Mr Maguire (the uncle and brother-in-law of the victims), and that he had been acquitted of the commission of crimes. Barron J. continued:

Insofar as the detention of the Applicant may in any way be based upon the expressed views of Dr O’Connor, then it seems to me there is a danger that justice will not be seen to be done.²⁴²

²⁴⁰ Ibid., p.8.

²⁴¹ Ibid., p.7.

²⁴² Ibid., loc.cit.

In this application, Gallagher was attempting to raise the important question of whether the Supreme Court judgment in *Gallagher (No.1)*²⁴³ is to be read as justifying continued detention of a person who has a personality disorder. It will be recalled that McCarthy J. said in that case that the person is detained until such time as the executive is satisfied that, having regard to his or her *mental health*, it is safe to release him or her.²⁴⁴ He later referred to release on the grounds that the person is not suffering from any *mental disorder* warranting his or her continued detention.²⁴⁵ The terms of reference of the advisory committees refer to *mental disorder*.²⁴⁶ Barron J. in his judgment states that the Minister has to decide whether the Applicant still has a *mental disorder* which warrants his continued detention.²⁴⁷ Since the Supreme Court laid down the conditions for release, it is reasonable for a person to apply to the courts for an interpretation of those grounds. Interestingly, in the Green Paper, which had been published two years prior to this judgment, it was said that as a legal term in the civil context “mental disorder” included personality disorders²⁴⁸ but also noted that this was a controversial issue and that English and Welsh law limited this sub-category of mental disorder to persons with a psychopathic disorder.²⁴⁹ Barron J.

²⁴³ [1991] 1 IR 31

²⁴⁴ [1991] 1 IR 31 at 38.

²⁴⁵ *Ibid.*, loc.cit.

²⁴⁶ *Gallagher v Director of Central Mental Hospital*, Barron J., 16 December 1994, p.3.

²⁴⁷ *Ibid.*, p.6.

²⁴⁸ Department of Health, *Green Paper on Mental Health* (Government Publications, Dublin, 1992), para. 18.6.

²⁴⁹ *Ibid.*, para. 18.10. A psychopathic disorder is defined in s.1 of the Mental

does not wish to get involved in this debate and instead refers the matter back to the government. This demonstrates again the preference of the courts for avoidance of mental health issues rather than confrontation of those issues. In *Gallagher (No.1)* it was said that decisions on release are up to the executive, but it is submitted that the criteria for release are a matter for the courts.

Barron J. also appeared to be unduly censorious of the psychiatrist in this case. It is dangerous for a judge to attempt to steer the expert evidence away from a particular conclusion. While his motivation was well-meaning and perhaps even patient-centred, he ought to have recognised that psychiatrists are entitled to hold a different view from the jury which tried the case, and a judge deciding on an application for release must decide the issue based on the current evidence before him. It is unlikely that issue estoppel could be used to constrain the psychiatrists from advancing such views.

There are useful comments in Barron J's judgment which are to be welcomed, for example his emphasis on the fact that Gallagher had been acquitted at his trial and that an analogy with a serious sex offender is inapplicable. It is not necessarily correct for Barron J. to state that the facts that Gallagher had been taking slimming tablets and that he meant no harm to the third party (Mr Maguire) must be accepted as true because of the verdict of the jury. The jury found that Gallagher was insane but

Health Act 1983 [UK] as "a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned." In Australia, see the Commonwealth Criminal Code 1995, s.73, which defines mental impairment to include severe personality disorder.

might have based this on other aspects of the psychiatric evidence, apart from the taking of slimming tablets. The jury did not hold that Gallagher meant no harm to the third party as the charge of attempted murder of Mr Maguire was withdrawn from the jury by the trial judge.

On 7 February 1995, Barron J. said that the High Court did not have jurisdiction to deal with the case.²⁵⁰ In March 1995, the Inspector of Mental Hospitals reported, under s.248(6) of the Mental Treatment Act 1945, that Gallagher had “recovered.”²⁵¹ This report was later withdrawn for further consideration.²⁵²

The third advisory committee on Gallagher’s detention recommended that a programme of limited and carefully monitored periods of freedom should be instituted on a trial basis. However, the Minister took nine months to make a decision based on this recommendation. Gallagher made another application under Article 40.4.2. As a preliminary matter, the High Court ruled that Mr Maguire, an alleged potential victim of Gallagher’s, could not be joined as a party to the proceedings.²⁵³ Geoghegan J. said that Gallagher was seeking his immediate release and the State was

²⁵⁰ *Irish Times*, 8 February 1995.

²⁵¹ *Application of Gallagher (No.2)* [1996] 3 IR 10 at 26; *Irish Times*, 26 April 1995; Faye Boland, ‘Diminished Responsibility as a Defence in Irish Law’ [Part I] (1995) 5 *Ir.Crim.LJ* 173 at 178.

²⁵² *Application of Gallagher (No.2)* [1996] 3 IR 10 at 26.

²⁵³ *Application of Maguire* [1996] 3 IR 1. Note *Labour Relations Board of Saskatchewan v John East Ironworks* [1949] AC 134, where it was said that the judicial power should only be concerned with doing justice as between the parties before it and not with any community (or other third party) interest, like the public interest (cited by Morgan, *op.cit.*, p.56).

opposing such an order. There was no conflict of interest between Maguire and the State and accordingly there was no need for additional representation. It was solely a matter for the Executive to decide when and in what circumstances Gallagher could be released. It was a general feature of the criminal law that a victim or alleged potential victim was not given a hearing in the criminal process and such representation could seriously compromise the necessary independence and detachment of the court and jury. He distinguished *SPUC v Coogan*²⁵⁴ on the basis that in that case the Attorney General was not proposing to take any steps to protect the constitutional right to life of the unborn.

The substantive issues are discussed in three judgments of a Divisional Court of the High Court in *Application of Gallagher (No.2)*.²⁵⁵ It was accepted that Gallagher no longer had a mental illness, but instead he had a personality disorder. All three judges held that a personality disorder could constitute sufficient grounds for Gallagher's continued detention, provided his detention was still warranted in the public and private interests.²⁵⁶ However, the State argued that, even if Gallagher no longer had a mental illness or disorder or mental ill-health, he could still be detained if he was dangerous. The High Court rejected this argument.²⁵⁷ According to Laffoy J,

²⁵⁴ [1989] IR 734.

²⁵⁵ [1996] 3 IR 10. See J. Paul McCutcheon, 'Judicial Review of the Detention of Guilty but Insane Acquittees: the Irish Experience', Conference Paper, XXIVth International Congress on Law and Mental Health, Toronto, 1999.

²⁵⁶ [1996] 3 IR 10 at 18-19 (Geoghegan J.), 34-35 (Laffoy J.), pp.49-50 (Kelly J.)

²⁵⁷ [1996] 3 IR 10 at pp.18-19 (Geoghegan J.), p.34 (Laffoy J.).

[T]o construe s.2, sub-s.2 of the Act of 1883 as permitting detention while a person is dangerous but not mentally ill would be to construe it as permitting deprivation of liberty for the purpose of preventing possible future criminal activity or deviant behaviour, in other words, preventative detention, which is a construction which is impermissible under the Constitution (*The People (Attorney General) v O'Callaghan* [1966] IR 501 and *Ryan v Director of Public Prosecutions* [1989] IR 399) and cannot have been intended by the Supreme Court.²⁵⁸

The High Court also rejected Gallagher's arguments concerning the Minister's delay in reaching a decision,²⁵⁹ and so Gallagher remained in the CMH but was allowed limited periods of freedom.

There are a number of interesting elements in the *Gallagher (No.2)* case. It was important that the High Court stated that Gallagher could not be detained on grounds of dangerousness alone. This approach is consistent with the US Supreme Court decision in *Foucha v Louisiana*²⁶⁰ and with European case-law.²⁶¹

²⁵⁸ [1996] 3 IR 10 at 34.

²⁵⁹ Both Laffoy J. and Kelly J. believed that the delay was too lengthy, but was not sufficient to grant release under Article 40.4.2 ([1996] 3 IR 10 at 42, 61-2 and 65). Geoghegan J. did not believe that the delay was too lengthy (p.26).

²⁶⁰ 504 US 71; 112 S Ct 1780 (1992). The Supreme Court held that retention of a non-mentally ill insanity acquittee in a forensic mental hospital violated the due process clause. Foucha had anti-social personality disorder and this was not a "mental illness" under Louisiana law. The decision erodes some of the reasoning in *Jones v US* 463 US 354 (1983) - see fn.145 above.

²⁶¹ See for example *Johnson v UK*, European Court of Human Rights, 24 October 1997, where the UK was held to have violated article 5(1)(e) due to the absence of safeguards to ensure that the applicant's release from detention in Rampton Hospital could not be unreasonably delayed after it was established that he was no longer mentally ill. Note, however, that Article 5(1)(c) permits detention of a person "when it is reasonably considered necessary to prevent his committing an offence."

However, by adopting a broad definition of mental health to include personality disorders, it is arguable that the High Court is re-introducing dangerousness as a criterion for detention. If Gallagher were detained under the Mental Treatment Act 1945, he might have to be released if he only had a personality disorder.²⁶² Personality disorders (PDs) include, for example, paranoid PD, antisocial PD, narcissistic PD and obsessive compulsive PD.²⁶³ One of the most controversial PDs is psychopathic PD. One medical definition of psychopathy is as follows:

A personality disorder with a predominantly sociopathic or asocial manifestation ... characterized by disregard for social obligations, lack of feeling for others, and impetuous violence or callous unconcern. There is a gross disparity between behaviour and the prevailing social norms. Behaviour is not readily modifiable by experience, including punishment. People with this personality disorder are often affectively cold and may be abnormally aggressive or irresponsible. Their tolerance to frustration is low: they blame others or offer plausible rationalizations for the behaviour which brings them into conflict with society.²⁶⁴

By way of contrast, a legal definition of psychopathy may be broader, encompassing a wide range of PDs. For example, English and Welsh legislation defines ‘psychopathic disorder’ as

²⁶² Note, however, that the Insanity Defence Working Group of the American Psychiatric Association states that it is a mistake to analogise insanity acquittees as fully equivalent to civil committees who, when all is said and done, have not usually already demonstrated their clear-cut potential for dangerous behaviour because they have not yet committed a highly dangerous act - Insanity Defence Working Group, ‘APA Statement on the Insanity Defence’ (1983) 140 Am. Jnl. of Psychiatry 681 at 686. See Lawrie Reznek, *Evil or Ill?: Justifying the Insanity Defence* (Routledge, London and New York, 1997), p.300.

²⁶³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th edition, (“DSM IV”) (APA, Washington, DC, 1994)

²⁶⁴ *International Classification of Diseases, Ninth Revision* (“ICD 9”) (World Health Organisation); cited in McAuley, op.cit., p.85.

a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.²⁶⁵

From a medical point of view, it is difficult to distinguish between psychopathy and psychosis.²⁶⁶ Even assuming that a person has correctly been classified as a psychopath, there is controversy as to whether psychopaths should be imprisoned or treated in mental hospitals.²⁶⁷ The Henchy Committee recommended that the insanity defence should not extend to people with violent personality disorder²⁶⁸ and that the courts should be able to sentence such people who were convicted of offences to a special unit.²⁶⁹ The ALI Model Penal Code test in the USA includes a caveat

²⁶⁵ Mental Health Act 1983 [UK], s.1(2). Note that in Northern Ireland people with personality disorders may not be detained - art.3(2) Mental Health (Northern Ireland) Order 1986, SI No. 595 of 1986 (NI 4).

²⁶⁶ D. Power, 'Psychopathic Disorder' (1988) 12 *The Criminologist* 202; cited in J K Mason and R A McCall Smith, *Law and Medical Ethics*, 4th ed. (Butterworths, London, 1994), p.387.

²⁶⁷ In the UK, it has been found that there are 17 times more psychopaths in prison than in the hospital system: J.Gunn, A. Maden and M. Swinton, 'Treatment Needs of Patients with Psychiatric Disorders' (1991) 303 *Br Med J* 338; D. Brooke, C. Taylor, J. Gunn and A. Maden, 'Point Prevalence of Mental Disorder in Unconvicted Male Prisoners in England and Wales' (1996) 313 *Br Med J* 1524, Chris Kershaw & Gary Renshaw, *Statistics of Mentally Disordered Offenders: England and Wales 1995* (Home Office, London, 1996), Table 4, Nigel Eastman and Jill Peay, 'Sentencing Psychopaths: Is the "Hospital and Limitation Direction" an Ill-Considered Hybrid?' [1998] *Crim L R* 93 at 97.

²⁶⁸ Henchy Committee draft Bill, s.4(1), s.13 and s.17.

²⁶⁹ Henchy Committee draft Bill, s.27. The Committee also recommended that at the end of their sentence the person's detention could be continued by the President of the High Court - draft Bill, s.28. The Committee noted at para. 14 that "the recommendation is not without reservations in principle on the part of certain members of the Committee."

designed to exclude personality disorders.²⁷⁰ But Finlay CJ has stated that a sexual psychopath could avail of the insanity defence in Ireland²⁷¹ and the Fianna Fáil Bill of 1996 allows a personality disorder to be used as part of an insanity defence.²⁷² In the O'Donnell trial, it appears to have been assumed that if he had a personality disorder he could not avail of the insanity defence.²⁷³ While Gallagher does not appear to have been classified as a “psychopath”, in future a psychopath could be detained under the 1883 Act if the reasoning in *Gallagher (No.2)* is followed.

The judges' comments on the nature of an application under Article 40.4.2 of the Constitution are instructive. Kelly J refers to this procedure as a “great remedy”²⁷⁴ but also emphasises that it should not be used in circumstances where the complaints made should more properly be addressed by some other inquiry or procedure, for example judicial review.²⁷⁵ Geoghegan J. warns that the court must avoid combining

²⁷⁰ American Legal Institute, Model Penal Code, §4.01(2): “As used in this Article, the terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.” This caveat has been rejected by some courts, e.g. *Wade v United States* 426 F.2d 64 (9th Cir.1970).

²⁷¹ Finlay CJ commented in *People (DPP) v O'Mahony* [1985] IR 517 at 522 that a sexual psychopath, if tried in accordance with the law of this country, would be acquitted on grounds of insanity.

²⁷² Criminal Justice (Mental Disorder) Bill 1996, s.1.

²⁷³ O'Donnell trial, *Irish Times*, January to April 1996. There was a conflict of psychiatric evidence: Some psychiatric witnesses said that O'Donnell had borderline mental handicap. Others disagreed as to whether he had schizophrenia or a personality disorder. The jury found O'Donnell guilty of all charges.

²⁷⁴ [1996] 3 IR 10 at 47

²⁷⁵ *Ibid.*, p.47

judicial review with the task in hand which is an Article 40 enquiry.²⁷⁶ Laffoy J. says that Gallagher was “constrained” to advance certain arguments because of the nature of an Article 40 application.²⁷⁷ She later imposes an interesting limitation on the procedure:

Fourthly, the gravity of the irregularity, breach or default falls to be considered and whether it can be appropriately redressed by a less radical remedy than immediate release.²⁷⁸

The consequences of these statements are quite far-reaching. The court is expressing a preference for judicial review over Article 40 applications in cases such as this, but judicial review is a remedy which is also quite constraining on an applicant. For example, in Gallagher’s case, if he had sought judicial review, the most he could have hoped for would have been that the matter would have been sent back to the Minister for Justice for a new decision. The Minister’s delaying tactics would have been rewarded yet again.

Proposals for Reform

The Henchy Committee proposed the establishment of a Mental Care Review Body to which a person could apply for review of his or her detention.²⁷⁹ If the court, on

²⁷⁶ Ibid., p.16.

²⁷⁷ Ibid., p.35.

²⁷⁸ Ibid., p.36.

²⁷⁹ Henchy Committee draft Bill, ss.20-23. The person could apply for review on initial detention and thereafter at annual intervals or at such earlier time as the appropriate court might allow for good cause.

consideration of the report of the review body, was of the opinion that the person should not be further detained, it could make such order in relation to the custody or release of the person as it thought proper. Hospitals would be required to keep the review body informed of every person detained under the Bill and every new admission. If a medical officer, having consulted the review body, believed that the person should no longer be detained as the person was no longer in need of in-patient treatment or was no longer dangerous, the officer would forthwith inform the court. The court would then order the patient to be brought before it and determine whether the treatment was still required or the person was still dangerous.²⁸⁰

The 1996 Bill did not propose the establishment of a review body, but would permit an acquittee to apply to the High Court for a review of his or her detention. The High Court could make such order as it thought proper for the person's disposal, including discharge with or without conditions concerning out-patient treatment or supervision or both.²⁸¹ The Minister for Justice and the DPP would be entitled to be heard or represented at these proceedings.²⁸² A medical officer would also be obliged to notify the High Court if the patient was no longer in need of in-patient treatment or care or no longer dangerous.²⁸³

While the White Paper proposes the establishment of a Mental Health Review Board,

²⁸⁰ Henchy Committee draft Bill, s.25(5).

²⁸¹ Criminal Justice (Mental Disorder) Bill 1996, s.7(5).

²⁸² *Ibid.*, s.7(6).

²⁸³ *Ibid.*, s.7(3).

it does not propose that this Board would review the detention of insanity acquittees.²⁸⁴ It refers to the fact that legislation is in preparation in the Department of Justice.²⁸⁵

RAISING THE INSANITY DEFENCE

In *People (AG) v Messitt*,²⁸⁶ the Court of Criminal Appeal held that in certain cases evidence should be heard on the defendant's insanity at the time of the alleged offence, even if he or she does not raise the issue himself or herself. Kenny J. said:

If the accused or his advisors are not prepared to make the case that he is insane, the duty of putting such evidence as is available on the topic before the jury rests on the People, if the Attorney General is of opinion that the evidence is such that the jury might reasonably conclude that the accused was insane.²⁸⁷

The Supreme Court of Canada has held in *R v Swain*²⁸⁸ that the common law rule permitting the Crown to adduce evidence of insanity against the defendant's wishes

²⁸⁴ See full list of functions of proposed Board in White Paper, para. 5.22.

²⁸⁵ White Paper, paras. 7.25-6.

²⁸⁶ [1972] IR 204.

²⁸⁷ [1972] IR 204 at 213. This was not a straightforward case as the defendant was representing himself, a doctor had said in the jury's presence that the defendant was a psychopath, the jury had asked for assistance on the mental condition of the defendant at the time of the crime, and the jury had added a rider about the defendant's mental condition to its verdict. It has been noted that there is "no restriction at all" in *Messitt* on the duties of prosecuting counsel to raise the insanity defence - Niall Osborough, 'The Answerability of the Offender: The Indicia of Responsibility', Society of Young Solicitors, Lecture 78, 1974, p.12.

²⁸⁸ (1991) 63 CCC (3d.) 481; 5 CR (4th) 253.

violates s.7 of the Canadian Charter. The court went on to fashion a new common law rule that allowed the Crown to raise insanity only in two situations: firstly, after the trier of fact had concluded that the defendant was otherwise guilty of the charge, and secondly, after the defendant's own defence has (in the view of the trial judge) put the defendant's capacity for criminal intent in issue.²⁸⁹ There is also some Australian authority that the Crown may not raise the issue of insanity when the defendant has not raised any issue relating to his or her mental condition.²⁹⁰

The Canadian and Australian approach is to be preferred to *Messitt*, as it is an essential principle of an adversarial system that the defendant chooses how to conduct his or her own defence. Assuming the defendant is fit for trial (and ideally the criteria for unfitness should be broadened),²⁹¹ then the defendant is fit to make decisions about whether to raise the insanity defence or not.²⁹² If the State is concerned that the defendant will not receive treatment for a mental condition, or that the defendant has a mental disorder and is dangerous, there are other mechanisms for dealing with this.

²⁸⁹ Similarly, see the Ellis trial in the High Court, where as the defendant had put his mental condition in issue, the second exception to *R. v Swain* would apply; above, p.196. See Part XX.1 of the Canadian Criminal Code dealing with 'Mental Disorder' added by S.C. 1991, c.43, s.4; A.J.C. O'Marra, 'Hadfield to Swain: The Criminal Code Amendments Dealing with the Mentally Disordered Accused' (1993) 36 *Crim.LQ* 49.

²⁹⁰ *R. v Joyce* [1970] SASR 184; *R. v Jeffrey* [1967] VR 467.

²⁹¹ See chapter 2 above.

²⁹² Contrast Kenny J.: "It is not an answer to this to say that the accused does not wish this evidence to be given. One of the questions in issue is his sanity: his fitness to plead does not involve the conclusion that he is the only person to make a decision as to whether the issue of his insanity is to be considered by the jury" - [1972] IR 204 at 213-214.

The Henchy Committee and the 1996 Bill make no specific proposals regarding the raising of the insanity defence, but the 1996 Bill states that once one mental condition defence²⁹³ has been raised by the accused in a murder case, the prosecution may give evidence to prove the other defence.²⁹⁴

THE COURT'S DECISION ON THE DEFENCE

At common law it is presumed that a person is sane²⁹⁵ and a defendant must prove that he or she is insane on the balance of probabilities.²⁹⁶ It has even been said in one Irish case that insanity must be proven beyond a reasonable doubt, but this would be unlikely to be followed today.²⁹⁷ As part of the response to Hinckley's acquittal in the USA, legislation was enacted to require the defendant to prove insanity by "clear and convincing evidence."²⁹⁸

²⁹³ Either insanity or diminished responsibility.

²⁹⁴ Criminal Justice (Mental Disorder) Bill 1996, s.4(4).

²⁹⁵ *R. v McNaghten* (1843) 10 Cl. & F. 200.

²⁹⁶ *Woolmington v DPP* [1935] AC 462. See generally T.H. Jones, 'Insanity, Automatism and the Burden of Proof on the Accused' (1995) 111 LQR 475.

²⁹⁷ *People (AG) v Fennell (No.1)* [1940] IR 445; McAuley, p.94; Úna Ní Raifeartaigh, 'Reversing the Burden of Proof in a Criminal Trial: Canadian and Irish Perspectives on the Presumption of Innocence' (1995) 5 Ir.Crim.L.J. 135 at p.136, fn.5; *People (DPP) v O'Mahony* [1985] IR 517 at 522.

²⁹⁸ Insanity Defense Reform Act 1984.

A challenge could be brought to the current burden of proof in Ireland, based on the presumption of innocence as a constitutional right²⁹⁹ and under the European Convention.³⁰⁰ There is a Canadian Supreme Court case which would be of some assistance, in which it was held that the burden of proof violated s.11(d) of the Charter.³⁰¹ However, the court went on to hold that the burden of proof was a reasonable limit under s.1 of the Charter and therefore valid.³⁰²

In the case of trials on indictment, the jury will decide whether the defendant is insane or not. It is interesting to note that in the USA, jurors' attitudes to insanity defences are affected by the fact that in some states jurors will be excluded from trials in which the death penalty might be imposed if they are opposed to that penalty, and this may mean that the remaining "death-qualified" jurors are less likely to accept an insanity defence.³⁰³

²⁹⁹ *O'Leary v AG* [1993] 1 IR 102.

³⁰⁰ Article 6(2).

³⁰¹ *R. v Chaulk* (1990) 2 CR (4th) 1; Patrick Healy, 'R v Chaulk: Some Answers and Some Questions on Insanity' (1991) 2 CR (4th) 95; Don Stuart, 'Will Section 1 now Save any Charter Violation? The Chaulk Effectiveness Test is Improper' (1991) 2 CR (4th) 107. Section 11(d) states the presumption of innocence.

³⁰² Section 1 states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

³⁰³ For example, when confronted with the statement, "the plea of insanity is a loophole allowing too many guilty people to go free," over half of death-qualified respondents agreed, as compared to only slightly more than a quarter of death-excludable participants in a study - Fitzgerald & Ellsworth,

The Henchy Committee and the 1996 Bill make no specific proposals regarding the burden of proof as regards the insanity defence, but in proposing a new defence of diminished responsibility, they place the burden of proof on the defendant.³⁰⁴

APPEALS

As the special verdict is regarded as an acquittal, in principle there is no appeal against it.³⁰⁵ This applies even in the case of decisions of the Central Criminal Court.³⁰⁶

In an appeal against a guilty verdict, the Supreme Court has the power to substitute a 'guilty but insane so as not to be responsible' verdict.³⁰⁷

'Due Process vs. Crime Control: Death Qualifications and Jury Attitudes' (1984) 8 Law & Hum. Behav. 31 at 45. See also literature cited in Perlin at 360-75.

³⁰⁴ Henchy Committee draft Bill, s.18(2) and 1996 Bill s.5(2).

³⁰⁵ *Felstead v The King* [1914] AC 534; *R. v Taylor* [1915] 2 KB 709; *R. v Duke* [1963] 1 QB 210.

³⁰⁶ Article 34.3.3 states "The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court." Section 44 of the Courts and Courts Officers Act 1995 states: "An appeal shall not lie to the Supreme Court from a decision of the Central Criminal Court to acquit a person, other than an appeal under s.34 of the Criminal Procedure Act 1967."

³⁰⁷ Section 35 Courts of Justice Act 1924 concerning the Court of Criminal Appeal. The powers of the Court of Criminal Appeal have been taken over by the Supreme Court under the Courts and Court Officers Act 1995.

In Northern Ireland, special legislation has recently been enacted to enable the Criminal Cases Review Commission to consider cases where the defendant had been found guilty but insane.³⁰⁸

The Henchy Committee proposed that appeals could be brought by the defendant against the 'not guilty by reason of mental disorder' verdict and against an order of committal. The prosecution could only appeal against a refusal of the order of committal.³⁰⁹ The 1996 Bill is in similar terms.³¹⁰

TEMPORARY RELEASE

The Trial of Lunatics Act provides that once the court has ordered the person to be kept in custody in such place as the court shall direct,

it shall be lawful for [the Lord Lieutenant] thereupon, and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to [the Lord Lieutenant] may seem fit.³¹¹

It appears that this is interpreted as permitting the Minister for Justice to grant temporary release to persons found guilty but insane so as not be responsible if the

³⁰⁸ Criminal Cases Review (Insanity) Act 1999 [UK]. This legislation was primarily enacted to allow the Commission to review the Gordon case.

³⁰⁹ Henchy Committee draft Bill, s.13(5) and s.17(5).

³¹⁰ Criminal Justice (Mental Disorder) Bill 1996. s.6(3)-(5).

³¹¹ Trial of Lunatics Act, 1883 (46 & 47 Vic., c.38), s.2(2), as adapted for Ireland by s.3(1).

court order specified a place of detention.³¹²

However, if the court order does not specify a place of detention, then the Minister will make an order under s.8 of the Central Criminal Lunatic Asylum (Ireland) Act 1845³¹³ detaining the person in the CMH. In that situation, temporary release may be granted under s.3 of the Criminal Justice Act 1960.³¹⁴ Section 3 only permits such temporary release if, in the opinion of the Resident Physician and Governor of the CMH, the person is not dangerous to himself, herself or others.³¹⁵

The Justice FOI s.16 Book says that a number of factors are taken into account when considering temporary release, including the medical recommendation, form of current medication (“i.e. depot or self-administering”), security issues for the safety of the offender and public safety.³¹⁶

TRANSFER TO ANOTHER HOSPITAL

Gerard O’Halloran killed another patient in 1988 by striking him over the head with a

³¹² Justice FOI s.16 book, p.92.

³¹³ 8 & 9 Vic., c.107

³¹⁴ Justice FOI s.16 Book, p.92. Section 3 of the 1960 Act applies where the person is detained “by warrant, order or direction of the Government or the Minister.”

³¹⁵ s.3(2) Criminal Justice Act 1960.

³¹⁶ Justice FOI s.16 Book, p.92.

mop.³¹⁷ A jury returned a verdict of guilty but insane so as not to be responsible in 1989.³¹⁸ Dr Art O'Connor of the Central Mental Hospital wrote to the Minister for Justice suggesting that O'Halloran could be held in a less secure hospital such as a local psychiatric hospital³¹⁹ and the Department of Justice wrote back appearing to accept Dr O'Connor's conclusions subject to certain conditions.³²⁰ The Southern Health Board was unwilling to accept O'Halloran back in Cork and his family was opposed to such a move.³²¹

The Inspector of Mental Hospitals also wrote to the Minister saying he believed O'Halloran had recovered.³²² An advisory committee dealing with applications for

³¹⁷ At the time, O'Halloran was being treated for main depression at St. Anne's Psychiatric Hospital, Shanakiel, Cork.

³¹⁸ This is the only reported Irish case where a patient was tried for murder regarding an incident in a mental hospital. It was later stated that O'Halloran was detained at the pleasure of the Government (*O'Halloran v Minister for Justice and Others*, Geoghegan J., High Court, 31 July 1998, p.2) but since the verdict was after 1972 and before *Ellis, Neilan and Gallagher*, presumably detention until further court order was ordered.

³¹⁹ Letter of March 1993 cited in *Irish Times*, 25 June 1998.

³²⁰ Letter of February 1994, cited in *Irish Times*, 25 June 1998.

³²¹ Letter circa 1994 from Southern Health Board Programme Manager, reproduced in *O'Halloran v Minister for Justice and Others*, Geoghegan J., High Court, 31 July 1998, pp.3-4. The Health Board stated that O'Halloran would be back amongst many of the patients who were present when the incident occurred and this would cause tensions in the unit which would result in an unsafe environment for all concerned. It is not clear why the family was opposed to the move, but it was stated in the Southern Health Board letter that the family believed that O'Halloran only indicated agreement to go to Cork on the false impression that he would be living in a flat in the city.

³²² Letter from Inspector of Mental Hospitals, February 1995, cited in *Irish Times*, 25 June 1998.

release from the Central Mental Hospital recommended that he be transferred to a Cork psychiatric hospital.³²³ The Minister accepted the committee's advice and a decision in principle was made to permit O'Halloran to move to the Cork hospital. But the Southern Health Board was unwilling to accept O'Halloran back.

O'Halloran applied for judicial review of his continued detention in the Central Mental Hospital, and various orders against State agencies.³²⁴ Counsel for the State said that the Central Mental Hospital was not a penal institution; it was an institution of care. While the Minister for Justice was empowered to make a transfer order for a person in the Central Mental Hospital, the Minister could only do so where accommodation was available in a suitable alternative institution, and where a transfer was in the best interests of the patient and community.³²⁵ Counsel for the Southern Health Board argued that it did not have the facilities to accept O'Halloran and the Ministers for Justice and Health had no power to compel the Board to accept

³²³ The advisory committee stated that O'Halloran continued to suffer from a mental disorder requiring his continued detention in the public and private interests, his mental disorder had responded well to treatment and he did not require continued detention in the Central Mental Hospital. O'Halloran would require to continue in supervised psychiatric treatment in the long term.

³²⁴ O'Halloran sought an order of mandamus directing the Minister for Justice to make an order directing O'Halloran's transfer to St. Anne's Hospital, an order of mandamus directing the Minister to provide a place for O'Halloran in that hospital and an order directing the Southern Health Board to receive and maintain O'Halloran in that hospital. The Attorney General, Ireland and the Director of the Central Mental Hospital were additional respondents. During the hearing, Geoghegan J. granted an application by O'Halloran's counsel to have the Minister for Health added as a respondent - *Irish Times*, 26 June 1998.

³²⁵ *Irish Times*, 26 June 1998.

him.³²⁶

In his first reserved judgment, which runs to only six pages, Geoghegan J. chose not to make any decision on any issue or make any order. He said it was never entirely clear what the real view of the Minister and Department of Justice was. Before the court would consider making any of the orders sought it would require considerable further argument as to what exactly the statutory powers of the Minister were. The issue of the powers of the Minister had not been adequately researched and argued.³²⁷ Before any of these difficult questions should be considered, the Minister for Justice and/or the Minister for Health should obtain an independent and up-to-date assessment as to the validity of the Southern Health Board's arguments for not receiving O'Halloran. Geoghegan J. then adjourned the case for mention three months later. Subsequent developments will be discussed below.

The role of the advisory committee in this case is crucial. In *Gallagher (No.1)*,³²⁸ the Supreme Court referred to applications being made to the executive for release, but made no reference to decisions by the executive to transfer patients from the Central Mental Hospital to local psychiatric hospitals. As a matter of strict legal interpretation, it is arguable that advisory committees established by the Minister should only consider whether to release the patient and not make any other

³²⁶ Ibid.

³²⁷ Contrast personal communication from counsel for O'Halloran dated 2 October 1998, referring to detailed list of case law cited in court.

³²⁸ *Application of Gallagher (No.1)* [1991] 1 IR 31.

recommendation. However, once a committee has made a recommendation, even if it is arguably outside its terms of reference, the Minister would face difficulties if he or she chose not to implement the recommendation. But it seems odd that the committee should specify to exactly which city's psychiatric hospital the patient should be sent. It would appear to be more appropriate for a committee to recommend that the patient be transferred to an ordinary psychiatric hospital, without specifying the exact location of that hospital.

Geoghegan J's first judgment was unsatisfactory because he failed to answer any of the important questions which arose in this case. Since he believed more legal research was needed, perhaps he could have called counsel back and asked for further research to be done. Lawyers and their clients look to the courts for guidance as to the law on issues; they do not expect courts to avoid the legal questions on the grounds that they are too difficult. While Geoghegan J's suggestion that the two Departments obtain an assessment of the situation was attractive from a pragmatic perspective, it did little to clarify the law and left O'Halloran in a state of limbo.

Information on further developments in the O'Halloran case is sketchy. It was reported in May 1999 that O'Halloran had been transferred to a Cork hospital under the control of the Minister for Justice, but the Southern Health Board was still arguing that it could not accept a transfer to Cork while the patient's care was under the Minister's control.³²⁹ Eventually, Geoghegan J. issued a second reserved judgment

³²⁹ *Irish Times*, 6 May 1999.

which contained a more detailed analysis of the legal situation.³³⁰ He referred to s.2(2) of the Trial of Lunatics Act 1883, which provides that the Lord Lieutenant may detain the a person acquitted on grounds of insanity in such place and in such manner as to him may seem fit.³³¹ He said that the Act did not apply to Ireland only and should not be interpreted in isolation from earlier and unrepealed enactments, such as the Lunacy (Ireland) Act 1821 and the Central Criminal Lunatic Asylum (Ireland) Act 1845. According to Geoghegan J.,

I think that despite the general wording in the 1883 Act which I have already pointed out applied to England and Wales also, it would have been generally understood that the Central Criminal Lunatic Asylum was the place in Ireland for the Lord Lieutenant to direct an insane prisoner to be sent. That indeed has been the history ever since.³³²

He went on to decide that, without an enactment expressly permitting it, the Executive could not direct a public hospital under the control of a Health Board to take in an insanity acquittee and detain and treat such person subject to overriding directions from the Minister for Justice. However, section 2 of the 1883 Act could be given a broad interpretation to permit the Executive to sanction O'Halloran's temporary release on conditions, one of which would require him to be accepted as a voluntary patient in a suitable mental hospital of the Southern Health Board and another of which would be that upon any discharge of him by the Cork hospital or any departure by him from that hospital, he would agree to return or be returned to the CMH. The Minister for Health could also give directions to the Health Board

³³⁰ *O'Halloran v Minister for Justice and Others*, High Court, Geoghegan J., 30 July 1999.

³³¹ See full text of s.2(2) at p.168 above.

³³² *O'Halloran v Minister for Justice*, High Court, Geoghegan J., 30 July 1999,

stating that, in general, where a patient in the CMH became a voluntary patient of the Health Board hospital, no permanent discharge of that patient would be made without prior notice to the Minister for Justice and/or the CMH. The authorities of the Health Board hospital would be free to make all the day to day decisions relating to the patient such as outings or short release without reference to the Department of Justice. This was the only lawful way by which the desired result could be achieved in the absence of a consent from the Health Board. It would be a matter for the Minister for Justice, having taken advice, to decide whether some such regime should be proceeded with.³³³

This second *O'Halloran* judgment is a good deal more satisfactory than the first. It contains a clear summary of the legal situation, and reaches definite conclusions regarding the powers of the two Ministers. Geoghegan J. rightly reads the 1883 Act in combination with previous legislation in analysing the legal situation. The solution he suggests, of temporary release on conditions, is a relatively reasonable one in all the circumstances, although it would have been preferable if he had considered whether an advisory committee has the power to recommend transfer to an ordinary mental hospital in the first place. Ultimately legislation will be needed to clarify all of this.

European case-law would not appear to be of assistance on this issue, as in

p.5.

³³³ It is not known whether the Minister proceeded with this scheme.

*Ashingdane v UK*³³⁴ it was held that the patient's potential move from a secure hospital to a more open hospital was merely the substitution of one form of deprivation of liberty for another, and that a delayed transfer was not an unlawful deprivation of liberty under Article 5.

The Fianna Fáil Bill of 1996 allows transfers between designated centres with the consent of the Minister for Health.³³⁵

INSANITY IN CONTEMPT OF COURT CASES

The applicant in *State (H.) v Daly*³³⁶ had been the defendant in Circuit Court civil proceedings taken by his brother concerning ownership of lands. The Court ruled against H. in these civil proceedings and this was confirmed on appeal, but because he had a deep-seated condition of paranoia, H. disobeyed the order. A motion for his attachment and committal for contempt of the Circuit Court was issued. At the hearing, H. defended himself and refused to be represented by solicitor or counsel. The Circuit Court judge held a summary trial on the matter and committed H. to prison for civil contempt.

³³⁴ (1984) 7 EHRR 528.

³³⁵ Criminal Justice (Mental Disorder) Bill 1996, s.8.

³³⁶ [1977] IR 90

The Minister for Justice later transferred H. from prison to the CMH³³⁷ and after a year in the CMH, H. applied for his release under Article 40 of the Constitution.

In the High Court, H. was represented by counsel,³³⁸ who submitted that H. should have been tried by a jury on the issue of civil contempt. Both the High Court and, on appeal, the Supreme Court, rejected this submission. Finlay P. referred to his own previous decision in *State (Commins) v McRann*,³³⁹ in which he coincidentally delivered judgment on the same day as the instant case. In *Commins*, Finlay P had rejected a similar submission and ruled that an issue of civil contempt could be tried summarily. He considered it unnecessary to repeat his reasons here, and rejected H's similar submission. The Supreme Court agreed with Finlay P.

The inherent power of the courts to try issues of contempt is a sensitive matter, complicated by fears of executive interference if there are any changes in the present situation.³⁴⁰ Nevertheless, it is arguable that the courts were wrong in *Commins* and *H.*, and that a trial by jury is necessary, given the indefinite detention which follows a finding of contempt. The Law Reform Commission, in its Consultation Paper on Contempt of Court, expresses concern that trials of contempt by juries could from time to time result in perverse acquittals, particularly in cases which arise in a highly

³³⁷ The Minister's transfer was made under s.12 of the Central criminal Lunatic Asylum (Ireland) Act 1845.

³³⁸ But again in the Supreme Court, H. conducted his appeal in person.

³³⁹ [1977] IR 78

³⁴⁰ See Law Reform Commission, *Consultation Paper on Contempt of Court* (Dublin, 1991), chap. 8, pp. 190-209 and chap. 16, pp. 417-9.

emotional political or social context.³⁴¹ The Commission also states that there is a danger that the Supreme Court would not uphold the constitutionality of any future legislation placing in the hands of juries the function of adjudicating on liability for civil contempt.³⁴² The Commission accordingly provisionally recommends that there should be no change in this area.

But the courts and the Commission appear to have glossed over a crucial problem raised by the *H.* case: what if the person who is being tried for civil contempt has a mental disorder? This may mean that the person is unfit to plead, that he/she is not responsible for the contempt, or that he/she is mentally incapable of purging his/her contempt. H's counsel argued that the latter two problems arose in this case – H's deep-seated paranoia was a mental disease which meant that he was not responsible for his disobedience of the court order and that he was mentally incapable of purging his contempt. Understandably, Finlay P. said that, as this was a habeas corpus application, he could not consider the merits of the issue tried by the Circuit Court judge, or the weight of the evidence. Presumably if H. had brought an appeal or a case stated from the Circuit Court's decision, it could have been overturned on such a basis³⁴³ and an insanity acquittal could have been substituted. The fact that H. had been tried summarily might cause problems, as the special verdict under the Trial of

³⁴¹ Ibid., pp. 417-8.

³⁴² Ibid., p.419.

³⁴³ Given H's mental state, and the fact that he represented himself at some of his appearances in court, there was an increased danger that he would not avail fully of all the possible legal avenues open to him. Presumably the time limits for an appeal or case stated had expired.

Lunatics Act 1883 presupposes trial by jury.³⁴⁴ In any event, this was a habeas corpus application and Finlay P. could not consider the merits of the Circuit Court Judge's decision. The President admitted psychiatric evidence *de bene esse* and without ruling as to whether it was relevant or admissible. The psychiatrist stated that H. had for many years suffered a deep-seated condition of paranoia which prevented him from acting properly and rendered him "not a free agent" because he was acting under very strong delusions. These delusions did not prevent him from understanding the consequences of what he was doing, or the consequences of refusing to purge his contempt. In the psychiatrist's opinion, H. required, in his own interest, continued institutional medical treatment for his medical condition. None of this evidence was available to the Judge of the Circuit Court, but if it had been available and if H. had pleaded insanity, it is difficult to know whether it would have resulted in a special verdict. On *McNaghten* criteria, H. would appear to have been responsible for his contempt, but it could have been argued that the failure to obey the order was due to "volitional insanity."³⁴⁵ H's is therefore a borderline case, but this does not in any way solve the problem which may arise in a future case where evidence of mental disorder is given at the trial of an issue of civil contempt. In the Supreme Court, O'Higgins CJ briefly addressed the issue of whether H's mental condition could have excused the civil contempt. The Chief Justice said that he was satisfied that the mental illness was not such as rendered him incapable of knowing fully what he was

³⁴⁴ But see below pp.272ff. – Walsh J in *State (C.) v Minister for Justice* [1967] IR 106 at 121.

³⁴⁵ *Doyle v Wicklow County Council* [1974] IR 55 at 71: The question is whether the defendant was "debarred from refraining from [committing the act] because of a defect of reason, due to his mental illness [?]"

doing.³⁴⁶ Therefore, H's illness could not be considered a reason why an order of committal should not have been made. Surprisingly, he even reserves the question of whether a mental illness which rendered a person incapable of knowing fully what he/she was doing would be a bar to an order for committal.³⁴⁷ He makes no reference to the possibility of volitional insanity being considered.

H's inability to purge his contempt also posed a dilemma. Imprisonment for civil contempt is intended to have a coercive effect, so that the person will eventually realise the error of their disobedience of the court order. In H's case, while he understood the consequences of refusing to purge his contempt, he was unable to act properly due to his deep-seated paranoia. The serious nature of his psychiatric condition was demonstrated by the Minister for Justice's decision to transfer him from prison to the Central Mental Hospital. If H. had brought an appeal or case stated within the required time limits, it is submitted that the decision of the Judge of the Circuit Court should have been overturned on the basis of the new psychiatric evidence which was now available, which clearly showed that the sentence of imprisonment would not have the usual coercive effect due to his mental state. Even on this habeas corpus application, the courts could have ordered H's release on the basis of the new psychiatric evidence (although it might have been better from a procedural point of view if H. had also applied for an order of certiorari quashing the

³⁴⁶ [1977] IR 90 at 97.

³⁴⁷ "I am satisfied that whatever degree of mental illness the prosecutor suffered it was not such as rendered him incapable of knowing fully what he was doing. Therefore, without considering further whether in such circumstances mental illness may be a bar to an order for committal, ..." (pp.97-8).

Circuit Court's decision). As already stated, H's counsel argued that H's mental state was relevant at two stages - firstly, because H. was not responsible at the time of the contempt and secondly because he was mentally incapable of purging his contempt. In the High Court, Finlay P. fails to analyse separately these two very different issues. In the Supreme Court, O'Higgins C.J. (with whom the other two Judges agreed) does not even *refer* to the second stage.³⁴⁸

H. also argued that the section under which he had been transferred to the CMH was unconstitutional, and this aspect of the case will be considered in Chapter 5 below.

THE INSANITY DEFENCE IN THE DISTRICT COURT

In England there has been detailed discussion of the question whether the insanity defence is available at magistrates' court level.³⁴⁹ The debate has recently been resolved by the Court of Appeal decision in *R v Horseferry Road Magistrates' Court, Ex parte K*,³⁵⁰ where it was held that the common law defence of insanity remains available to a defendant in a summary trial before magistrates. The decision relied

³⁴⁸ [1977] IR 90 at 97-8.

³⁴⁹ Practical Point 2 (1979) 143 JPN 469; Michael Crosta, 'Sullivan's Choice' (1984) 148 JPN 245; Stephen White letter (1984) 148 JPN 318; White, 'Insanity in a Magistrates' Court' (1984) 148 JPN 419 (continued at 435 and 452); Crosta letter (1984) 148 JPN 557; White, 'Insanity Defences and Magistrates' Courts' [1991] Crim. LR 501.

³⁵⁰ [1997] QB 23. The implications of the case are reviewed in Stephen White & Paul Bowen, 'Insanity Defences in Summary Trials' (1997) 61 J.Crim.L. 198.

heavily on White's detailed analysis of the common law situation and the historical impact of statutory changes.³⁵¹ The thrust of his analysis was that at common law insanity had been a defence to any charge³⁵² and the legislative history showed that Parliament had legislated merely to provide a special verdict procedure in relation to trials on indictment. The reference to "any indictment or information" in the Trial of Lunatics Act 1883 was inserted to accommodate criminal informations which could be filed in the High Court at the time.³⁵³

The Divisional Court later held in *DPP v H*³⁵⁴ that the insanity defence is not available where a strict liability offence is triable summarily, although this decision

³⁵¹ White, 'Insanity in a Magistrates' Court', supra n.349. The Divisional Court in *Ex parte K.* did not expressly refer to White's article, but the judgment follows the sequence of White's argument very closely and White has stated that a copy of the article was handed to the court - see White's letter at [1997] Crim. LR 243.

³⁵² See for example William Hawkins, *Pleas of the Crown*, (1716), p.1. Nigel Walker, in a letter at [1996] Crim. LR 844, criticises the court in *Ex Parte K.* for failing to deal adequately with Hale's view that insanity was a defence only available for capital offences, but White in his 1984 article at 421 states that Hale's book was about capital offences only and, since it was not published by Hale himself, this suggests that it does not present his fully considered views.

³⁵³ There were two kinds of such criminal informations: those filed by the Master of the Crown Office on behalf of a private individual and those filed ex officio by the Attorney General. Interestingly, at the beginning of 1881 Charles Stewart Parnell was prosecuted on an ex officio information for conspiring to incite tenants in Ireland to withhold rents (*R v Parnell* (1881) 14 Cox CC 508) and this is one of the highly publicised examples of the use of informations before and in 1883 which are cited as explaining the use of the phrase "any indictment or information" in the Trial of Lunatics Act 1883 - White (1984) 148 JPN at 435.

³⁵⁴ [1997] 1 WLR 1406.

has been criticised.³⁵⁵

There has been no detailed consideration in Ireland of the question of insanity defences in District Court summary trials, but in 1967 Walsh J. stated *obiter* that, since there is no statutory verdict set out regarding such trials, the Court is governed by the common law rule that the form of verdict is one of acquittal.³⁵⁶

The Henchy Committee appears to have overlooked Walsh J's *obiter dicta* in the *C.* case completely³⁵⁷ and stated that "at present the District Court has no jurisdiction to give such a verdict."³⁵⁸ The District Court's lack of jurisdiction was later referred to as:

a lacuna which could perhaps be challenged on Constitutional grounds, although there is some judicial authority on a related issue which suggests that the challenge might not be successful.³⁵⁹

³⁵⁵ See Tony Ward, 'Magistrates, Insanity and the Common Law' [1997] Crim. LR 796. Ward argues at p.802, for example, that McCowan LJ used a fallacious argument when he stated that H's defence was based on absence of mens rea and since no mens rea was required for the offence of drunken driving, the insanity defence was irrelevant. Ward points out that the basis of H's argument was that he did not know that drunken driving was either morally or legally wrong and that such knowledge is not part of the mens rea of any offence.

³⁵⁶ *State (C.) v Minister for Justice* [1967] IR 106 at 121. Walsh J. does not however explicitly state that the person must be released after such an acquittal. Contrast Casey & Craven at p.387, fn. 78, who believe that the 1883 Act applies to misdemeanours.

³⁵⁷ See also Chapter 2 above.

³⁵⁸ Henchy Committee, para. 6.

³⁵⁹ William Binchy, 'Mental Retardation and the Criminal Law' (1984) 2 ILT (ns) 111 at 111.

This might be the subject of a challenge based on interference with the person's right to liberty. For example, if a person is charged with a minor larceny in the District Court, opts for summary trial, and wishes to plead insanity, that person could claim infringement of liberty if the Judge stated that he or she was not entitled to find a special verdict under the 1883 Act and then imposed a custodial sentence instead. However, if Walsh J. was correct in *State (C.) v Minister for Justice*, this would mean that it would be advantageous for an accused person to be tried summarily in the District Court. If the person was acquitted, he or she would not be placed in custody. An argument based on the constitutional right to equality could be made by a person who was tried on indictment and found "guilty but insane so as not to be responsible."

The Henchy Committee proposed that the District Court should have a specific statutory power to deal with insanity defences³⁶⁰ and the Fianna Fáil Bill of 1996 contained similar provisions.³⁶¹

STATISTICS

According to CMH case registers, 50 patients had been acquitted on grounds of

³⁶⁰ Henchy Committee draft Bill, s.13.

³⁶¹ Criminal Justice (Mental Disorder) Bill 1996, s.4.

insanity from 1937 to 1995.³⁶² In 1995, there were 21 patients in that category and their average length of stay was 11 years.

While Garda figures show 135 offences where the defendant was found either unfit to plead or guilty but insane,³⁶³ the CMH only records a total of 74 patients.³⁶⁴ This may be explained by multiple charges against the same defendant, or errors in CMH files, or both. On the other hand, it is also possible that the Garda figures are actually *understated* for two reasons.³⁶⁵ Firstly, for many years the Garda annual figures did not provide a breakdown of what happened cases pending from previous years.³⁶⁶ Individual examples of insanity acquittals not recorded in the annual reports may indicate that other such cases were not recorded.³⁶⁷ Secondly, Dooley's study of

³⁶² Lynn Hutchinson & Art O'Connor, 'Unfit to Plead in Ireland' (1995) 12 *Ir.J.Psychol.Med.* 112 at 114.

³⁶³ See summary in McAuley at pp.224-5 of 118 offences from 1947 to 1990, and add 17 offences using the following data from more recent *Reports on Crime* issued annually: No offences from 1991 to 1993; 7 offences in 1994 (including 4 cases from previous years); 5 offences in 1995 (including 2 cases from previous years); 3 offences in 1996; 2 offences in 1997 (including one from previous years.)

³⁶⁴ 24 patients found unfit to plead and 50 acquitted on grounds of insanity. Both figures are from Hutchinson & O'Connor, *op.cit.*

³⁶⁵ This would naturally imply that the CMH case registers do not record all relevant cases either, which may mean that some of defendants are not actually sent to the CMH after the special verdict is found.

³⁶⁶ From 1995 on, the Reports on Crime have begun to show a breakdown of cases carried over from previous years in a separate listing. In the years prior to that, the reports sometimes stated the total of convictions (and orders made without conviction) in cases pending from previous years.

³⁶⁷ The Garda figures concerning findings of insanity and unfitness to plead do not appear to show the insanity acquittals of Neilan in 1983, Kirwan in 1984 and McElligott in 1994. Only one murder offence is listed in 1989, even

homicide cases from 1972-1991 has found 31 cases of insanity acquittals or findings of unfitness to plead,³⁶⁸ whereas the Garda figures only show 4 such cases in the same period.³⁶⁹ The Dooley study appears to indicate that the insanity defence and unfitness to plead have not been in decline in recent decades, and so speculation as to reasons for such supposed decline may have been premature.³⁷⁰ The study also provides a useful analysis of 58 'psychiatric' cases where the primary motive for the homicide was considered to be some form of psychotic illness or other mental disorder. When compared with the other homicide cases, the perpetrators in the 'psychiatric' cases were more likely to be female, the victims were more likely to be young, the homicides tended to occur during the day-time, killings of relatives were more likely, and the use of drowning as a method of homicide was particularly common. The majority (72.4%) of the perpetrators in this group had a previous psychiatric history. In only 50% of the cases was a psychiatric defence raised and in only 39.7% was the outcome a psychiatric disposal, either an insanity acquittal or a finding of unfitness to plead.³⁷¹ In 19% of the cases no charge was brought on the instructions of the DPP, or a *nolle prosequi* was entered.

though both the Gallagher and O'Halloran acquittals occurred in that year.

³⁶⁸ Enda Dooley, *Homicide in Ireland, 1972-1991* (Stationery Office, Dublin, 1995), p.20. No separate figures are given for insanity acquittals and findings of unfitness to plead. See also other statistics in an article by Paul Carney in the *Irish Times* of 13 January 1990.

³⁶⁹ One homicide in 1973, two in 1975, and one in 1989. All of these were murders.

³⁷⁰ See McAuley at 206-218.

³⁷¹ Dooley, *op.cit.*, pp.17-18.

CHAPTER 5

TRANSFERS FROM PRISONS TO MENTAL HOSPITALS

Transfers from Prisons to Mental Hospitals - People Not Under Sentence.	280
Transfers from Prisons to Mental Hospitals - People Under Sentence	300
Temporary Release for Prisoners transferred to Mental Hospitals	312
Statistics	313

It is unclear how many prisoners have mental disorders which require psychiatric treatment,¹ but what is clear is that there needs to be a system of transfer of prisoners to mental hospitals.

While in theory a prisoner who was not receiving adequate psychiatric treatment might in extreme circumstances be released under the habeas corpus procedure, in practice it is more likely that the most the court will do is to order that the relevant treatment be provided.²

The Whitaker report recommended that a psychiatric unit be established in Portlaoise Prison to accommodate prisoners with psychiatric disorders, but no action has been taken on this.³

¹ See statistics at pp.313ff. below.

² See Raymond Byrne, Gerard Hogan & Paul McDermott, *Prisoners' Rights: A Study in Irish Prison Law* (Co-op Books, Dublin, 1981) at 40-44, citing cases such as *State (C.) v Frawley* [1976] IR 365 and *State (McDonagh) v Frawley* [1978] IR 131.

³ *Report of the Committee of Inquiry into the Penal System* (Chair: T.K. Whitaker, Pl. 3391, Stationery Office, Dublin, 1985)

In its report on its visit to Ireland in 1993, the European Committee for the Prevention of Torture noted that there was no specially-equipped psychiatric facility for prisoners within the Irish prison service and as a result prisoners requiring to be hospitalised were transferred to the CMH. Assessment took place in prison, and this could take up to seven days. It could take up to two weeks to arrange such a transfer. The Committee emphasised that mentally ill prisoners should be kept and cared for in a hospital facility which is adequately equipped and possesses appropriately trained staff. The Committee recommended that the facility should be an appropriately equipped psychiatric hospital or a specially equipped psychiatric facility within the prison system.⁴

This chapter will firstly consider transfers of people not under sentence, and in particular the *C.* case in 1967, in which it was held that part of the relevant legislation was unconstitutional as it interfered with the judicial power. Transfers of people under sentence will then be discussed, especially *State (H.) v Daly* which involved the transfer of a man who had been imprisoned for contempt of court. Temporary release

⁴ Council of Europe, *Report to the Irish Government on the visit to Ireland by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 September to 5 October 1993*, Strasbourg/Dublin, 13 December 1995. CPT/Inf (95) 14. See also Council of Europe, *Response of the Irish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993*, Strasbourg/Dublin, 13 December 1995. CPT/Inf (95) 15 and Council of Europe, *Follow-up report of the Irish Government in response to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993*, Strasbourg/Dublin, 19 September 1996. CPT/Inf (96) 23.

of transferees will also be considered, and finally statistics concerning this issue.

In any case of an admission to the Central Mental Hospital, hospital policy states that the decision to admit is determined by the clinical condition of the patient and this decision is taken by a medical officer.⁵ Hospital policy also allows for admission in the absence of full documentation, with the agreement of the Clinical Director or Consultant on Call, provided documentation is obtained the following working day from the referring prison.⁶

This chapter will concentrate on transfers of prisoners to mental hospitals which take place under various legislative provisions and at present ordinarily require a Ministerial Order. It is also possible for transfers to take place under a voluntary Hospital Order.⁷

Transfers from Prisons to Mental Hospitals - People Not Under Sentence.

A diagrammatic representation of statutory provisions on this topic is provided on the following page.

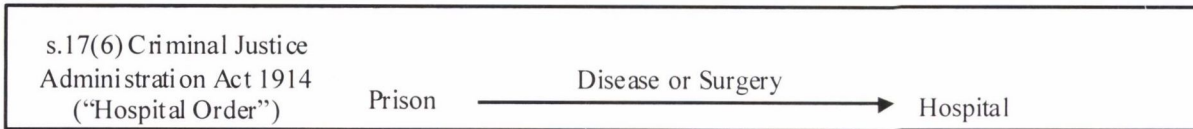
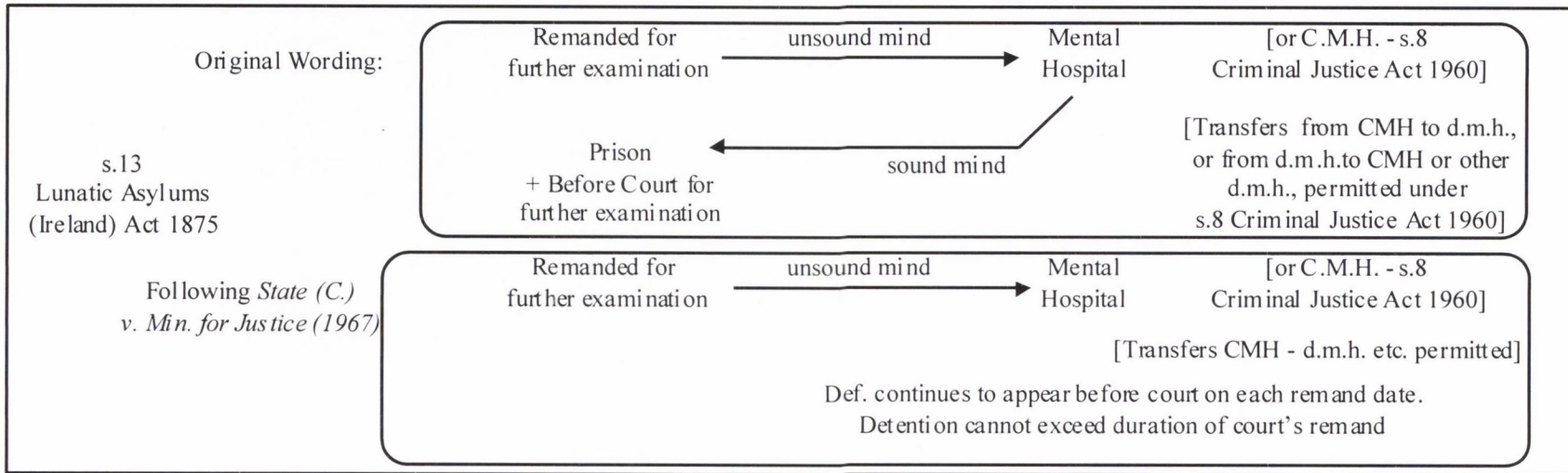
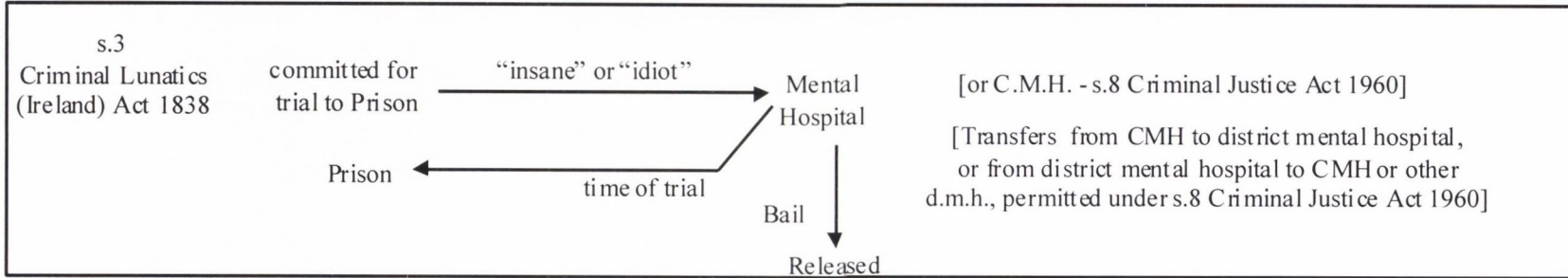
⁵ CMH Admission Policy.

⁶ CMH Admission Policy. Note also that if a patient will not consent to an injection, it is stated that it may be necessary to change the patient's status from Hospital Order to Ministerial Order - Policy on Administering an Injection without a Patient's Consent, CMH.

⁷ CMH Admission Policy.

TRANSFERS

Prisons to Mental Hospitals - People not under Sentence



Section 3 of the Criminal Lunatics (Ireland) Act 1838⁸ provided that if a person was committed to prison for trial for any offence, two doctors could certify that the person was insane or was an “idiot.” The Lord Lieutenant, or the Chief Governor(s) of Ireland, could then, if he so thought fit, issue a warrant directing that the person be removed to a lunatic asylum. The person would remain in the asylum until admitted to bail, or until the time of trial. At the time of trial, the person would be remitted to the custody of the prison to which he/she was originally committed, so that the trial could take place or the matter could otherwise be disposed of. While detained in the lunatic asylum, the person would have the same right to see his/her friends and legal advisors which he/she would have had in the prison from which he/she was removed. The powers in the 1838 Act were expressly saved by the Mental Treatment Act 1945.⁹

Section 13 of the Lunatic Asylums (Ireland) Act 1875¹⁰ dealt with the situation where a person had been remanded by justice(s) of the peace for further examination and during the period of remand two doctors certified that the person was of unsound mind. The Lord Lieutenant could issue a warrant ordering that the person be removed to a district lunatic asylum. If two doctors later certified that the person had become of sound mind, the Lord Lieutenant was authorised to direct that the person

⁸ 1 & 2 Vic., c.27

⁹ s.284 Mental Treatment Act 1945. Also expressly saved by the Health (Mental Services) Act 1981, which has never come into operation.

¹⁰ 38 & 39 Vic., c.67.

be remitted to the prison or place of confinement from which he/she was removed to the asylum, and be brought before the justice(s) for further examination. This power was expressly saved by the Mental Treatment Act 1945.¹¹

Section 17(6) of the Criminal Justice Administration Act, 1914,¹² applied to prisoners¹³ in cases of “disease” which could not be treated in prison or a surgical operation which could not properly be performed in prison. In such cases, the Lord Lieutenant¹⁴ could order that the prisoner be taken to a hospital or other suitable place for the purpose of treatment or the operation. This power was saved by the 1945 Act.¹⁵ Sheppard and Hardiman¹⁶ refer to this as a “Hospital Order.” They say that it requires the signature of only one medical officer¹⁷ and that patients admitted in this way tend in general to be suffering from an acute psychiatric problem, most commonly receiving a diagnosis of neurosis or personality disorder. According to

¹¹ s.284 Mental Treatment Act 1945. Also expressly saved by the Health (Mental Services) Act 1981, which has never come into operation.

¹² 4 & 5 Geo. 5, c.58.

¹³ “Prisoners” would appear to include both remand prisoners and those who have been convicted.

¹⁴ As substituted by s.43(1)(a) of the Act

¹⁵ S.284 Mental Treatment Act 1945. Also expressly saved by the Health (Mental Services) Act, 1981, which has never come into operation.

¹⁶ Sheppard, Noel & Hardiman, Éamon, ‘Treatment of the Mentally Ill Offender in Ireland - An Examination of the Forensic Psychiatric Services’ (1986) v.7, no.1, *Ir.Jnl. of Psychiatry* 13

¹⁷ They say that the governor of the prison makes the arrangements. They make no mention of consultation with the Department of Justice, but this does not necessarily mean that such consultation does not take place.

them, the use of the hospital order was increasing in the 1980s because other transfer procedures were seen as “awkward.”¹⁸ Later studies indicated that the vast majority of transfers were taking place under hospital orders.¹⁹

Two of the above powers were extended by s.8 of the Criminal Justice Act 1960. A warrant under s.3 of the 1838 Act or s.13 of the 1875 Act could, at the discretion of the Minister for Justice, order the removal of the person to the Central Mental Hospital or to any district mental hospital. Where a person is detained under s.3 of the 1838 Act or s.13 of the 1875 Act, the Minister may direct the transfer of the person either from the Central Mental Hospital to a district mental hospital or from a district mental hospital to the Central Mental Hospital or another district mental hospital.

SECTION 3 OF THE 1838 ACT

This section was used in *Murray (Crowley) v DPP*²⁰ to transfer a patient from Portlaoise Prison to the Central Mental Hospital. It was also noted by Dr Charles Smith, Psychiatrist, that “the mental health legislation is applicable to the Applicant but unenforceable because there has to be a reception order from the receiving hospital.”²¹ This appears to indicate that no ordinary mental hospital would take

¹⁸ Ibid., p.15.

¹⁹ See statistics, below p.313.

²⁰ High Court, Denham J., 13 May 1992.

²¹ Ibid., p.9.

Murray as he was charged with armed robbery, was detained in Portlaoise Prison and charged before the Special Criminal Court.

SECTION 13 OF THE 1875 ACT

The case of *State (C.) v Minister for Justice*²² provided an opportunity for the Supreme Court to rule on the constitutionality of s.13 of the 1875 Act. C. was charged with an indictable offence of malicious damage, and as part of the preliminary examination, was remanded in custody by the District Court for seven days, to allow for preparation of a medical report. The medical report stated that C. was very retarded, showed memory impairment, and could not control his actions. The report recommended a course of treatment in a mental hospital. On the day when C. was due to appear in court again, the Gardaí took him to a Garda station (and later to a mental hospital) pursuant to s.165 of the 1945 Act. The District Court ordered that the matter should be adjourned generally with liberty to re-enter. Within a few months, C. was discharged from the mental hospital. He was later re-arrested for the previous offence and new indictable offences, under the Malicious Damage Act 1861 and the Larceny Act 1916. Another medical report was requested by the District Court, as part of the preliminary examination, and this report reached the same conclusions as the previous report had reached. While C. was still on remand, two more doctors examined him and certified that he was “insane.” The Minister for Justice then ordered C’s transfer to a mental hospital under s.13 of the 1875 Act. Ten days later, the Minister transferred him to the Central Mental Hospital under s.8

²² [1967] IR 106 (SC.)

of the 1960 Act. The District Court adjourned the charges on a number of occasions, once a month and eventually adjourned one of the charges generally, with liberty to re-enter.

C. brought certiorari and habeas corpus proceedings challenging his detention on various grounds. The Attorney General was notified of the arguments as to constitutionality of statutes included in the claim. In the High Court, Murnaghan J. rejected C's claims,²³ and he appealed to the Supreme Court. The Supreme Court unanimously decided that C. should be released and that part of s.13 of the 1875 Act was unconstitutional.

On the question of the transfer of functions from the Lord Lieutenant, Walsh J. said that the fact that a statutory power is conferred upon a member of the executive does not make that power an executive power.²⁴ Walsh J. concluded that the power exercisable by the Lord Lieutenant under s.13 was now exercisable by the Minister for Justice. The power fell under law and justice in the relevant 1922 Order.²⁵ and this conclusion was consistent with the High Court's decision in *State (Tynan) v Governor of Portlaoise Prison*.²⁶ O'Higgins C.J. agreed, stating that the power was conferred on the Lord Lieutenant as a named individual and was to be identified as an

²³ *State (Coughlan) v Minister for Justice* (1968) 102 ILTR 177 (HC and SC.)

²⁴ [1967] IR 106 at 118.

²⁵ Provisional Government (Transfer of Functions) Order 1922.

²⁶ High Court, unreported, 3 Sept. 1963. The High Court held that the functions of the Lord Lieutenant in connection with Portlaoise Prison were now exercised by the Minister for Justice.

administrative function related to prisons.²⁷ As will be stated later (page 305 below), it is arguable that the Minister for *Health* should exercise powers such as this, as the 1922 Order assigned the administration of lunatic asylums to the Ministry of Local Government, part of which later became the Department of Health.

C's counsel argued that s.13 of the 1875 Act was unconstitutional as it interfered with the judicial power of the State. Walsh J. analysed s.13 and made a number of comments on its scope. He said that s.13 only applied to persons who had been remanded in custody and not to those who had been remanded on bail.²⁸ The section applied not merely to the preliminary examination of indictable offences but also to the exercise of summary jurisdiction by Justices. The purpose of the section was to assist in the administration of justice. Walsh J. then looked at other powers of the courts concerning mental health, such as the law on fitness to plead, s.207 of the 1945 Act and the powers to transfer people returned for trial in custody and people under sentence to mental hospitals.²⁹ However, in this case, the Minister made the transfer while the case was still before the District Court. The conduct of the preliminary examination was the exercise of the judicial power of the State and the Constitution vested in the courts the exclusive right to determine justifiable controversies between a citizen or citizens and the State.³⁰ Section 13 interfered with the judicial power of the State and rendered it physically impossible for the District Court to continue the

²⁷ [1967] IR 106 at 117.

²⁸ [1967] IR 106 at 119.

²⁹ s.3 of the 1838 Act and s.12 of the 1845 Act.

³⁰ [1967] IR 106 at 123.

case.

Ó Dálaigh C.J. said that s.13 fell into three distinct parts. In the first part, the Lord Lieutenant made an order for removal of the person to the hospital; in the second, the section provided what the period of confinement of the prisoner in the hospital was to be; and thirdly, the section laid down the machinery for termination of the confinement and the person's remittal to the court for continuation of the court's examination.³¹ The first part of the section did not impinge upon the court's function but the second part in effect purported to discharge the court's order because of the prisoner's insanity. The preliminary investigation was a stage in the administration of justice, but could the legislature legitimately intervene to adjourn a preliminary investigation on the ground that the accused was of unsound mind? Ó Dálaigh C.J. looked at the law on fitness to plead and noted that s.13 did not distinguish between insanity entitling the accused to avoid trial and "insanity at large." The section caused the preliminary investigation to be adjourned willy-nilly.³² In a strongly-worded passage, he said:

The provision of the Act of 1875 (which takes the accused away from the Court's disposal, sets at nought the Court's remand and adjourns the preliminary investigation *sine die*) is about as large an intrusion upon a court proceeding as one could imagine.³³

The Chief Justice therefore concluded that the second part of s.13 was unconstitutional.

³¹ [1967] IR 106 at 113.

³² [1967] IR 106 at 115.

³³ [1967] IR 106 at 115-6.

The Supreme Court's decision on the constitutionality of s.13 seems sound, and is consistent with the separation of powers envisaged by the Constitution. Similar decisions were reached in some later cases - see chapter 4 above - and it has already been argued that the Supreme Court in *Gallagher (No.1)* ought to have held that release of insanity acquittees was part of the judicial power.

Both the Chief Justice and Walsh J. agreed that the offending second part of s.13 could be severed and the rest of the section could remain. This means that the section now states that the person remains in the mental hospital until brought before the court for further examination. Walsh J. said that the accused must appear before the District Court again on the date in the order for remand either for trial, preliminary investigation, or further remand as the District Court may direct.³⁴ The District Court could remand for a further period if the judge wished if satisfied that through illness the accused is unable to attend.³⁵ Walsh J. also discussed the question of fitness to plead in preliminary examinations³⁶ and stated that s.165 of the 1945 Act had been improperly invoked in this case. The Supreme Court said that, as C's most recent remand before his transfer under s.13 had long since expired, C. should be released and an absolute order of habeas corpus should issue.³⁷ If he needed to be detained again there were ample powers available for that purpose. The District Court could,

³⁴ [1967] IR 106 at 124.

³⁵ See discussion of long remands in chapter 2 above.

³⁶ See chapter 2 above.

³⁷ [1967] IR 106 at 116.

in addition, issue a warrant for C's production before it as the charges had been adjourned generally with liberty to re-enter. Finally, Walsh J. stated that the relevant part of s.8 of the 1960 Act should now be read as relating only to so much of s.13 of the 1875 Act which was not unconstitutional.³⁸

While the outcome of the *C.* case was a positive step towards curtailing the excessive powers given to the Minister for Justice in the 1875 Act, one point which remains unresolved is the situation which arises if the person regains his or her mental health while in the mental hospital. When the full wording of s.13 still existed, Walsh J. was careful to express his opinion that in such circumstances the section made it mandatory for the Lord Lieutenant to send the person back to prison and bring the person before the court.³⁹ However, now that the second part of s.13 no longer exists, there is no such specific instruction in the legislation. This would be particularly problematic if the District Court had opted for a long remand, due to the person's mental illness, under s.24(4) of the Criminal Procedure Act 1967. The person might have been remanded for six months, but regain mental health after one month. In such a case, there is no requirement on the Minister for Justice to send the person back to a prison and bring the person before the District Court for further preliminary examination of the charge.

³⁸ [1967] IR 106 at 127.

³⁹ [1967] IR 106 at 119.

In *State (M.) v O'Brien* (1970), both Henchy J. in the High Court⁴⁰ and Ó Dálaigh C.J. in the Supreme Court⁴¹ referred in passing to the relationship between s.13 of the 1875 Act and s.207 of the Mental Treatment Act 1945. Ó Dálaigh C.J. said that the two sections were to be looked at together, not as co-ordinate, but rather as parallel provisions. While it was true that s.13 had “shed its tail by reason of constitutional infirmity”, it still provided for the case of an accused who manifested insanity after being charged and remanded, whereas s.207 concerned itself with an accused who, as at the date of being charged, is already a detained person, in a mental hospital.

The fact that s.13 has been used in cases of long remand is illustrated by *In Re Dolphin: State (Egan) v Governor of Central Mental Hospital*.⁴² Martin Dolphin was at one stage remanded in custody by the District Court to Mountjoy Prison for two months due to mental illness.⁴³ On the following day, two doctors had certified that Mr Dolphin was of unsound mind and the Minister for Justice had transferred Mr Dolphin to the Central Mental Hospital under s.13 of the 1875 Act as adapted by s.8 of the 1960 Act. A friend of Mr Dolphin’s made a habeas corpus application, and also applied for certiorari. Meanwhile, the Governor of the CMH decided that Mr Dolphin was no longer of unsound mind and she released him two days before his remand date. For further discussion of this case see chapter 2 above.

⁴⁰ *State (McEvoy) v O'Brien*, High Court, unreported, 3 Nov. 1969.

⁴¹ [1972] IR 169 at 176.

⁴² Kenny J., High Court, 27 Jan. 1972.

⁴³ District Court order of 3 December 1970 remanding in custody until 4 February 1971.

Edward Caseley was the next patient to test s.13 of the 1875 Act in the courts. Caseley was charged before the District Court with unlawfully and maliciously setting fire to a school contrary to s.6 of the Malicious Damage Act 1861.⁴⁴ The district justice remanded Caseley in custody for one week with consent to bail and a request for a medical report. Bail was not forthcoming, and in its absence Caseley was detained in Mountjoy prison.⁴⁵ Three days after the remand order, following the required certificate from two doctors, the Minister for Justice transferred Caseley from Mountjoy Prison to the Central Mental Hospital, in exercise of his powers under s.13 of the 1875 Act as adapted and extended by s.8 of the 1960 Act.⁴⁶ Caseley was not brought before the District Court again. Instead, on the first remand date, the court heard medical evidence in his absence that he was unfit to attend court and the court made an order for long remand due to illness under s.24(4) of the Criminal Procedure Act 1967. On ten subsequent dates, similar orders were made in Caseley's absence. Caseley was not represented by a lawyer on any of these occasions. These orders appear to have continued for a three year period, and the last one was in the following terms:

⁴⁴ It is not clear from the judgment whether Caseley was being charged summarily or on indictment.

⁴⁵ If bail had been forthcoming, s.13 of the 1875 Act could not have been used - see Walsh J. in the *C.* case at p.119. Presumably it is more likely that a mental patient will not be able to find a person to co-operate in bail than it would be for a person who is not a mental patient.

⁴⁶ Apparently, this order was specifically expressed to be for the duration only of the remand in custody to the next remand date directed by the District Court order made three days beforehand - *State (Caseley) v Daly & O'Sullivan*, High Court, Gannon J., 19 February 1979, p.5.

And I did adjudge that evidence of Dr E. Hardiman that due to illness Mr Caseley could not appear in Court. Might be fit for court in three months. Remand to 12.1.79 at 10.30 a.m.

Two weeks after this order, Caseley applied for certiorari of the last order and made a habeas corpus application.

The High Court judgment was delivered by Gannon J.: *State (Caseley) v Daly and O'Sullivan*.⁴⁷ Some of the arguments raised by counsel were not addressed in Gannon J's judgement⁴⁸ Instead, in an oddly-structured judgment, Gannon J. devoted considerable time to analysing and criticising what the district justice did, but then suddenly concluded by deciding that the justice's last order was in fact valid. However the State did not succeed on a further point, the length of Caseley's detention once transferred to the Central Mental Hospital. The Minister's order of transfer expired on the first remand date, and Gannon J. ordered Caseley's release from Dundrum.

Gannon J's analysis of what the district justice did emphasised that the justice did not perform any judicial function on any of the occasions when this matter came before him. He did not hear any evidence in support of the charge and he did not decide whether Caseley was unfit to plead. The district justice's function in remanding Caseley in custody was administrative only. The orders did not state the place of detention as it was only the Minister for Justice who could order that Caseley be

⁴⁷ 19 February 1979.

⁴⁸ For example, counsel argued that Caseley should have been offered legal aid or been informed of his right to legal aid.

detained in the CMH under s.13 of the 1875 Act. Gannon J. stated:

No person can be committed by court order to detention in a place or institution designated for mental health treatment (or lunatic asylum as it might have been called) without a proper investigation by trial of the grounds for doing so.⁴⁹

Even s.207 of the Mental Treatment Act 1945 did not permit a district justice to commit a person to a mental hospital - the decision was left to the Minister for Health. Gannon J's criticisms of the district justice concerned the third remand in custody, on 18 September 1975, four months after Caseley had entered the CMH. At that stage, Gannon J. believed the justice should have determined whether Caseley was fit to plead, if the evidence suggested a continuing incapacity of indefinite duration. A proper opportunity should have been given to the patient to be present and to be legally represented, as the decision on fitness to plead would be a judicial function, under the Mental Treatment Act 1945.⁵⁰

However, despite these criticisms, Gannon J. then suddenly turned to the justice's last remand order and held that it was valid. It was not bad on its face, it was not made without or in excess of jurisdiction and "none of the particulars of grounds are pertinent to this administrative order."⁵¹

On the final point of the length of Caseley's detention in Dundrum, Gannon J. said that the Minister's order was effective only for the limited period stated in it, i.e. up to

⁴⁹ *State (Caseley) v Daly & O'Sullivan*, 19 February 1979, p.10

⁵⁰ *State (Caseley) v Daly & O'Sullivan*, 19 February 1979, p.12.

⁵¹ *Ibid.*, p.13. Presumably, Gannon J. is referring to the grounds of challenge given on earlier pages of the judgment, e.g. p.3 and pp.5-6.

the next remand date. As no subsequent order was made by the Minister for Justice, there was no further authority for the Director of the CMH to continue to detain the patient there and so the court ordered his release under the habeas corpus procedure.⁵² While Gannon J. did not expand on this point in much detail, it appears that he accepted counsel's arguments made earlier to the effect that due to the Supreme Court's decision in *State (C.) v Minister for Justice* a new and further order under s.13 of the 1875 Act was necessary in respect of each period of remand provided such remand was for further examination.⁵³

Gannon J's assertions that the district justice was not performing a judicial function when remanding the patient are not convincing. When a person is brought before the District Court on a criminal charge, the Judge can strike out the case immediately if the charge is not properly drafted. At the very early stages, it might be pointed out to the Judge that there is some procedural defect which means that the case cannot proceed. For example, cases in the District Court can only be heard by the judge for the time being assigned to the District in which the crime was committed or the accused has been arrested or resides.⁵⁴ So a Judge of the District Court is exercising a judicial function from the moment a person appears on a criminal charge because the power is vested in the Judge to dismiss the charge for procedural reasons. The

⁵² *State (Caseley) v Daly & O'Sullivan*, 19 February 1979, p.13.

⁵³ *State (Caseley) v Daly & O'Sullivan*, 19 February 1979, p.6.

⁵⁴ s.79 Courts of Justice Act 1924 (No.10). See also the Areas Orders made under the Courts of Justice Act 1953 – James V. Woods, *District Court Practice and Procedure in Criminal Cases* (James V. Woods, Limerick, 1994), p.27.

decision whether to remand in custody or grant bail is quite clearly a judicial decision as it involves consideration of the accused's constitutional right to liberty, assessment of "bailsmen" (if applicable), the seriousness of the charge, the nature of the evidence in support of the charge and so on. The fact that this type of decision is a judicial function was confirmed by Keane J. in *O'Mahony v Melia*.⁵⁵

While Gannon J. criticises the district justice for not determining whether Caseley was fit to plead at the time of the fourth remand in custody, he nevertheless goes on to hold that the last remand order was valid. This approach is unduly deferential to the district justice, and detrimental to the rights of Mr Caseley and others in his position. If the district justice was wrong to continue remanding Caseley on the fourth occasion, then he was wrong to remand him again on the tenth occasion. Gannon J. should have granted the order of certiorari of the last remand order as requested. This would have been a clear signal to the District Court in future cases as to how it should act.

In stating that the district justice should have made a decision on fitness to plead, Gannon J. cites the Mental Treatment Act 1945 as the Act under which such decision should be made.⁵⁶ He does not cite the section under which the decision would be

⁵⁵ [1989] IR 335. Keane J. held that it was unconstitutional for s.15(4) of the Criminal Justice Act 1951 (as substituted by s.26 of the Criminal Justice Act 1984) to allow a peace commissioner to decide whether an accused person should be remanded on bail or in custody. Keane J. relied on obiter dicta of Walsh J. in *State (Lynch) v Ballagh* [1986] IR 203 at 210.

⁵⁶ *State (Caseley) v Daly & O'Sullivan*, 19 February 1979, p.12.

made, but presumably he means s.207 of the 1945 Act.⁵⁷ While Gannon J's citation of the 1945 Act is *obiter*, it can be read as demonstrating a mistaken attitude which may have been quite widespread at the time - that s.207 was the only method of dealing with fitness to plead in the District Court. In fact, there are other legal mechanisms available.⁵⁸ Gannon J. does not clarify that the District Court hearing under s.207 would have to take place *in* the mental hospital. He also appears to believe that if Caseley had been transferred to the CMH by the Minister following a s.207 order from the district justice, that this would be the end of the matter, whereas the Supreme Court said in the Ballinasloe case that the patient must be remanded on the charge so that it can be dealt with in due course.⁵⁹

Gannon J. held that the Minister's order under s.13 of the 1875 Act was effective only for the limited period stated in it and as no further ministerial order was made Caseley must be released. This is not necessarily what was intended by the Supreme Court in *State (C.) v Minister for Justice*.⁶⁰ In that case, the court emphasised that the accused's case must continue to be brought before the District Court. At no stage is it specifically stated that the Minister must make a new order after each remand. The more likely intention was that the Minister's first order would remain in force provided the accused was brought before the court on each remand date.⁶¹ The

⁵⁷ See Gannon J's earlier reference to s.207 at p.10 of the judgment.

⁵⁸ See chapter 2 above.

⁵⁹ *State (O.) v O'Brien (Ballinasloe Case)* [1971] IR 42.

⁶⁰ [1967] IR 106.

⁶¹ See [1967] IR 106 at 123-4 (Walsh J) and 116 (Ó Dálaigh CJ)

alternative view would require that if the district justice decided to remand the person, the person would on each occasion be sent to a remand prison and then transferred by the Minister to a mental hospital. It might even be argued that a new medical certificate would be required each time. Admittedly, Gannon J. relies mainly on the wording of the Minister's order, which appears to have specified that it would expire on the next remand date. However, the wording of the Minister's order is not given in the judgment, and it may be that it was drafted to allow for its extension on further remands. In any event, it is always open to the Department of Justice to use a new wording in subsequent cases.

The case of *O'Connor v Judges of the Dublin Metropolitan District Court*⁶² primarily concerned fitness to plead in the District Court. In the course of the High Court judgment, O'Hanlon J. referred with approval to the Supreme Court's decision on s.13 of the 1875 Act in the *C.* case⁶³ and to Gannon J's judgment in *State (Caseley) v Daly*.⁶⁴

Proposals for Reform:

The Henchy Committee proposed the Minister for Justice could transfer a prisoner to

⁶² [1992] 1 IR 387 (H.C.); *sub nom. O'C. v Judges of the DMDC* [1994] 3 IR 246 (Supreme Court). See chapter 2 above.

⁶³ [1992] 1 IR 387 at 393.

⁶⁴ [1992] 1 IR 387 at 397-8.

a designated centre if two medical officers⁶⁵ certified that the prisoner was, by reason of mental disorder, in need of in-patient treatment there.⁶⁶ In the case of a prisoner on remand, the transfer would be for a period expiring not later than the expiration of the period of remand, and in the case of a prisoner sent forward for trial or awaiting trial or sentence, it would expire not later than the time appointed for trial or sentence. The Prison Governor would notify the court of the transfer as soon as may be. The person so transferred could apply to the Review Body for a review of his or her detention.⁶⁷

The Henchy Committee also proposed that in certain circumstances where a person with mental disorder had been charged with an offence, the court could commit the person in his or her absence to a designated centre for renewable periods of six months.⁶⁸

The White Paper proposes that a court could remand a convicted person to custody for treatment, which would be provided in prison or, in severe cases, on transfer from prison to a special psychiatric centre.⁶⁹ The Paper also proposes powers for the courts to order medical reports and assessments during the course of proceedings before a

⁶⁵ An approved medical officer and a medical officer of the prison in which the prisoner is detained.

⁶⁶ Henchy Committee draft Bill, s.24.

⁶⁷ Henchy Committee draft Bill, s.22.

⁶⁸ Henchy Committee draft Bill, s.11 and s.15; above chapter 2. There is no such proposal in the Fianna Fáil Bill of 1996.

⁶⁹ White Paper, paras. 7.20 and 7.38.

court. A consultant psychiatrist could detain the person for treatment and inform the court of this. The judge would adjourn the case until the person had recovered sufficiently to return to court for completion of the trial.⁷⁰

Transfers from Prisons to Mental Hospitals - People Under Sentence

A diagrammatic representation of statutory provisions on this topic is provided at page 301.

Section 2 of the Criminal Lunatics (Ireland) Act, 1838,⁷¹ provided that if a person was detained in custody under a sentence of imprisonment or transportation, two doctors could certify that the person was insane. The Lord Lieutenant, or the Chief Governor(s) of Ireland could then, if he so thought fit, issue a warrant directing that the person be removed to a Lunatic Asylum.⁷² The person would remain in the asylum until two doctors certified that he or she had become of sound mind. The Lord Lieutenant or Chief Governor(s) could then direct that the person be remitted to prison or, if the period of custody had expired, could order that the person be discharged. Under the Lunatic Asylums Act, 1875,⁷³ section 10, it was stated that if,

⁷⁰ White Paper, para.7.18.

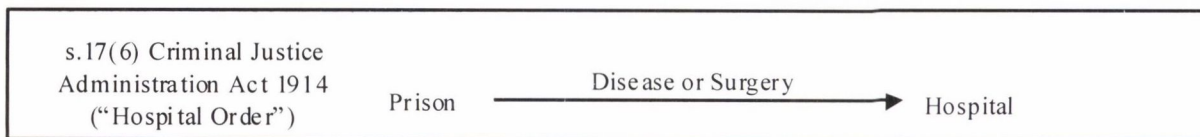
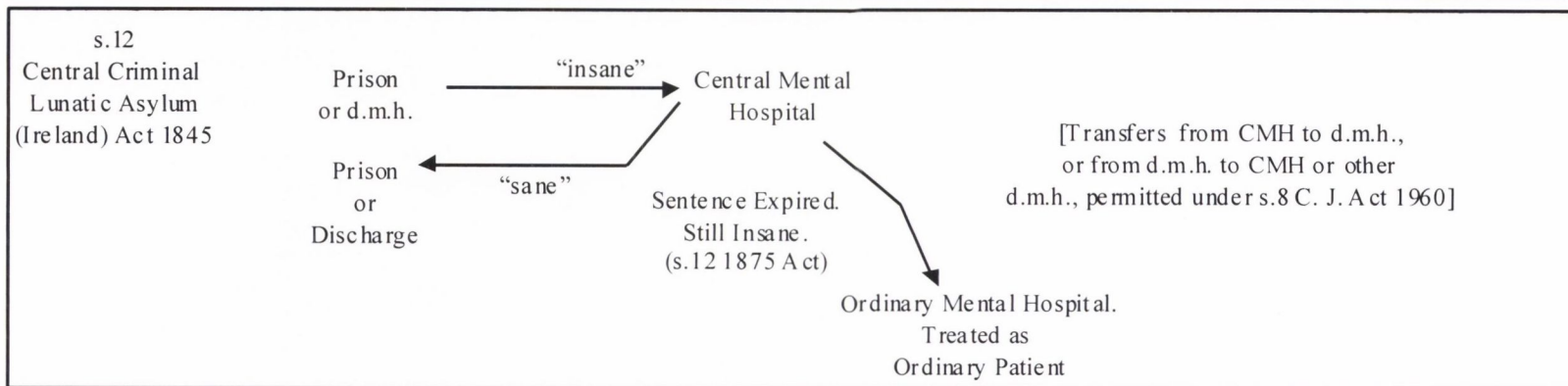
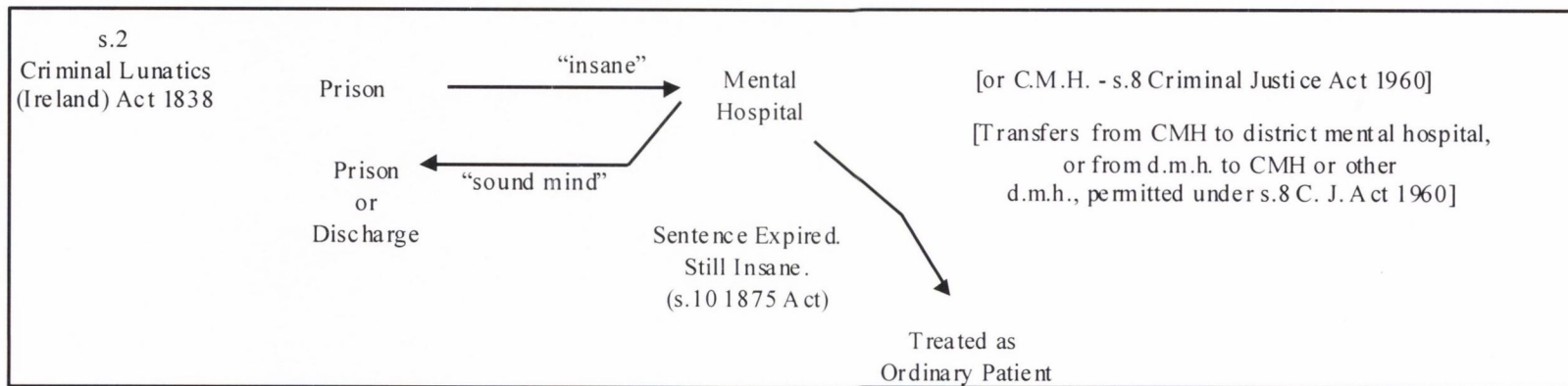
⁷¹ 1 & 2 Vic., c.27.

⁷² This was confined to ordinary lunatic asylums, i.e. mental hospitals. It did not extend to the Central Mental Hospital, which was not set up until 1845.

⁷³ 38 & 39 Vic., c.67.

TRANSFERS

Prisons to Mental Hospitals - People under Sentence



the person had been removed from a gaol to an asylum under the 1838 Act, he or she had not been certified to be of sound mind, and his or her sentence had expired, he or she should be regarded and treated in all respects as if he or she had been admitted into the asylum as an ordinary patient.⁷⁴ The governors of the asylum, in their discretion, could discharge the patient or place him or her in the care of his or her friends in the same manner as any ordinary patient. The powers in the 1838 Act were expressly saved by the Mental Treatment Act, 1945.⁷⁵

Section 12 of the Central Criminal Lunatic Asylum (Ireland) Act, 1845,⁷⁶ stated that if a person was under a sentence of imprisonment or transportation in a gaol or lunatic asylum, and two doctors certified that he or she was insane, the Lord Lieutenant could direct that the person be removed to the central criminal lunatic asylum so long as the person remained subject to be continued in custody or until certified to be sane. If the person was certified to be sane, the Lord Lieutenant could remit the person to the prison or could discharge the person if he or she was entitled to discharge. These powers were saved by the 1945 Act.⁷⁷

⁷⁴ Under s.38(1) of the Mental Treatment Act 1961, the person is to be treated as if he/she were received into the mental hospital as a person of unsound mind under the 1945 Act.

⁷⁵ S.284 Mental Treatment Act 1945. Also expressly saved by the Health (Mental Services) Act, 1981, which has never come into operation.

⁷⁶ 8 & 9 Vic., c.107; reproduced [1977] IR 90 at 96.

⁷⁷ S.284 Mental Treatment Act 1945. Also expressly saved by the Health (Mental Services) Act, 1981, which has never come into operation.

Section 12 of the Lunatic Asylums (Ireland) Act, 1875,⁷⁸ dealt with the situation where a person was confined in the central criminal lunatic asylum, had not been certified to be of sound mind, and whose sentence had expired. The Lord Lieutenant could order that the person be removed to a district lunatic asylum. The person would then be treated as an ordinary patient⁷⁹ and could be discharged by the governors in the same manner as any ordinary patient. The powers in s.12 of the 1875 Act were saved by the 1945 Act.⁸⁰

Section 17(6) of the Criminal Justice Administration Act authorises prisoners with “disease” to be transferred to a hospital, and this section was saved by the 1945 Act.⁸¹

Two of the above powers were extended by s.8 of the Criminal Justice Act, 1960. A warrant under s.2 of the 1838 Act could, at the discretion of the Minister for Justice, order the removal of the person to the Central Mental Hospital or to any district mental hospital. Where a person is detained under s.2 of the 1838 Act or s.12 of the 1845 Act, the Minister may direct the transfer of the person either from the Central Mental Hospital to a district mental hospital or from a district mental hospital to the

⁷⁸ 38 & 39 Vic., c.67.

⁷⁹ Under s.38(2) of the Mental Treatment Act 1961, the person is to be treated as if he/she were received into the mental hospital as a person of unsound mind under the 1945 Act.

⁸⁰ S.284 Mental Treatment Act 1945. Also expressly saved by the Health (Mental Services) Act, 1981, which has never come into operation.

⁸¹ s.284 Mental Treatment Act 1945. Also expressly saved by the Health (Mental Services) Act 1981, which has never come into operation.

Central Mental Hospital or another district mental hospital. It has been stated that these extended powers of the Minister are “awkward” as they require the signature of two medical officers and further necessitate de-certification of the patient when he or she is fit for discharge or transfer back to prison.⁸²

Section 2 of the 1838 Act was cited by the Minister for Justice as authority for a transfer from Mountjoy Prison to the Central Mental Hospital in *State (O.) v O'Brien (Children Act case)*.⁸³ Walsh J. said that it was “disturbing” that O’s detention in Dundrum had continued for so long and he recommended a change in the law so that a person like O. could be transferred to an ordinary mental hospital after the expiration of what would have been regarded as the ordinary period of imprisonment if he had not become insane.⁸⁴ Section 12 of the 1845 Act was referred to in passing by Walsh J. in *State (C.) v Minister for Justice*.⁸⁵

Brendan O’Donnell, who was convicted of three murders and whose insanity defence was rejected, was moved back and forth between prison and the CMH after he was convicted. He died in the CMH in 1997.⁸⁶

⁸² Ibid., pp.14-15.

⁸³ [1973] IR 50. See above, chapter 4.

⁸⁴ [1973] IR 50 at 66. For a recent case involving 28 years detention in an English special hospital and an extradition application from Ireland back to that hospital, see *In Re Varga: Varga v O’Toole*, High Court, Morris J., 31 July 1998.

⁸⁵ [1967] IR 106 at 121-2.

⁸⁶ *Irish Times*, 25 July 1997. Earlier it was reported that O’Donnell told Gardaí that he met John Gallagher during his time in Dundrum, and Gallagher had

SECTION 12 OF THE 1845 ACT

Section 12 of the 1845 Act (as extended) has been the subject of two court cases. In *State (Murtagh) v Governor of the Central Mental Hospital*⁸⁷, the applicant questioned the right of the Minister for Justice to exercise the powers laid down in the section, which had originally been granted to the Lord Lieutenant. In a terse one page judgement, Ó Dálaigh CJ dismissed the application for habeas corpus, stating that a similar question had arisen in *State (C.) v Minister for Justice*.⁸⁸ In the *C.* case, the Supreme Court had concluded that there was no room for doubt that the Minister for Justice now exercised the powers of the Lord Lieutenant in relation to s. 13 of the Lunatic Asylums (Ireland) Act 1875. The power conferred by that section was similar to the power conferred by the section at issue in the instant case, and by the same chain of transmission the latter power was now exercisable by the Minister for Justice. Unfortunately it is not clear from the judgement whether Murtagh made any argument as to who else should exercise the power in the section. It could, for example, be argued that the power should be exercised by the courts rather than by the Minister for Justice, or that s. 12 involved an unconstitutional exercise of judicial power by the executive. It could even be argued that the Minister for *Health* should exercise the power, as the Provisional Government (Transfer of Functions) Order

told him how to feign mental illness to convince doctors he was insane - *Irish Times*, 3 April 1996.

⁸⁷ Supreme Court, 12 November 1968.

⁸⁸ [1967] IR 106. Ó Dálaigh CJ refers to his own judgment at p. 117 and Walsh J at pp. 118-9.

1922⁸⁹ assigned the administration of lunatic asylums (including the Central Mental Hospital) to the Ministry of Local Government, part of which later became the Department of Health.

Reference was made to the contempt of court case of *State (H.) v Daly*⁹⁰ in the previous chapter. It will be recalled that the applicant had been the defendant in Circuit Court civil proceedings taken by his brother concerning ownership of lands. The Court ruled against H. in these civil proceedings and this was confirmed on appeal, but because he had a deep-seated condition of paranoia, H. disobeyed the order. The Circuit Court judge committed H. to prison for civil contempt. Twelve days later, the Minister for Justice made an order under s. 12 of the 1845 Act transferring H. from prison to the Central Mental Hospital. After a year in Dundrum, H. applied to the High Court for his release under the habeas corpus procedure, and also argued that s. 12 of the 1845 Act was unconstitutional.

The High Court and Supreme Court made a number of comments on s.12 of the 1845 Act. O'Higgins C.J. noted that no question arose with regard to the transfer from the Lord Lieutenant to the Minister for Justice of the powers in the section.⁹¹ The Chief Justice also considered whether H. had been in prison under a "sentence of imprisonment", as is required under the section. Perhaps the power of transfer in s.12

⁸⁹ Statutory Rules and Orders, UK, 1922, No. 315, 1 April 1922.

⁹⁰ [1977] IR 90

⁹¹ O'Higgins CJ at p.97. At p.91, the case reporter notes the Supreme Court's decision in *State (Murtagh) v Governor of Central Mental Hospital*, 12

only applied to those who have committed criminal offences, whereas H. had been imprisoned for civil contempt. O’Higgins C.J. held that even though the marginal note of s.12 referred to “convicts,”⁹² any person under a sentence of imprisonment (including imprisonment for civil contempt or attachment for debt) could be transferred under it. It is questionable whether imprisonment for civil contempt is a ‘sentence of imprisonment’ and on balance it would have been preferable if the benefit of the doubt had been given to the applicant in this case.

It was only in the High Court that any reference was made to when H’s custody might come to an end under the legislation.⁹³ In assessing Finlay P’s analysis, it is important to remember that in 1875 a very specific addition to the 1845 legislation was made. The 1875 Act dealt with the situation where a person was confined in the Central Mental Hospital, had not been certified to be of sound mind and whose sentence had expired. the Lord Lieutenant could then order that the person be removed to a district mental hospital.⁹⁴ While this power is discretionary (“It shall be lawful ...”) its existence demonstrates that it was expected that if a person’s sentence had expired he or she should not remain in the CMH but could go to an ordinary mental hospital. There is no reference anywhere in Finlay P’s judgment to this

November 1968.

⁹² The word ‘convicts’ does not in fact appear in the marginal note of s.12 of the 1845 Act.

⁹³ In the Supreme Court, O’Higgins C.J. merely states that he agrees with Finlay P. on the arguments about the statutory provisions, although the Chief Justice says he agrees “for the reasons given earlier in this judgement” (i.e. the question of whether s.12 applied to a civil contempt) rather than necessarily endorsing Finlay P’s analysis of the legislation (p.98).

⁹⁴ s.12 Lunatic Asylums (Ireland) Act 1875, 38 & 39 Vic., c.67.

section. Instead, the President states that even if H. purged his contempt, he “could not be released from his present detention in the Central Mental Hospital” until he had recovered from his mental condition.⁹⁵ This is contrary to what appears in the 1875 Act. It is conceivable that Finlay P. believed that a possible move from Dundrum to a district mental hospital was insignificant because it did not involve a complete “release” , but it is more likely that he was not aware of the existence of s.12 of the 1875 Act at the time of his judgment. The relevant section of the 1875 Act was definitely cited to the Supreme Court,⁹⁶ so it is regrettable that that court did not explain how it affected the case and whether knowledge of its existence necessitated a reassessment of Finlay P’s analysis of the legislation.

Finlay P’s analysis depends to a large extent on reading s.12 of the 1845 Act in isolation. The section refers to the consequences if the patient recovers while in the Central Mental Hospital, so Finlay P. concludes that if the patient does not recover, his or her detention in Dundrum continues. The President says that this detention continues in just the same way as a person may be similarly detained against his or her will under the provisions of the Mental Treatment Act 1945.⁹⁷ However, Finlay P. seems to neglect the fact that the patient is being detained in the Central Mental Hospital, and that this detention is different from detention in an ordinary mental hospital. Later in his judgment, in addressing the constitutional issues, Finlay P. made the remarkable statement that H. was not in fact serving a prison sentence and

⁹⁵ [1977] IR 90 at 94.

⁹⁶ [1977] IR 90 at 95.

that his detention in Dundrum was not dependant on any court order.⁹⁸ Again, this would appear to conflict with the fuller picture of s.12 of the 1845 Act which emerges when one reads it in conjunction with s.12 of the 1875 Act. The “prison sentence” does not cease when a transfer to the Central Mental Hospital takes place. Otherwise, it would be impossible to refer to an expiry of the “sentence” (as in s.12 of the 1875 Act) or even to refer to the sending back of the patient to prison if the patient recovers and the person is not entitled to his or her discharge (in the original s.12 of the 1845 Act).

H’s counsel also made two other constitutional arguments. Firstly it was argued that H. was suffering a period of imprisonment removed from the supervision of the court. It is not clear what constitutional article counsel cited as being infringed by this state of affairs. Perhaps this was an argument based on separation of powers and *State (C.) v Minister for Justice*. Finlay P. addresses the argument by making the statement already given above (that H. is not serving a prison sentence and his detention is not dependent on any court order) and concludes that there is no necessity for the court to supervise H’s detention otherwise than by the habeas corpus enquiry under Article 40 of the Constitution, which was then being conducted.

Secondly, counsel argued that there was an unconstitutional discrimination in the mental treatment legislation between persons detained in ordinary mental hospitals and those detained in the Central Mental Hospital, as the Inspector of Mental

⁹⁷ [1977] IR 90 at 94.

⁹⁸ [1977] IR 90 at 95.

Hospitals is obliged to report on the legality of the detention of a person in an ordinary mental hospital, but this is not one of the matters on which the inspector must report when sent by the Minister for Health to examine a person detained in the Central Mental Hospital.⁹⁹ Finlay P. answered this argument by referring to H's right to make a habeas corpus application and to the power of the President of the High Court to send an inspector to report on any matter concerning a person detained in any mental institution, including the Central Mental Hospital.¹⁰⁰ Finlay P. concluded that the distinction in detail between the matters on which the inspector should report, referred to by counsel, did not discriminate against H., nor did it affect his constitutional rights, nor was it a failure to protect and secure to him his personal freedom. The Supreme Court did not deal with these two constitutional arguments.

SECTION 12 OF THE 1875 ACT

In *State (O.) v O'Brien (Children Act case)*,¹⁰¹ where the patient had been sentenced

⁹⁹ Perhaps this refers to s.239 of the 1945 Act, where the Inspector of Mental Hospitals becomes of opinion that the propriety of the detention of a patient requires further consideration and reports this to the Minister. The Minister may then require the Inspector of Mental Hospitals to visit the patient and make a report on his or her mental condition. The Minister may later order the patient's discharge. This might be contrasted with s.248 concerning recovery of "inmates" at the Central Mental Hospital. See discussion of patients' rights in the Central Mental Hospital in chapter 2 above. Furthermore, the words used by Finlay P concern examinations made by the Inspector of Mental Hospitals at the instance of the Minister for *Health* in each case, whereas s.248 concerning the Central Mental Hospital applies to a report by the Inspector to the Minister for *Justice*.

¹⁰⁰ s.241 Mental Treatment Act 1945.

¹⁰¹ [1973] IR 50.

to be detained “until the pleasure of the Government be made known” and had later been transferred to the Central Mental Hospital, Walsh J. commented in passing that if he had been sentenced to a term of years and had then become insane, he could not have been detained in the Central Mental Hospital after the period of his prison sentence and cited s.12 of the 1875 Act as authority for this proposition.¹⁰² It is possible that Walsh J. failed to notice that s.12 is phrased in discretionary terms (“It shall be lawful ...”) but it is also possible that he wished to clarify that he thought that in reality it would not be possible for the State to justify not exercising the power in s.12 of the 1875 Act to remove the person to an ordinary mental hospital once a sentence had expired. In other words, Walsh J. may have believed that while s.12 of the 1875 Act is phrased in discretionary terms, it should be interpreted as being mandatory.

Proposals for Reform:

The Henchy Committee proposed the Minister for Justice could transfer a prisoner to a designated centre if two medical officers¹⁰³ certified that the prisoner was, by reason of mental disorder, in need of in-patient treatment there.¹⁰⁴ In the case of a prisoner serving a sentence, the transfer would be for a period expiring not later than the

¹⁰² [1973] IR 50 at 65-6.

¹⁰³ An approved medical officer and a medical officer of the prison in which the prisoner is detained.

¹⁰⁴ Henchy Committee draft Bill, s.24.

unexpired period of his or her sentence, but at the end of the sentence the detention could be extended by the President of the High Court provided the mental disorder continued and the person would be dangerous if released.¹⁰⁵ The person so transferred could apply to the Review Body for a review of his or her detention.¹⁰⁶ The Committee also recommended that the Minister could, if he or she considered it necessary that a prisoner be psychiatrically assessed, transfer the prisoner to a designated centre for that purpose on the advice of a prison medical officer.

The White Paper referred to difficulties in effecting transfers from prisons to the CMH and said that a Working Group had made recommendations on the issue. Prisoners convicted of serious offences would continue to be sent to the CMH and to other special psychiatric facilities when available. Those convicted of minor offences might be transferred to other approved centres. As at present, the prisoner would return to prison on recovery. If his or sentence expired while in hospital, detention could only be continued under the provisions for civil commitment.¹⁰⁷

Temporary Release for Prisoners transferred to Mental Hospitals

Temporary release for prisoners transferred to mental hospitals is provided for by s.3

¹⁰⁵ Ibid., s.26. The President of the High Court could also extend the detention of a person with violent personality disorder in a special unit beyond the end of his or her sentence - s.28.

¹⁰⁶ Henchy Committee draft Bill, s.22.

¹⁰⁷ White Paper, paras. 7.28-7.31, 7.41.

of the Criminal Justice Act 1960.¹⁰⁸ Section 3 only permits such temporary release if, in the opinion of the Resident Physician and Governor of the CMH, the person is not dangerous to himself, herself or others.¹⁰⁹

The Justice FOI s.16 Book says that a number of factors are taken into account when considering temporary release, including the medical recommendation, form of current medication (“i.e. depot or self-administering”), security issues for the safety of the offender and public safety.¹¹⁰

Section 5 of the 1960 Act rather strangely allows the Minister to suspend the currency of the sentence, if any, of a person temporarily released under s.3.

Statistics

A study of 235 male prisoners in Mountjoy prison found that 4.3% had a major mental illness, 7.2% had other psychiatric diagnoses excluding substance misuse, 19.6% were dependent on illicit drugs, 26.8% were dependent on alcohol and 42.1% had no psychiatric disorder.¹¹¹ No attempt was made to quantify and classify

¹⁰⁸ Section 3 of the 1960 Act applies to any person who is detained in a district mental hospital or in the Central Mental Hospital by warrant, order or direction of the Government or the Minister for Justice and, if the person is undergoing a sentence of penal servitude or imprisonment, whose sentence has not expired.

¹⁰⁹ s.3(2) Criminal Justice Act 1960.

¹¹⁰ Justice FOI s.16 Book, p.92.

¹¹¹ Charles Smith, Helen O’Neill, John Tobin, David Walshe & Enda Dooley,

personality disorder and therefore the proportion of prisoners shown as having a mental disorder was a minimum estimate. Rates of major mental illness were higher than would be expected for the general population. The authors were surprised that the proportion of men with major mental illness was the same in the pre-trial and sentenced groups. Because of waiting lists for admission to the CMH, prisoners might not be able to be transferred there immediately and might have to stay in a strip cell or a padded cell in Mountjoy.¹¹² Health service provision did not appear to be meeting need, and major treatment programmes for alcoholism and other substance abuse were required.

There have also been studies of prison transfers to the CMH between 1983 and 1988.¹¹³ These studies showed 627 male transfers and 99 female transfers in that period. Only 29 male and two female transfers took place by Ministerial order, the others all being hospital orders under the Criminal Justice Administration Act 1914. Mean lengths of stay ranged from 2 weeks to 14 weeks.¹¹⁴ A higher proportion of the female prison population was admitted to the CMH during their imprisonment than

‘Mental Disorders Detected in an Irish Prison Sample’ (1996) 6 *Crim.Behav. & M.H.* 177. Combined totals of pre-trial and sentenced prisoners in Table 1 at p.180.

¹¹² Conditions in these padded cells have been criticised by the Mountjoy Visiting Committee in its *Annual Report 1995* and *Annual Report 1996*. Recently a woman spent 28 days in a padded cell in Mountjoy because the CMH was full - *Irish Times*, 20 March 1998 and 31 October 1998.

¹¹³ Art O’Connor & Helen O’Neill, ‘Male Prison Transfers to the Central Mental Hospital, a Special Hospital, 1983-1988’ (1990) 7 *Ir.J.Psychol. Med.* 118 and ‘Female Prison Transfers to the Central Mental Hospital, a Special Hospital, 1983-1988’ (1991) 8 *Ir.J.Psychol. Med.* 122.

¹¹⁴ No overall mean length of stay is given in the studies. Two weeks was the mean length of stay for females with mania, while fourteen weeks was the mean for females with mental handicap.

their male counterparts. While schizophrenia was the commonest psychiatric disorder amongst the males (31%) with personality disorder second (25%), in the female group personality disorder was the commonest diagnosis (36%) with schizophrenia at only 11%. Many of the transferees had committed only minor offences and the authors believed that new legislation should be enacted to allow prisoners to be transferred to local psychiatric hospitals rather than the CMH.

CHAPTER 6

CONCLUSION

Given that most of the existing legislation on criminal procedure and mental health dates from the nineteenth century, it naturally reflects earlier thinking about the nature of mental disorder and the need to lock the mentally disordered away in asylums for as long as possible.¹ It is therefore not surprising that this legislation is in dire need of reform. The main twentieth century contribution to the field, the Mental Treatment Act 1945, must also be overhauled in light of changes in thinking and increased awareness of human rights.

In a situation where the legislation is so obviously inadequate, attention naturally focuses on the courts and how they have dealt with the issues. As there has been lengthy discussion in each of the chapters of case-law, it is proposed to group the conclusions which may be drawn from this case-law under a number of headings. This will be followed by a general conclusion on the failings of the courts in this area, and proposals for legislative reform.

Conclusions from Case-Law

Unconvincing Judicial Reasoning:

Judgments have often been too short and lacking in detailed consideration of the

¹ Joseph Robins, *Fools and Mad: A History of the Insane in Ireland* (Institute of Public Administration, Dublin, 1986); Mark Finnane, *Insanity and the Insane in Post-Famine Ireland* (Croom Helm, London, 1981).

issues. Even when questions are considered in detail, the courts' reasoning in many of the cases discussed has been unconvincing, and some examples will illustrate this point.

*Gallagher (No.1)*² is unconvincing for a number of reasons. It went against the trend in Irish separation of powers cases, in spite of cogent reasoning to the contrary in the Children Act and *Neilan* cases.³ It paid little regard to the constitutional right to liberty. It led to the establishment of a release system with criteria which are unduly medically-focused on the mental condition and dangerousness of the patient, without any presumption of liberty. *Gallagher (No.1)* reflects general undue judicial deference to the executive's decisions on release, with the judiciary continuing to turn a 'blind eye' to executive interference with the length of sentences. It also leads to the possibility that the executive will be influenced by unsuitable financial or operational considerations.

It was rightly held in *Gallagher (No.2)*⁴ that a patient could not be detained on grounds of dangerousness alone, but when the court held that a personality disorder was enough to justify detention, it was arguably re-introducing dangerousness as a criterion. The court also failed to take decisive action over the Minister for Justice's nine month delay in implementing the recommendation of an advisory committee.

² *Application of Gallagher (No.1)* [1991] 1 IR 31

³ *State (O.) v O'Brien (Children Act case)* [1973] IR 50; *Application of Neilan* [1990] 2 IR 267.

⁴ *Application of Gallagher (No.2)* [1996] 3 IR 10.

The case of *Re Philip Clarke*,⁵ decided in a peremptory manner and with explicit reliance on paternalism nearly fifty years ago, is still used in answer to modern challenges to mental health law.⁶ The potential in Budd J's judgment in *Croke (No.2)* is extinguished by the Supreme Court decision in the same case.⁷ The court adopts a condescending tone. It fails to examine the nature of the administration of justice in detail, and its reliance on *Keady*⁸ is questionable. The Supreme Court closes off avenues of challenge of mental health legislation in the future and in effect overrules parts of the *R.T.* judgment.⁹ On two occasions in the unreported version of *Croke (No.2)* the court makes substantive errors in quoting from the applicable legislation.¹⁰

In *Murray (Crowley) v DPP*,¹¹ the trial had commenced and Murray had been found unfit to plead, yet the court did not order him to be kept in strict custody until the pleasure of the executive be known, as the legislation requires. Rather than sending Murray to Portlaoise Prison, the court ought to have sent him to the CMH, where he could have been given the specialist treatment which he needed.

⁵ *Re Philip Clarke* [1950] IR 235.

⁶ *Application of Gallagher (No.1)* [1991] 1 IR 31 at 38; *Croke v Smith (No.2)* [1998] 1 IR 101 at 112 and 132; David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell, Dublin, 1997), p.185.

⁷ *Croke v Smith (No.2)*, High Court, Budd J., 27 and 31 July 1995; [1998] 1 IR 101 (SC).

⁸ *Keady v An Garda Síochána* [1992] 2 IR 197.

⁹ *R.T. v Director of Central Mental Hospital* [1995] 2 IR 65.

¹⁰ Similarly, Finlay P. fails to note in *State (H.) v Daly* the important changes in the 1845 Act which were made by the 1875 Act.

¹¹ High Court, Denham J., 13 May 1992.

The *Ballinasloe* case¹² allowed the District Court to find a person guilty under s.207 of the 1945 Act, rather than prima facie guilty as required by the section. The Supreme Court rightly held that s.207 was the initial stage of a criminal proceeding which could only be disposed of according to law and said that the District Court should have ordered a remand. But, as it was held that the failure to remand did not invalidate the order, a clear signal was not sent out as to the importance of such remand. In all subsequent cases on s.207, there is no reference to failure to remand the defendant on the charge. If the *Ballinasloe* case had been properly followed, the s.207 procedure would perhaps have been changed long before the *R.T.* case in 1995.

In the *Ardee* case,¹³ the Supreme Court uses deceptive phraseology when it states that the s.207 procedure is “very much ancillary and preparatory.” In fact, s.207 has profound implications for the patient, resulting in a finding that the patient prima facie committed the offence, and detention in the CMH.

Gannon J. says in *Caseley*¹⁴ that remands in custody by the District Court were not part of the judicial function, but this part of the judgment is not convincing. Gannon J’s judgment contains much criticism of the procedures followed by the District Court, but concludes by deciding that the District Court’s last order was in fact valid.

¹² *State (O.) v O’Brien (Ballinasloe case)* [1971] IR 42.

¹³ *State (O.) v. Daly (Ardee Case)* [1977] IR 312.

¹⁴ *State (Caseley) v Daly & O’Sullivan*, High Court, Gannon J., 19 February 1979.

O'Hanlon J. in *O'Connor*¹⁵ recognises that he is not bound by the guidelines in the *C.* case concerning fitness to plead, as they were obiter dicta, but decides to follow them without directly addressing arguments to the contrary which had been made. He fails to confront the problems arising with the application of the guidelines, and relies on the problematic extended remand system provided for by the Criminal Procedure Act 1967. The Supreme Court decision in *O'Connor* is far too short and does not address the issues raised in a methodical way. Finlay CJ gives the impression he is following *C.*, but in fact he puts a new gloss on it.

Ó Dálaigh CJ and Walsh J. were happy in *C.*¹⁶ to see extended remands in the absence of the defendant in the District Court being used in the case of mental disorders. This notion is questionable, particularly when the patient is in custody. There was no reference to *C.* in *Dolphin*¹⁷ and there was no reference to *Dolphin* in *Caseley*.¹⁸ Gannon J. said in *Caseley* equated unfitness to plead with inability to appear before in court due to illness. He appeared to advocate the use of s.207 of the Mental Treatment Act 1945 in all cases of unfitness for trial in the District Court. It is difficult to see how O'Hanlon J. could state in *O'Connor*¹⁹ that *Caseley* threw further light on the procedure to be followed.

¹⁵ *O'Connor v Judges of Dublin Metropolitan District* [1992] 1 IR 387 (High Court); *O'C. v Judges of Dublin Metropolitan District* [1994] 3 IR 246 (Supreme Court, 1992.)

¹⁶ *State (C.) v Minister for Justice* [1967] IR 106.

¹⁷ *Re Dolphin: State (Egan) v Governor of Central Mental Hospital*, High Court, Kenny J., 27 January 1972.

¹⁸ *State (Caseley) v Daly & O'Sullivan*, High Court, Gannon J., 19 February 1979.

¹⁹ *O'Connor v Judges of Dublin Metropolitan District* [1992] 1 IR 387.

Lack of Transparency:

There is a lack of transparency about procedures. The change in court practice in 1972, by which the courts ordered detention “till further order of this Court,” took place privately and without public debate.

Avoidance of ‘Hard’ Questions:

Cases where the insanity defence is raised, or where insanity acquittees apply for their release, receive a great deal of media attention, and this may affect policy in the area, as has been noted in the USA regarding the Hinckley case. For example, Seán Courtney, John Gallagher and Brendan O’Donnell were household names during their trials, as were the people they killed - Patricia O’Toole, Anne and Annie Gillespie, Imelda and Liam Riney, Fr. Joseph Walsh. The courts have had to make decisions in the glare of publicity and amid public concern. No court or Minister wants to be the subject of a media headline stating that they have released a killer early. Presented with a ready route of transferring responsibility to another authority, the courts have enthusiastically restricted the scope of the judicial power in these cases. Any concessions which have taken place have occurred away from public attention, e.g. in the *Neilan* case²⁰ and the advisory committees.²¹ When a patient comes back to the

²⁰ *Application of Neilan* [1990] 2 IR 267.

²¹ The advisory committees sit in private and no information is released about them under the Freedom of Information Act - personal correspondence with Department of Justice, Equality & Law Reform and Office of Information Commissioner, 1999 (ongoing case.)

courts in a high profile case seeking habeas corpus, the courts remind the patient that this is a limited remedy.²²

Barron J. in *Gallagher v Director of CMH*²³ avoided the question whether a personality disorder was sufficient to justify detention, and referred the case back to the executive once more. In *Neilan*,²⁴ Keane J. assesses whether the decision on release fulfils the criteria for the judicial power of the State, and rightly concludes that it does. But the Supreme Court in *Gallagher (No.1)*²⁵ prefers to wash its hands of these cases and consign them into the hands of the executive, which is supposedly better equipped to deal with them.

The Supreme Court in *R.T.*²⁶ did not decide on the constitutionality of s.207 as the State had transferred R.T. back to St. Brendan's. By transferring one patient back to an ordinary mental hospital, the State succeeded in postponing much-needed reforms in transfer procedures. The State probably did not transfer back other patients who were detained in the CMH under s.207.

The Attorney General ought to have been involved at High Court stage in *Ellis*²⁷ and

²² *Application of Gallagher (No.2)* [1996] 3 IR 10.

²³ *Gallagher v Director of Central Mental Hospital*, High Court, Barron J., 16 December 1994.

²⁴ *Supra* n.3.

²⁵ *Supra* n.2.

²⁶ *R.T. v Director of Central Mental Hospital* [1995] 2 IR 65.

²⁷ *Application of Ellis* [1990] 2 IR 291.

Neilan,²⁸ as the constitutionality of a statute was in issue, even if it is a pre-1937 statute. The Attorney General's lack of involvement at High Court level in *Ellis* gave the Supreme Court a perfect excuse, in its eyes, not to deal with the question of release of insanity acquittees.

Lack of Regard to the European Convention:

The European Convention is not mentioned once in all the cases on insanity acquittals, and European case-law is not cited in the limited reports of arguments of counsel.

Some More Positive Case-Law:

Costello P. observed in *R.T.*²⁹ that patients in mental hospitals are weak and vulnerable, so the State's duty to protect the citizen's rights becomes more exacting. He said that the Oireachtas must be particularly astute when depriving such patients of their liberty and must guard against abuse and error, having regard to international standards. It was an abuse of the criminal process to use s.207 solely as a mechanism of transfer.³⁰ Section 207 was also defective because of the lack of procedures for patients to review the Inspector of Mental Hospital's opinion, procure their re-transfer or liberty, or to review their continued detention. The State had failed adequately to

²⁸ Supra n.3.

²⁹ Supra n.26.

³⁰ Contrast O'Higgins CJ in the Ardee case, where he said that s.207 was "eminently fair and just and designed to serve both the common good and the needs of those afflicted with mental illness and disorders."

protect the right to liberty and the lack of new legislation was because “the best was the enemy of the good.”

The Supreme Court in *Croke v Smith (No.1)*³¹ held that, as Croke was a temporary patient at the time, he could not be transferred to the CMH indefinitely under s.208 of the 1945 Act. The failure to extend his detention after six months invalidated his detention and he was therefore released. By way of contrast, in the High Court, Flood J. had held that it was no necessary to extend the six month period and that the various protections in the 1945 Act, while not ideal, were adequate.

Budd J. in *Croke (No.2)*³² said that the certainties implicit in *Clarke* may be diluted with increasing knowledge about the psyche, changing patterns of behaviour, conflicts between psychiatrists as to the nature of mental illness and awareness of the abuses of psychiatric treatment in other countries. Budd J. relied heavily on *R.T.*³³ and held that the lack of review of patients’ detention breached their right to liberty. The Supreme Court in *Croke (No.2)*³⁴ states that proper regular reviews of patients detention by the resident medical superintendent are required and this may lead to future cases being brought, assuming the “adventitious concatenation” of the determined party, the right set of facts, the persuasive lawyer and the perceptive court exists.

³¹ [1994] 3 IR 525.

³² *Croke v Smith (No.2)*, High Court, Budd J., 27 and 31 July 1995.

³³ *Supra* n.26.

³⁴ *Croke v Smith (No.2)* [1998] 1 IR 101.

It is possible to read Finlay CJ's judgment in *O'Connor*³⁵ as a victory for mental patients' constitutional right to liberty, along the same lines as Costello P's later decision in *R.T.* The Supreme Court decision in the *C.*³⁶ case consists of a robust defence of the judicial power, and Ó Dálaigh CJ's language roundly condemns a procedure which was "about as large an intrusion upon a court proceeding as one could imagine."

The courts have from time to time called for legislative reform of these areas. Keane J. said in *Neilan*³⁷ that the insanity defence was in urgent need of statutory reform, and O'Hanlon J. said that *Ellis* highlighted the necessity for the Oireachtas "to examine as a matter of real urgency whether legislation is now needed to define the nature and scope of the plea of insanity and, possibly, of diminished responsibility, as a defence in criminal trials."³⁸ Costello P. also referred to the lengthy preparation of new legislation in *R.T.*³⁹

Unresolved Issues:

Important questions were raised in the first *O'Halloran* case,⁴⁰ but were not resolved in the judgment. It was unclear whether an advisory committee could recommend

³⁵ Supra n.15.

³⁶ *State (C.) v Minister for Justice* [1967] IR 106.

³⁷ Supra n.3.

³⁸ [1990] 2 IR 291 at 295.

³⁹ Supra n.9.

⁴⁰ *O'Halloran v Minister for Justice and Others*, Geoghegan J., High Court, 31 July 1998

that a person be transferred from the CMH to a local psychiatric hospital, or whether a Health Board could be obliged to accept a patient back from the CMH. There was a lack of clarity about the respective roles of the Ministers for Justice and Health in such a case. It was twelve months before the second judgment in the case clarified some of these issues.⁴¹

It is unclear after *C.*⁴² what happens if a person on remand who has been transferred from prison to a mental hospital regains his or her mental health while in the mental hospital. Because of the manner in which the court in *C.* severed the offending part of the relevant section, there is no longer a specific statutory instruction to the Minister to bring the person before the District Court immediately for further preliminary examination.

The courts seem anxious to preserve their powers of imprisonment of contempt of court. There are difficulties where a person is unable to purge their contempt because they are mentally incapable of doing so, and the Supreme Court has also reserved the question in *State (H.) v Daly*⁴³ of whether a mental illness which rendered a person incapable of knowing fully what he or she was doing would be a bar to an order for committal. It is questionable whether imprisonment for civil contempt is a 'sentence of imprisonment' and the benefit of the doubt should have been given to H.

⁴¹ *O'Halloran v Minister for Justice and Others*, Geoghegan J., High Court, 30 July 1999.

⁴² *Supra* n.16.

⁴³ [1977] IR 90.

Lack of Legal Aid:

The Supreme Court does a disservice to the rights of poorer people in the Ardee case⁴⁴ by denying legal aid and restricting the *ratio* of *State (Healy) v Donoghue*.⁴⁵ The Ardee case is inconsistent with other cases on legal aid, and with the general thrust of European Convention case-law.

Other Issues:

The courts have found it difficult to determine exactly how the right to fair trial ought to be applied to the area of fitness to plead. They seek to protect the defendant's right to a fair trial by defining unfitness for trial narrowly, thus allowing the trial to go ahead in most cases. However, it has also been recognised that it is part of the right to a fair trial that the case cannot proceed if the defendant is unfit. It is unwise to 'balance' the right to a fair trial against other rights, as was done in the Canadian case of *Taylor*.⁴⁶

There has been no widening of the legal definition of unfitness for trial, even though the insanity defence criteria have been widened. It is arguable that there should be more frequent use of the courts' function of raising the issue of fitness for trial on their own initiative.

⁴⁴ Supra n.13.

⁴⁵ [1976] IR 325.

⁴⁶ *R. v Taylor* (1992) 77 CCC (3d) 551, 17 CR (4th) 371, 11 OR (3d) 323.

The courts should consider re-activating the judicial discretion which appears to be vested in them by s.17 of the Lunacy (Ireland) Act 1821, whereby they could discontinue their current practice of automatically detaining those found unfit to plead in the CMH and instead hold a proper hearing on the question of whether that detention is warranted. The current practice of automatic detention probably violates the European Convention. It may also be criticised as a “patent illogicality” using Costello P’s reasoning in *R.T.*⁴⁷

The courts should at least take up the suggestion in *Neilan*⁴⁸ that a medical report should be obtained within two weeks so that a person can be set at liberty if he or she has recovered from his or her medical condition.

General Conclusion on Case-Law:

The case-law has shown a general unwillingness by the courts to develop the area of criminal procedure and mental health and to move it on to reflect changing notions of mental health and respect for constitutional and human rights. This failure on the part of the courts contrasts with judicial activism in other areas of law, such as the area of unenumerated rights. The potential of two judgments which showed major signs of improvement in recent years - the *R.T.* case and the High Court judgment in *Croke (No.2)* - has been severely curtailed by the Supreme Court judgment in the latter case.

The courts’ judgments have been internally inconsistent and incoherent, lacked detail

⁴⁷ Supra n.9.

⁴⁸ Supra n.3.

and contained substantive errors at times. The result is a chaotic series of cases which have failed to confront 'hard' questions directly, as dramatically illustrated by the narrow interpretation of separation of powers which has been used in order to avoid responsibility for decisions on release of patients.

These failings may be partly due to increasing workloads of the courts, and a shortage of judicial research assistants, but it is likely that the primary reason for the courts' inadequacies has been a lack of genuine respect for the rights of mental patients, harking back to nineteenth century notions about the need to detain 'dangerous' mental patients for as long as possible. To use the American terminology, this reflects 'sanist' thinking, and also conforms with wide-spread popular myths about mental patients. It reflects general judicial reluctance to interfere with medical decisions, and tacit acceptance of medical fear of 'unnecessary bureaucracy and procedures.' It is also possible that the Irish courts believed that by extending the *McNaghten* rules in *Doyle*,⁴⁹ they had shown sufficient regard for changes in definitions of insanity, and that after that there was no need to develop the substantive law in related areas of criminal procedure.

The intransigence of the judiciary appears to be so immutable that it can now only really be resolved by fresh legislation on criminal procedure and mental health, combined with comprehensive judicial training on its application.

⁴⁹ *R v McNaghten* (1843) 10 Cl. & F. 200; 4 St. Tr. (ns) 847. *Doyle v Wicklow County Council* [1974] IR 55.

Proposals for Legislative Change

In each of the chapters above, proposals for change in legislation were reviewed and in general welcomed, with reservations on particular points as appropriate. In general terms, the Henchy Committee report, the Fianna Fáil Bill of 1996 and the White Paper contain useful proposals which would redress many of the problems which have been highlighted. What is most reprehensible is the slowness of governmental action in these areas, which probably reflects the perception that ‘there are no votes in mental health law’, the lack of media attention given to this area except in high profile cases of violence, and politicians’ fear of public reaction to unpopular decisions to release certain patients.

In formulating new legislation, there ought to be much closer co-ordination between the Departments of Health and Justice, and perhaps a final decision ought to be made to transfer primary responsibility to the Minister for Health, with secondary consultation with the Minister for Justice on some points. One of the interesting features of European human rights case law is that it emphasises a person’s primary status as a mental patient rather than as a person who is before the criminal courts. It is arguable, in fact, that there should be more convergence of the approaches towards mental health in civil and criminal matters, and the White Paper alludes to this. The rights of mental patients should not be lost in ‘turf wars’ between Government Departments.

The criteria for fitness to plead need to be stated in legislation, and should be extended beyond traditional cognitive criteria to focus on ‘decisional incompetence,’ whatever its source. This would mean that it would also apply in appropriate cases of

personality disorders and amnesia at the time of trial. There should be a 'trial of the facts' procedure in cases of unfitness to plead, but the 'optional extra' model proposed in the 1996 Bill should not be adopted. The proposal to postpone the issue of fitness for trial until the prosecution case has ended conflicts with the right to a fair trial and would be unnecessary if a proper 'trial of the facts' were introduced. The new statutory procedure concerning fitness to plead should include District Court cases, with restrictions on the power of extended remand in the case of illness. Detention following a finding of unfitness should not be automatic, there should be regular reviews by a review body, and release should be a matter for the courts or an independent tribunal.

Sections 207 and 208 of the 1945 Act need to be replaced by a system of transfers to the CMH permitted only by a Review Body, with the possibility of an appeal to the courts. The principle of treatment in the least restrictive environment⁵⁰ should be enshrined in the legislation. Transfers from prisons to mental hospitals ought to be dealt with in a similar manner.

Procedure following an insanity acquittal should not involve automatic detention in a mental hospital. There ought to be automatic periodic reviews of detention, with decisions on release being made by the courts or an independent tribunal. The Minister for Health needs to be empowered to order transfers from the CMH to ordinary mental hospitals. The burden of proof should be reformed and the question

⁵⁰ Principle 9.1 of UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991.

of insanity in contempt of court cases specifically addressed.⁵¹

A new Ombudsman for Mental Health needs to be appointed, whose office would keep mental health legislation under review, ensure that patients' rights in mental hospitals are respected, deal with complaints from mental patients, and organise regular inspections of mental hospitals. Patients' representatives should sit on hospital committees. A guardian *ad litem* service for mental patients should be provided, and the proposed Human Rights Commission should also be involved in assisting patients who allege breaches of their human rights. Support for people killed or injured by people with mental disorders would also need to be formalised.⁵²

* * *

It is ironic that in the dichotomy between legal and medical approaches to criminal procedure and mental health, the courts, which ought to be fighting to preserve the legalistic perspective, have profoundly failed to protect mental patients' rights. If a legal system is to be judged on the way in which it treats its weakest citizens, the treatment of mental patients has serious implications for Ireland's claims to be a modern, democratic society. Comprehensive legislative reform, co-ordinated

⁵¹ Although it is outside the scope of this thesis, a defence of diminished responsibility should also be introduced.

⁵² The State obviously owes a duty to the people killed or injured by people with mental disorders, their families and other people involved, to ensure that justice is done. The State must also provide a highly professional level of support and sensitivity to everyone involved. The courts have rightly ruled that people involved in these cases are not entitled to separate legal representation, as this would cause an unfair imbalance against the patient (*Application of Maguire* [1996] 3 IR 10.) But this should not in any way diminish the care with which the State handles these cases.

Conclusion

between the Departments of Health and Justice, is now long overdue and ought to be enacted without any further delay.

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