Mag19

Written Ruling handed down at Strabane Petty Sessions on 16th April 2002.

Third Party Disclosure; application in respect of all relevant papers held by The Compensation Agency; sought for the purposes of cross-examination; whether the provisions contained in S. 51B of The Judicature (NI) Act 1978 apply to Magistrates' Court proceedings; whether, in the alternative, the power to issue a witness summons in the Magistrates' Courts can be used to obtain advance discovery.

A WALLACE	Complainant	
PAUL DEVINE	Defendant	
A WALLACE	Complainant	Petty Sessions District of Strabane
KIERAN KELLY	Defendant	County Court Division of Fermanagh and Tyrone
A WALLACE	Complainant	
ROGER ALEXANDER McLAUGHLIN	Defendant	

Ruling on Applications for Third Party Disclosure

These 3 cases are each the subject of an Application for Third party Disclosure. In each case the defendant is charged with an indictable offence. In each case the defendant, on 13th December last, elected for summary trial and pleaded not guilty. Paul Devine is charged with unlawfully and maliciously inflicting grievous bodily harm upon Padraig Martin Harvey; contrary to Section 20 of the offences Against the Person Act 1861; Kieran Kelly is charged in the same terms, each of those two accused being charged with having committed the offence along with the other, while Roger McLaughlin is charged with assault occasioning actual bodily harm upon Aaron Harvey, contrary to Section 47 of the offences Against the Person Act 1861. The incidents giving rise to these charges are all stated to have occurred on 12th November 2000 in this County Court Division.

In the case of Kieran Kelly, there is a written Notice of Application dated 13th February 2002, lodged with the Chief Clerk at Strabane and, evidently, served upon both the DPP in Omagh and The Compensation Agency.

I was informed on 21st February, on behalf of Kieran Kelly, that if I saw fit issue an order for advance production against the Compensation Agency the relevant documents would thereupon be forthcoming and that such an order was perfectly routine.

In the cases of Paul Devine and Roger McLaughlin the defendants' solicitors filed with the Clerk of Petty Sessions identical letters from the Compensation Agency dated 21st February 2002, in reply to a request dated 15th February, and stating that Padraig Harvey (a minor) and Aaron Harvey (a minor), respectively, had each made a (criminal injury) claim and that "full disclosure" would be given "once we have received an order to do so." My understanding is that this paperwork was deemed to be an application to the court for third party disclosure and that those matters were listed before me on that basis, married up to the more formal application in respect of Kieran Kelly.

The Notice on behalf of Kieran Kelly is preambled with the words;

> PURSUANT TO Section 51A & 51B of the Judicature (NI) Act 1978 (inserted by Section 66 of the Criminal Procedures and Investigations Act 1966) AND Article 118 of the Magistrates' Court Order 1980.

In formalized terms, the Notice intimates an application that both the DPP and "the following parties" make disclosure of, basically, anything they may have "relating to Padraig Harvey" and

> (a) The stipulated evidence, document or thing is any document or form or medical report howsoever described containing any account of the alleged injured party of the alleged assault and any record of the medical treatment or condition of the injured party in the custody, power or control of the Compensation Agency, regarding the alleged incident on 12th November 2000.
> (b) It is submitted that any account or history of the alleged assaults is material evidence containing potential material for cross-examination on the basis of a previous inconsistent history or statement and the credibility of the injured party.
> (c) The applicant considers that all directed Departments, bodies or persons will not voluntarily attend or proffer a witness or produce the documents in question. In the experience of the Solicitor involved that it is not the normal practice for such documentation to be provided consensually by the directed Departments, bodies or persons in light of the question of confidentiality.

> The directed persons or agencies should take notice that the applicant seeks advance production of the documentation under Section 51b of the Act on 21st February 2002 at 10.30 am at the Magistrates' Court sitting at Strabane.

The Notice was addressed to the DPP, the Compensation Agency and to the Clerk of Petty Sessions. The application is supported by an affidavit of Michael Fahy, partner in the firm of P. Fahy & Co., the solicitors on record. In the body of the affidavit it is averred;

> It is believed that the said documentation is material as potentially providing material for use in cross-examination relating to the question of a potentially inconsistent history or statement and the credibility of the injured party.

In the course of ensuing submissions in respect of the matter, it has been conceded by all concerned that Section 51A & 51B of the Judicature (Northern Ireland) Act 1978, as added by Schedule 4, paragraph 28 of the Criminal Procedures and Investigations Act 1966, has no bearing whatsoever upon proceedings in the magistrates' courts, but is concerned exclusively with crown court procedure.

It must follow that the application, as framed, is entirely misconceived, in that no disclosure order could issue from a magistrates' court under the Judicature (Northern Ireland) Act 1978.

The only relevant statutory provision, so far as this court be concerned is Article 118 of the Magistrates' Court (Northern Ireland) Order 1981 (the 1981 Order), the relevant paragraphs of which read;

> *Summons to witness or warrant for his arrest*
> 118. – (1) Where a justice of the peace is satisfied that any person is able to give material evidence or produce any document or thing before a magistrates' court, he may issue a summons directed to such person requiring him to attend before the court at the time and place appointed in the summons to give evidence or to produce the document or thing.
> …
> (3) Upon failure of any person to attend before a magistrates' court in answer to a summons under paragraph (1), if-
> (a) the court is satisfied by evidence on oath that he is likely to be able to give material evidence or produce any document or thing likely to be material evidence in the proceedings; and
> (b) it is proved on oath or by affidavit or in such other manner as may be prescribed that such summons was duly served upon such person or that he is evading service and that he is able to give material evidence; and
> (c) no just excuse has been shown for such failure to attend;

> a justice of the peace may issue a warrant to arrest him and bring him before a magistrates' court to testify and to produce such documents or things as may be required.
> (4) Where a person is arrested upon a warrant issued under this Article he shall be brought, as soon as practicable, before a magistrates' court which may, if desirable, discharge such person upon his entering a recognizance to appear before that or any other magistrates' court at the time and place specified in the recognizance and, if necessary, to appear at every time and place to which during the proceedings the hearing may be adjourned.

During fuller submissions upon this matter on 1st March, and specifically upon the terms of paragraph (1) of Article 118 of the 1980 Order, Mr. McStay of counsel, instructed on behalf of Kieran Kelly, highlighted the words "… at the time and place appointed in the summons …". With evident support from counsel appearing on behalf of the DPP, he reasoned that these words were wide enough to allow for such a witness to be required to attend to produce documents and give evidence at an advance date (by which I mean ahead of the scheduled trial of the matter). Mr. McStay also referred me to the judgment of Girvan J in R v O'N and Another [2001] NI 136.

There followed a stimulating discussion as to how, on the premise that Article 118 could or should be interpreted widely enough to afford an equivalence in magistrates' court practice to the procedures laid down in the Judicature (Northern Ireland) Act, section 51B, and Crown Court Rules one might then have the summonsed party produce material to the magistrate, who could then examine it and direct what items should be disclosed to the defence.

I must confess that I saw some force behind this argument at that time, when considered in the context of Section 3 of the Human Rights Act 1998;

> 3. *Interpretation of legislation*
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
> (2) This section—
> (a) applies to primary legislation and subordinate legislation whenever enacted;
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

In R v O'N and Another [2001] NI 136, Girvan J reviewed the history of legislative provision in respect of disclosure by third parties in criminal trials. I will return to the helpful detail supplied in the course of that judgment in due course. At this juncture, though, one might recall that passage where the learned judge articulated cause to place a liberal interpretation upon the legislative framework, having regard, in particular, to the Convention rights of an accused person (at page 149 et sequi.);

> In a case of alleged sexual abuse the Crown case may often be based largely or solely on the allegations of one or more complainant whose evidence may require serious investigation and testing cross-examination. Without the defendant having a full opportunity to do so fully and fairly the jury may put too much weight on the evidence of the complainant. As already noted often highly relevant material and information (or in laymen's terms 'evidence') may be in the hands of third parties such as social workers, health and social services bodies and agencies, medical practitioners and psychiatrists. If the Crown in the course of a properly exhaustive investigation gained access to material from such third parties that material would be subject to the Crown's disclosure duties. If the Crown had not obtained such information then it cannot disclose any such information or material to the defendant but such material may be highly relevant to the defence and may contain evidence of inconsistent allegations, admissions by complainants that abuse was committed by other persons or evidence that the complainant has a psychiatric or other mental or emotional problem. Yet, those materials may well never come to light or may only come to light at a later stage after the defendant has been convicted (as has happened in a recent case in the Court of Appeal). Giving the provisions of ss 51A et seq the restrictive interpretation which would follow from an application of the approach in *R v Derby Magistrates' Court* a defendant would be unable to establish that the third party is 'likely' to produce a document 'likely to be material evidence' admissible as evidence as such at the trial. What the defendant may well be able to establish is that an identified third party is likely to have possession of documentary matter likely to be material to the defence in their preparation of his defence of the charges.
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> There are a number of factors that lead to a conclusion that a different approach is now called for in the construction and application of ss 51A et seq from the approach adopted under the prior legislation as a result of the Convention and as a result of the overall structure of the provisions.

Further, Girvan, J set out the relevant obligation upon (any) court) (page 154);

> Section 6 of the Human Rights Act 1998 renders it unlawful for a public authority including a court to act in a way which is incompatible with the Convention right. That however does not apply if as a result of primary legislation the court cannot act differently or if the court has no alternative but to interpret and apply the primary legislation in a way which is

> incompatible with the person's individual Convention rights.

In the particular context of the facts and law involved, the learned judge concluded (page 152);

> Putting the legislation in its full context and reading it in the light of the Convention I conclude that the defendants are entitled to rely on ss 51A et seq to persuade the court to direct the issue of a witness summons to third parties who are likely to be able to produce documents which are likely to contain relevant evidence in the sense of relevant material of potential use to the defendants in the defence of the charge.

In the instance case, I am now urged to adopt much the same approach in response to these 3 applications and to allow the issue of witness summonses (rather than the orders sought under the Judicature (Northern Ireland) Act 1978, as amended), with a return date in advance of trial, in order that I may examine to evidence or material thereby produced to the court.

A closer study of the judgment in R v O'N and Another throws considerable light upon the central issue now squarely before me: *does Article 118 of the 1981 Order allow a justice of the peace or magistrate, whether previously or in light of an "alteration of the legal landscape" to issue a summons against a third party with a view to allowing advance enquiry by the court as to whether that third party is in possession of "relevant" evidence or material* . Indeed, has there been any material alteration of the landscape, so far as magistrates courts be concerned?

R v O'N and Another concerned a trial in the Crown Court of persons charged on a number of counts alleging sexual offences and acts of physical violence against the first defendant's step-daughters. There was apparently a certain amount of confusion as to the proper procedure to be followed in relation to the investigation of potentially relevant third party documentation and conflicting views on the proper practice and law relating to third party disclosure.

In his judgment, Girvan, J makes clear that the position with regard to third party disclosure in England and Wales, whether under Article 97 of the Magistrates' Courts Act 1980, or the Criminal Procedure (Attendance of Witnesses) Act 1965 (in respect of trials on indictment) was previously both reasonably well-settled and quite constrictive.

Girvan, J recalls the case of R v Cheltenham Justices, ex p Secretary of State for Trade [1977] 1 All ER 460 where Lord Widgery LCJ made it clear that it was not open to the defence to obtain a witness summons in a magistrates' court to secure discovery of documents for use in cross-examination.

That much is quite clear from the following passage of Lord Widgery LCJ's judgment (*ibid* at pages 463 to 464);

> In *R v Lewes Justices* the document in question was an original document. It was a document which, if put before the court, would have been evidence in itself to prove the truth of what it said. The documents with which we are concerned in this case are not in that category at all. They are on their face not admissible evidence in the pending proceedings at all. Their purpose and virtue is simply this. If in the proceedings when they take place, that is to say the trial in the Crown Court when it takes place, a witness makes a statement which is contrary to a statement which he has previously made, he may have his attention drawn to that previous statement and be asked to give an explanation of the apparent discrepancy. Anyone with any experience of criminal law knows that if a cross-examiner is well armed with that kind of earlier and contradictory statement by a witness, it can be vital material for cross-examination, but he still has not got in his hand as he approaches the trial a document which is at that time evidence in the forthcoming case at all.
>
> In my judgment it is not really necessary to consider the public interest and any possible balancing of public interest against private interest where the documents in question are not documents which would be evidence in the trial anyway. It seems to me that in those circumstances there can be no possible right for the defendant to demand production and the right to inspect such documents. We all know that it does not happen. We all know that in an ordinary criminal prosecution police are not required to surrender to the defence a copy of the statement every witness has made. Why? Because those statements are not technically evidence at all. I think myself that the short answer to this whole problem is that the documents which the respondent seeks to obtain by virtue of the witness summons will not be documents which are evidence in the case, and that seems to me to be a sufficient answer in itself.

It should be recalled, at this juncture, that I am here concerned with a purported application that the Compensation Agency produce for inspection what must be mere copies of medical reports obtained by an injured party's solicitor solely and exclusively for the purpose of a criminal injury claim and forwarded to the Agency, to that end. Any such medical report, in turn, constitutes, among other things, an account by its author, which may or may not be accurate, of what the injured party said to that author with regard to how he sustained the injuries in question and what those injuries were. That the Agency's copies cannot of themselves constitute evidence is beyond question.

Lord Taylor CJ in R v Derby Magistrates' Court, ex p B [1996] AC 487,[1995] 4 All ER 526 made clear that the lower courts in that case had erred when they concluded that the documents sought were material in the sense of being generally useful and helpful to the defence rather than when they were likely to be material evidence within the meaning of the Act, the Magistates' Courts Act 1980, Section 97, which was the equivalent of Article 118 of the 1981 Order here. Section 97(1) of that English legislation provides;

> 97 *Summons to witness and warrant for his arrest*

> (1) Where a justice of the peace for [any commission area . . .] is satisfied that any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence, . . . at the summary trial of an information or hearing of a complaint by [a magistrates' court for that commission area] and that that person will not voluntarily attend as a witness or will not voluntarily produce the document or thing, the justice shall issue a summons directed to that person requiring him to attend before the court at the time and place appointed in the summons to give evidence or to produce the document or thing.

It is to be noted, in passing, that those words, "… at the time and place appointed in the summons …" also appear in the English legislation governing magistrates' courts and it is not to be supposed that they were previously regarded as allowing for a witness to be required to appear at an advance hearing in order for the court to consider third party disclosure.

Girvan. J continued;

> It was well settled that the court should interpret the provisions of the Criminal Procedure (Attendance of Witnesses) Act 1965 in the same way as the Magistrates' Courts Act 1980 (see *R v Skegness Magistrates' Court, ex p Cardy* [1985] RTR 49 and *R v Clowes and ors* [1992] 3 All ER 440). In *Ex p Cardy* Goff LJ said ([1985] RTR 49 at 56–57):
>
> > 'It will be observed that both in the magistrates' court and in the Crown Court the court has to be satisfied that the person in question is likely to be able to give material evidence or to produce any document or thing likely to be material evidence at the relevant hearing … it is important to bear in mind that, as was emphasised by Lord Widgery CJ in *Greenwich Juvenile Court, ex p Greenwich London Borough Council* (1974) 74 LGR 99 at 104 there is no formal process of discovery of documents in a magistrates' court and *a witness summons must not be issued under section 97 of the Act of 1980 as a disguised attempted to obtain discovery. … Nor can a witness summons be issued under section 97 summoning a person to produce documents at the hearing when the documents are not likely to be material evidence but it is merely desired to have them in court for the purposes of cross-examination* (see *R v Cheltenham Justices, ex p Secretary of State for Trade*). The same principles are in our judgment applicable in the case of an appeal to the Crown Court where likewise there is no formal process of discovery of documents.' (*my emphasis*)

The learned judge continue his review of the pre-1966 case law and found no material difference between the English legislation and the equivalent provisions in Northern Ireland. He concluded that portion of his judgment as follows;

> While it might be argued that the statutory provisions deal only with the production of material admissible *evidence* and would not preclude a separate

> jurisdiction relating to a power to order disclosure of potentially relevant *material* the authorities appear to come down conclusively against any common law power to order disclosure against third parties and on the pre-1996 authorities I conclude *that there was in fact no common law jurisdiction outside the confines of the statutes and in Northern Ireland the relevant rules.* (*My emphasis*)

In is quite apparent from the judgment in R v O'N and Another that the enactment of the Criminal Procedure and Investigations Act 1996 effected a major change with regard to third party disclosure and, equally, that the change was confined to Crown Court proceedings.

> In the case of criminal proceedings ss 51A–51H were inserted into the Judicature (Northern Ireland) Act 1978 under s 66 of the 1996 Act as applied to Northern Ireland by para 28 of Sch 4. Sections 51A et seq contain a statutory code dealing with the attendance of third parties as witnesses at the trial and the production of documents at or in advance of trial.

Article 51B, as thereby introduced, provides as follows;

> 51B *Power to require advance production*
> A witness summons which is issued under section 51A and which requires a person to produce a document or thing as mentioned in section 51A(2) may also require him to produce the document or thing—
> (a) at a place stated in the summons, and
> (b) at a time which is so stated and precedes that stated under section 51A(2) [*i.e., prior in advance of the trial date*], for inspection by the person applying for the summons.

Girvan, J continued (at page 145):-

> Section 51B introduced *for the first time* the concept of a witness summons which could be issued under s 51A requiring a person to produce a document or thing as mentioned in s 51A(2) and also requiring him to produce a document or thing at a place stated in the summons and at a time which is so stated and precedes that stated under s 51A(2) for inspection by the person applying for the summons. This provision thus makes provision for *advance* disclosure of the contents of documents. If as a result of inspection of the documents it is clear that the witness is not required to attend the trial an application can be made to the Crown Court for a direction that the summons shall be of no further effect. (*My emphasis*)

This legislative innovation, together with the Human Rights Act 1998 constitute the "alteration of the legal landscape" on foot of which the learned judge enunciated the more liberal approach to the concept of "evidence, document or

thing likely to be material evidence", with regard to what a third party might be required to produce in advance to the Court, with a view to the Court determining whether all or part might properly be disclosed to the defence, in a balance between the defendant's Convention right to a fair trial and to a third party's Convention right to privacy and confidentiality.

Indeed, one might add that this wider interpretation upon the term "evidence, document or thing likely to be material evidence" gains additional support when one considers the terms of Section 7(2) of the Criminal Procedure and Investigations Act 1996, concerning what material the prosecutor must produce in response to a defence statement under Section 5 or 6, namely

> … any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6

If that is the breath of material to which an accused is now regarded by statute as entitled in Crown Court proceedings, and to which he is also entitled in summary proceedings where he elects to give a defence statement, as regards what the prosecutor holds, (most particularly, material which might assist in the preparation of the defence case and not necessarily material capable of being given as evidence) then it seems only right that the same breath be applied to the definition where legislation allows for third party disclosure.

I can discern no suggestion, though, in the judgment of Girvan J that any of this applies to proceedings in a magistrates' court. It is equally clear from the judgment that the detailed procedures laid down in the Act and Crown Court Rules were to be strictly applied to the defence and that the Court would not direct third party disclosure where those procedures had not been followed, save in the most exceptional circumstances. The learned judge clearly regarded it as intrinsic to the protection of the Convention rights of the third party that it was now for the defence to first satisfy a Court that a summons should be issued, before a third party was put upon to challenge an Order which carried with it serious threat to that third party's liberties, having regard to the provisions concerning contempt. There was clear procedure laid down by the legislation and I do not discern that Girvan, J was in the least inclined to find any residual or inherent power on the Court's part. Thus (at page 147);

> Parliament and the Rules Committee in the 2000 [Crown Court] Rules have set out a detailed procedure to be followed where an applicant seeks an order from the Crown Court requiring a person to attend as a witness or to produce a document or thing that is likely to be material evidence. It is not surprising that the legislation and the Rules are clear and prescriptive in their requirements for disobedience of a witness summons is a contempt of court punishable summarily as if it were a contempt in the face of the court

> and the court may issue a warrant to arrest the witness and bring him before the court. Having regard to the Convention [and] bearing in mind the penal consequences of non-compliance with a witness summons the law must be clear and not arbitrary. The court accordingly should ensure that the terms of the Act and Rules are complied with. Under s 2 of the previous 1965 Act in England and Wales a party was entitled to issue a witness summons out of the Crown Court and out of the High Court and if the person summoned satisfied the court he could not give any material evidence or produce any document likely to be material evidence the court could direct that the summons be of no effect. Under the 1996 Act the applicant must satisfy the court that a person is likely to be able to give material evidence or produce a document or thing which is material evidence before the summons is issued.

In the course of a singularly consensual proposition before me in the instance case, it was suggested that I could and should construe Article 118 of the 1981 Order as wide enough to allow for a third party to be summonsed before me and to produce material documents, so that I might examine same and determine what, if any, ought in fairness be disclosed to the defence. In that context, it is, I think, salutary to keep in mind that passage from the judgment of Girvan, J in R v O'N and Another which appears at page 155;

> If s 51A were given the narrow interpretation it would follow from an application of earlier case law that the dictates of fairness and the Convention might call for the development of a separate jurisdiction by the court outside the framework of s 51A to enable the defendant to gain access to potentially relevant third party documentation. It is questionable, however, whether such a separate jurisdiction would fit easily within the statutory framework created by ss 51A et seq since the ex hypothesi express and limited power conferred on the court under s 51A et seq might negative any other implied and wider power vested in the court. Moreover, the penal powers conferred on the court in s 51G and s 51H would relate to those express and limited powers and a serious question would arise as to whether the court retained other penal powers to enforce 'common law' non-statutory orders for third party disclosure. The question would arise whether Parliament would have seen fit to create a distinct and separate scheme with its own penal consequences while leaving the court to adopt a separate and wider jurisdiction. *Furthermore it may be open to question whether the Crown Court, a creature of statute established under the 1978 Act, could develop a jurisdiction or practice heretofore without a legal basis independently of properly formulated Crown Court Rules made under s 52 of the 1978 Act.* (*My emphasis*)

Well, if the Crown Court is constrained in that way, how much more so is one to regard it as inappropriate to allow oneself to be tempted to begin developing novel rules of practice and procedure for a magistrate's court?

In In re Torney [2000] 1 BNIL 32, the applicant had been convicted of the murder of his family and sought access to medical records of the family from the Central Services Agency, for the purposes of asking the Criminal Cases Review Commission to refer his conviction to the Court of Appeal. Kerr, J held that the applicant's right of access under statute no longer existed as there was not a pending criminal trial (in Crown Court) or appeal, while there was no common law right of access.

Courts, high and low, will consider themselves bound by the terms of relevant empowering legislation. In R v Greene [2000] NI 118, the Lord Chief Justice and Nicholson, LJ had to consider the terms of Section 25(1) of the Criminal Appeal (Northern Ireland) Act 1980. The applicant was in the process of preparing an appeal against his conviction and imprisonment some time previously for indecent assault upon a child. This had been prompted by a communication from the DPP to his solicitors, relaying information which had come to light since the applicant's conviction and sentencing about the alleged victim's history of making and then withdrawing such allegations.

The Police had requested details of such matters from Causeway Health and Social Services Trust, but the Trust declined to disclose any such documents to the Police. Leave to appeal had been granted to the applicant, who had now applied on motion to the Court of Appeal for an order requiring the Trust to deliver certain documents to the applicant's solicitors and " … which appeared to have a possible bearing on the issues in the appeal." (*Ibid.,* per Carswell, LCJ at p.119). The Trust had adopted the attitude, described by Carswell, LCJ as very proper, that it did not oppose the release of such documents to the applicant, but wished the protection of a court order before doing so.

The Court of Appeal in that case found that Section 25(1) of the Criminal Appeal (Northern Ireland) Act 1980 could not be construed so as to read into it a provision for third party disclosure in criminal appeals. Instead, as with the English Court of Appeal, their Lordships would order the production of the documents to the court. They would be produced to the Master (Queen's Bench Division), who would allow the parties to inspect them and take copies and ensure that the originals were available for examination by the court on the hearing of the appeal.

From all the foregoing, I must conclude that I am not free to re-model Article 118 of the 1981 Order so as to create a vehicle for third party disclosure. It is clear that this could not have been the intention of Parliament at the time of that enactment.

It is equally clear that Parliament created a structure for third party disclosure in criminal cases, for both England and Wales and Northern Ireland, under the terms of the Criminal Procedure and Investigations Act 1996. On the other hand, it was manifestly not the intention to introduce that change into summary trials. Just as a defendant in summary proceedings, under the distinct terms of Section 6 of that Act, is not required to make a defence statement (where Section 5 makes it mandatory in Crown Court proceedings), so also Section 66 (for England and Wales) and paragraph 28 of Schedule 4 (for Northern Ireland), concerning third party disclosure relate exclusively to Crown Court.

By the same token, it is the Crown Court (Amendment) Rules (Northern Ireland) 2000, SR 2000/ 227 which lay down the precise procedures for seeking third party disclosure in that court. The papers countenanced thereunder have been presented to this court in relation to Mr. Kelly, without regard to the fact that no such application is countenanced under Article 118 of the 1981 Order. A witness summons in magistrates' courts proceedings is issued by a justice of the peace and the date inserted is that fixed by then for trial.

In this regard, I note the following passage in *Blackstone's Criminal Practice, 2000,* sect. D19.4;

> The power to issue a witness summons is conditional upon the magistrate [in England and Wales, a justice of the peace in Northern Ireland] being satisfied that the witness will be able to give or produce material evidence … Therefore, a summons should be granted only if the applicant can satisfy the tribunal upon that point (*Peterborough Magistrates' Court, ex parte Willis* (1987) 151 JP 785 – summonses obtained by the defence in respect of two police officers quashed by the Divisional Court because the applicant had not been asked the nature of the officers' anticipated testimony and, indeed, had applied for the summons on the basis that it might turn out that the officers could give material evidence, rather than on the basis that they actually had such evidence). Similarly, where the summons is to produce a document or thing, the applicant must bee able to show that the item to be produced would be admissible evidence and not, for example, inadmissible hearsay (*Cheltenham Justices, ex parte Secretary of State for Trade* [1977] 1 WLR 95) or material subject to legal professional privilege (*Derby Magistrates' Court, ex parte B* [1996] AC 487). … In short, the powers given to magistrates under s. 97 may not be used as a means of conducting a fishing expedition or obtaining discovery from the other side when, in truth, the applicant for a summons cannot show that the person he proposes to summon actually has material evidence, as opposed to hoping that something might turn up if the summons were granted (*Sheffield Justices, ex parte Wrigley* [1985] RTR 78, *Skegness Magistrates' Court, ex parte Cardy* [1985] RTR 49 and *Reading Justices, ex parte Berkshire County Council* [1996] 1 Cr App R 239).

For all these reasons, I conclude that none of the accused would be entitled to have a summons issued against an officer of the Compensation Agency.

It is apparent, then, that where an accused has reason to believe that it is necessary to obtain disclosure of material or evidence in the possession of a third party in order properly to prepare his defence the appropriate course is to refuse to consent to the charge being dealt with in a magistrates' court and, instead, to elect for trial by jury in the Crown Court.

John I Meehan, RM
Strabane
16th April 2002