Legal Issues for Creative Arts Therapists 2019

Presentation by Séamus Clarke SC to Irish Association of Creative Arts Therapists (IACAT)

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Contents Page

The Basics – Our Legal System

- The Irish legal system belongs to a family of legal systems known as "common law systems."

- This is the body of law which grew out of centuries of judicial decisions and which has established the major categories into which legal rules are placed.

- Common law is sometimes, inaccurately, referred to as case law, which reflects its significant feature, namely that it is made by judges, not legislators. In contrast, the law in a civil law system is contained in comprehensive codes which are enacted by legislators and which attempt to provide for every legal contingency.

Proceedings

- Inquisitorial - Coroners Court, Tribunals, Inquiries

- Adversarial - Criminal & Civil Courts

Our adversarial system means that:

- to succeed or win your case you must prove it by providing <u>evidence</u>

- all evidence is open to being <u>challenged</u>

Administration of Justice in the Courts.

Article 34.1 provides that justice cannot be administered in any place other than a court established in accord with the Constitution, presided over by a properly appointed Judge and that in general the courts should operate in public. It indicates the separation of powers in Article 6.1 in that judicial power is to be administered separate from the other arms of government, namely the legislative and the executive.

The Courts of Ireland consist of the following:

- The Supreme Court
- The Court of Appeal (Civil and Criminal Divisions)
- The High Court
- The Special Criminal Court
- The Circuit Court
- The District Court

Jurisdiction of the Courts

District Court

Civil – Claims up to €15,000 in damages
Criminal – Summary matters

Circuit

Civil – Claims up to €75,000 in damages (personal injury actions the limit is €60,000)
Criminal – Indictable offences
Deals with appeals from District Court

High

Civil – Unlimited damages in excess of €75,000 generally and €60,000 for personal injuries actions
Criminal – Central Criminal Court – indictable matters as scheduled in specific legislation
Deals with appeals from Circuit Court

Court of Appeal – the Appeal Court from High Court, generally final Court of appeal

Supreme Court – final Court of Appeal on points of exceptional importance or in lieu of the Court of Appeal if so deemed by the Supreme Court – "leapfrog" provision

Jurisdiction of courts: What court to choose?

The jurisdiction of the courts may overlap to a certain degree. The Applicant in civil proceedings must select the court where the proceedings are to be initiated. The choice is influenced by a variety of factors which may include the following:

a. The nature of the issues in dispute and the type of court Orders sought

b. The jurisdictional competence of the court to grant the Order sought

c. The legal complexity of the matter

d. The income and asset position of the parties and the value of any property in dispute;

e. The estimated legal costs to be incurred.

Coroner's Inquests

The **Coroners Court** is governed by the **Coroners Act 1962**. The main function of the Coroner is to conduct a full and sufficient inquiry to establish the identity of a deceased person and the cause of his or her death.

Prior to the inquest the delegated investigation officers, namely the Gardai are responsible for a draft book of depositions under the supervision of the coroner. He is responsible for directing the Gardai as to who he requires to attend at the inquest. He will also decide what documentary evidence is required.

The coroner prior to holding an inquest must decide whether he is legally obliged to hold the inquest sitting with a jury. Originally every inquest had to be held with a jury but this is no longer so. The majority of deaths where the cause of death is suspected to be suicide are held without a jury.

The Coroners Act is silent on matters of practice and procedure at inquests. Interested parties, i.e. those who are entitled to attend and examine witnesses are not defined in the Act. Common law precedents and other acts provide for categories of "interested persons." The coroner must ensure he has given due notice to all interested persons and should adjourn until they have been given an opportunity to attend and be represented, otherwise the inquest is open to being quashed by Judicial Review.

Simplified Diagram of the Main Courts in Ireland

Supreme Court
Appeal from High Court and/or Court of Appeal

Court of Appeal
Appeals from High Court *Appeal*
Criminal Courts (except District)

High Court

Criminal

Civil

Central Criminal Court
Claims in excess
[Special Criminal Court]
of €75k or €60k

Appeal

Circuit Court
Appeal from District Court

Criminal

Civil

Indictable offences
Claims of €15,001
subject to a max.
of €75,000

Appeal

District Court

Criminal

Civil

Summary
Claims of up
to €15,000.

Civil Law

Civil law matters relate to private legal matters litigated between individuals as opposed to public issues, such as criminal offences which are litigated or prosecuted by the State. Legal action is taken by an individual (plaintiff) against another individual or legal entity (corporate body).

One type of civil law claim is an action for damages arising out of the negligence of a defendant or a claim for breach of contract. In negligence law, a defendant owes a duty of care to certain persons for any injury sustained by them as a result of an act or failure to act on the part of the defendant who has a duty of care to the injured party.

The **onus of proof** is on the plaintiff.

The standard of proof is **"on the balance of probabilities"**

In a negligence claim, a plaintiff must be in a position to show that the Defendant:

- owed him a duty of care
- breached that duty in failing to conform to the required standard
- he suffered loss or damage
- the loss/damage was caused by the defendant's negligence

The compensation system is known as a fault based one. The onus of proof of negligence is on the injured party.

The Statute of Limitations 1957 and 1991, as amended by the Civil Liability and Courts Act 2004, provide that a legal personal injury claim must be initiated within a certain time frame, i.e. two years from the cause of action which is two years from the date the person is aware of the injury or that the injury was significant.

Two issues arise in the legal proceedings:

Liability is determined first by the court. If the plaintiff does not succeed in proving that the defendant was responsible in law for his injuries, then the second issue of **quantum** is irrelevant. Where he does succeed in satisfying the burden of proof, the court will than address the extent of damages the plaintiff is entitled to, i.e. quantum.

The **onus of proof** in a criminal case is on the prosecution.

The standard of proof is **"beyond reasonable doubt".**

District Court – Summary Procedure

This prosecution is initiated by a summons, which must be applied for within 12 months of the date of the alleged offence. The summons will contain two parts as follows:

- Statement of the offence alleged (the relevant sections of the Act and Regulations)
- Date and particulars of the alleged offence.

The defendant is generally entitled to disclosure - copies of relevant reports or statements where required in the interests of justice.

Circuit Court and Central Criminal Court – Indictment Procedure

The Prosecutor must get the consent of the DPP to proceed on indictment. No specific time limits exist but the case may be stopped exceptionally if any delay prejudices a fair trial. The case starts in the District Court and is referred to the Circuit Court/Central Criminal Court when the prosecution has served all relevant documents in the Book of Evidence. The matter proceeds in the Circuit Court before a judge and jury unless there is a guilty plea in which case the judge sits alone and decides on sentencing.

Central Criminal Court – Indictment Procedure – primarily murder, rape offences

Special Criminal Court - Indictment Procedure – Offences Against State or where other courts deemed inappropriate to deal with the offending behaviour (jury intimidation/gangland crime)

Courts

In Ireland, both the Circuit Court and the High Court have power to deal with judicial separation or divorce cases, with the High Court dealing with cases involving very considerable assets or income, or appeals from the Circuit Court. The District Court has jurisdiction to deal with issues relating to the Guardianship, Custody and Access of children, Maintenance and Domestic Violence. Family law cases are held "in camera", that is, in private and members of the public are not allowed attend, maintaining utmost confidentiality.

District Court

The country is divided into various districts. The District Court Office will assist parties in completing the forms required for making applications and the various reliefs available. The Court Office will ensure the earliest available hearing date, particularly where emergency relief is sought. The waiting lists in the District Court are generally shorter than those in a Circuit Court and High Court.

The following is a brief outline of the various types of family law business carried out in the District Court and the Orders available:

Maintenance procedures: The District Court jurisdiction in terms of an award of maintenance to a spouse is limited to a sum of €500 per week and to a sum of €150 per week for the support of a child. An Order not exceeding the sum of €952 can be made in respect of birth expenses of a dependant child and a similar sum in respect of funeral expenses of a dependant child. The court may make a lump sum Maintenance Order in addition to or instead of periodical maintenance payments for the amount or the aggregate of a lump sum payment, provided the Order does not exceed €15,000.

Guardianship, custody and access: The court can make Orders in relation to guardianship, custody and access. The court also allows grandparents who do not have access to the grandchildren to seek access by means of a Court Order. The court deals with disputes that can arise in relation to the issuing of a passport to underage children and where the signature of both guardians on the application form is required. The court deals with disputes regarding parentage, to include the carrying out of blood tests, in cases where there is a paternity dispute.

Domestic violence: The court adjudicates applications brought under the Domestic Violence Act, 1986 and where parties seek a Barring Order, Safety Order or Protection Order.

The Circuit Court

The country is divided into various circuits with one judge assigned to each circuit, except in Dublin and Cork where a number of Judges may be assigned. There are

numerous Circuit Court Offices in Ireland with the County Registrar in charge of the work of each office.

The Circuit Family Courts are more formal in nature than the District Family Courts. The court has jurisdiction where property in the case does not exceed a sum of €75,000 and where the rateable valuation does not exceed €254.

The Circuit Court and High Court have concurrent jurisdiction in the area of family law. The Circuit Court has jurisdiction in a wide range of family law proceedings to include the following:

i. Nullity
ii. Divorce
iii. Judicial Separation
iv. Custody and Access
v. Maintenance
vi. Determination of property disputes
vii. Declaration of marital status
viii. Declaration of Parentage
ix Actions against the estate of a deceased spouse
x. Applications to dispense with 3 month notice for period of marriage required.

The issue of a Family Law Civil Bill commences proceedings in the Circuit Court. This document can be obtained from the Circuit Court Family Law Office. The Civil Bill will reference the legislation under which an Order is being sought together with a list of the reliefs claimed. In certain cases, one is required to support the Civil Bill by way of a Grounding Affidavit, which will outline in detail the background to the case.

The High Court

The High Court sits in Dublin and provincial venues to hear family law matters to include Appeals from the Circuit Court. One Judge determines a matter before the High Court. The proceedings are formal in nature. As with the case for the District Court and Circuit Court, all cases are heard *"in camera"* (only officers of the court and individuals directly involved with the case will be allowed in court during the duration of proceedings)

Though the High Court enjoys extensive family law jurisdiction, the Circuit Court however, has in recent years, assumed a more central role in family law proceedings.

In practical terms, the District Court is the least expensive court in terms of costs. Further, its procedures and accessibility ensure relatively speedy hearings.

The issue of court selection in family law proceedings is more complex where a variety of Orders are sought. The practice directions in both the Circuit and High

Court are designed to ensure that cases come on for hearing before the court as speedily as possible. One might typically expect a twelve to eighteen month period from date of issuing of court proceedings to the date of hearing.

Current legislation provides that family law proceedings before the courts should be as informal as is practicable and consistent with the administration of justice. Judges and barristers in family law proceedings are prohibited from wearing wigs or gowns. Proceedings have traditionally been conducted by the application of an adversarial procedure. The evidence before the court is furnished by or represented on behalf of the disputing parties and the court adjudicates on the evidence as so heard by it. A party to litigation is not obliged to retain a solicitor or a barrister and can deal with an application himself/herself as a lay litigant. This is more common in the District Court.

Appeals

A decision of the District Court can be appealed to the Circuit Court. The Appeal consists of a full re-hearing in the Circuit Court.

A decision of the Circuit Court can be appealed to the High Court. The Appeal will consist of a full re-hearing in the High Court.

A decision made by the High Court may be reversed on appeal by the Court of Appeal or by the Supreme Court on a point of law.

Parents are free to make arrangements for their children's care, including custody and access, as long as the child's needs are met. Where parents can agree, custody of and access to children can be agreed to and set out in a Separation Agreement. However, the District Court holds concurrent jurisdiction with the Circuit Court to make orders dealing with guardianship and enforcement of a right of custody under statute. The courts adjudicate on all related guardianship, custody and access matters in relation to children.

Guardianship

Guardianship is the collection of rights and duties of parents and/or non-parents in respect of the upbringing of their children. A guardian has the duty to maintain and properly care for the child and has the right to make all major decisions affecting the child's upbringing, including choice of school, medical treatment, attendance for counselling, religious matters, health requirements and decisions about leaving the country (often called custody rights (see discussion later). Guardians are responsible for the welfare of the child. Welfare includes the moral, intellectual and physical wellbeing of the child and where there is property held on behalf of the child, it includes the proper administration of such property.

Where the parents of an infant are married to each other both are automatically conferred with guardianship rights.

In the case where they are not married the mother of the infant becomes an immediate legal guardian by law. However, the Children and Family Relationships Act, 2015 provides that an unmarried father will automatically be a guardian if he has lived with the child's mother for 12 months, including at least three months with the mother and child following the child's birth. The period of cohabitation can take place at any time before the child turns 18 years old.

Outside of the "automatic" guardianship provisions for unmarried fathers, it is open to the father of an infant to apply to the court for an order appointing him a guardian jointly with the mother and the court will decide any such case on its merits. Where the mother consents to the father's appointment as joint guardian this can be done without the necessity of having to go to court by the signing of statutory declarations.

Under the Children and Family Relationships Act, 2015, a new arrangement exists whereby unmarried parents may sign a statutory declaration when registering or re-registering a child's birth. A birth may be re-registered if the parents were not married to each other, did not record the father's details at the time of registration and now want to record those details. It may also be registered if the parents marry each other after the child's birth has been re-registered. At the point of registration of the child's

birth, the unmarried parents will be told that the inclusion of the father's name on the birth certificate does not in itself confer guardianship. The couple will be given a copy of the statutory declaration and it will be possible for them to sign the declaration in the presence of a registrar, at no charge, either at that time or within a fortnight. They may also make this declaration at a later time.

Custody

In law and fact, Custody and Access are two distinct issues. Although there is generally some overlap, you do not need to have one to enjoy the other.

Custody is the right to exercise physical care and control in respect to the upbringing of a child. A person who has custody of a child has the responsibility for the day to day care of the child and will have the power to make major decisions on the child's behalf.

The married parents of a child are automatically joint custodians of their child (as well as joint guardians). Where married parents have separated or divorced, they can decide between themselves on custody arrangements for their children. If they cannot agree, they may try to work out an arrangement through mediation but if that fails they must apply to the court for a final decision.

Where children are born outside of marriage the mother has an automatic right to custody. A father who is not married to the mother of his child can apply to the court for custody in the absence of agreement. It is not necessary for a father to have guardianship rights before he applies for custody.

If an unmarried mother does not want custody of the child and intends to place or has already placed the child for adoption, the unmarried father may still apply for custody.

The following may also apply for custody;

- a person who is a relative of a child or
- a person with whom the child resides if that person is or was married to, or in a civil partnership with, or has cohabited with the parent of the child for a period of at least three years and has shared the day-to-day care of the child for at least two years or
- a person with whom the child resides and who has had the day-to-day care of the child for a continuous period of not less than 12 months and the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child.

A person who is a guardian and who does not have custody (jointly or otherwise) or from whom custody of the child has been taken can apply for a custody order under section 11 of the Guardianship of Infants Act 1964 (as amended).

Often parents apply for custody and/or access as part of other proceedings when a marriage breaks up. Custody can be joint, giving both parents' decision-making

authority, or sole, granting the decision-making authority to one parent. If the parties are capable of deciding on a custody arrangement, then they may do so. If they are not, a court will designate either or both as custodial parents based on a review of the facts. Often, custody is a major battleground in family law proceedings where children are involved. Where both parents are capable of a mature commitment to work out arrangements that are in the children's best interests, joint custody is in order. However, where there is an inability to communicate, significant differences between the parents or a power imbalance, sole custody is more appropriate. In many cases, the issue of custody is irrelevant, either because all of the major decisions have been made or the children are old enough that they can make the decisions on their own. The starting point for any examination of custody is found at Section 20 of the Children's Law Reform Act, 1990 *"...the father and mother of a child are equally entitled to custody of the child".* The sole determining factor in a court's decision as to custody is the best interests of the children, a concept that is explored in greater detail below.

The Children and Family Relationships Act, 2015 made significant changes in respect of custody whereby now a step-parent, a civil partner, or a cohabitant of not less than 3 years is able to apply for custody where they have shared parenting of the child for 2 years. A person can also apply for custody if they have exercised those duties for one year and if there is no parent or guardian willing to exercise the powers and responsibilities of custody. This is again a significant development in respect of grandparents and relatives' rights.

In relation to parental consent requirements for a child to attend therapy, usually the consent of one parent is enough – counsellors are entitled to assume that both parents consent even if one has only given written consent. However, if a second parent is in opposition to therapy and joint custody exists, both parents must consent and the parent who wants therapy should make a court application on the issue.

Access

Access refers to the actual time that the child spends in another person's physical care. The amount of access that a parent enjoys is not determined by the custody arrangement in place. Non-custodial parents can have as much access as custodial ones. Access arrangements can be as varied as the individuals involved and, again, depend solely on the best interests of the children. An access schedule that may allow limited contact for younger children or at the initial time of separation, can later be expanded, either by agreement of the parents or a Court Order obtained by one parent. Similarly, where one parent demonstrates an inability to meet their access obligations, that access can be limited by agreement or Order of the Court. A parent with access has the right to visit and be visited by the children and the right to make inquiries and to be given information as to the health, education and welfare of the children. A parent will not be denied access to their children so long as they can demonstrate that continued contact with that parent is in the children's best interests.

The Children and Family Relationships Act, 2015 removed the previous two stage process in respect of applications for access for the wider family. Now grandparents,

relatives and any other persons can apply directly to the Court for an order in respect of access without first having to seek the Court's permission to bring such an application.

Best Interests of the Child

Since both custody and access depend on the "best interests of the child", it is important to set out what will be considered in determining the child's best interest. Section 45 of the Children and Family Relationships Act, 2015 amends Section 3 of the Guardianship of Infants Act, 1964 to spell out that in any proceedings before any court, where the (a) guardianship, custody or upbringing of, or access to, a child or (b) administration of any property belonging to or held on trust for a child or the application of the income thereof, is in question, the court, in deciding that question, shall regard the best interests of the child as "the paramount consideration.'

The Act sets out statutory criteria for the "best interests" principle dealing with a number of issues such as the physical, emotional, psychological, educational, and social needs of the child including the child's need for stability having regard to the child's age and stage of development. It also provides that the views of the child will be ascertained in any applications concerning the child. The Act also sets out that the Court shall ensure that the manner in which such views are provided to the Court facilitates the child freely expressing such views and are not as the result of undue influence of another, including the parent of a child. This is significant particularly in terms of the concept of parental alienation. The 'best interests' principle also sets out that the Court has a mandatory obligation to have regard to any family violence. There may be a difficulty however with regard to the implementation of the "best interests" principle and the voice of the child. Generally, the voice of the child may be brought to the Court by way of a child psychologist and/or therapist being appointed. This may prove a difficulty for parents who are going through a separation where there are limited funds and parents may not be able to afford the costs of a psychologist and/or therapist.

Witnesses and Evidence

At common law all persons who are capable of understanding the nature of an oath and giving rational testimony are competent witnesses.

In general a witness is only permitted to give evidence of fact i.e. what he observed, his findings etc. There are some exceptions to that rule and one in particular relates to expert evidence. Where the expertise of the witness can be of assistance to the judge or jury in explaining or interpreting certain facts, their evidence may be admissible in certain circumstances.

There are different types of witnesses – lay, professional and expert.

A **lay witness** can only give purely factual evidence to the court i.e. what he saw, heard, read, was informed of (subject to the rules of hearsay). The opinion of a lay witness is in principle not admitted in court.

A **professional witness** is generally a witness who is a party to an action and who by virtue of his qualifications, experience or job is called to give evidence. He is generally confined to matters of fact but is in possession of knowledge of those facts due to his professional capacity. He may at times be asked to interpret those facts in his professional capacity.

An **expert witness** is a specialist in a particular field who is asked by a solicitor to give an independent opinion on the facts of a case. Their role in court is to help the decision maker(s) (judge, jury, etc.) to understand the case. They need both the qualifications and experience in their specialist field. ***Qualifications*** include degrees, professional qualifications, training courses, certificates and membership of learned societies. ***Experience*** is indicated by the length of time spend in a particular specialist field.

For hundreds of years the *Oath of Hippocrates* has served as the aspirational standard for confidentiality in medicine:

> "Whatever, in connection with my professional service, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret. While I continue to keep this Oath unviolated, may it be granted to me to enjoy life and the practice of the art, respected by all men, in all times. But should I trespass and violate this Oath, may the reverse be my lot."

However, confidentiality is not only at the cornerstone of medical practice. Each profession that provides mental health treatment embraces confidentiality as a core ethical principle. Thus, confidentiality is a central tenet of therapy. For example, the United Kingdom Counsel for Psychotherapy states that "psychotherapists are required to preserve confidentiality and to disclose, if requested, the limits of confidentiality and circumstances under which it might be broken to specific third parties." The Irish Council for Psychotherapy refers to the Ethical Guidelines of the European Association for Psychotherapy which states that "psychotherapists, as well as all support staff, are bound by principles of confidentiality regarding all information that has become known to them during their psychotherapeutic involvement/practice. The same applies to supervision." The Ethical Guidelines of the European Association for Psychotherapy also state that "[a]t the beginning of the psychotherapeutic treatment, psychotherapists are required to make the patient/client aware of their rights with special emphasis on (i) the psychotherapeutic method to be employed (ii) the extent and duration of treatment (iii) the financial terms of treatment (iv) the complaints procedure and (v) confidentiality. The Irish Association for Counselling and Psychotherapy's Code of Ethics states – "Practitioners take care not to intrude inappropriately on clients' privacy. They treat as confidential all information obtained in the course of their work. As far as possible, they ensure that clients understand and consent to whatever professional action they propose."

While the importance of confidentiality as an ethical principle is evident from these statements, it is also clear that ethical obligations are separate to legal obligations. The legal system has always had the inherent power to require witnesses to testify in court or to order that certain documents are discovered in order to ensure that the judicial system has access to all the relevant evidence associated with a case. This is a component of the administration of justice and in a criminal trial is a crucial part of an individual's constitutional right to a fair trial and right of access to the courts. However, the law recognises that that there are certain special relationships that are viewed by our society as being so important that they deserve protection from such intrusion. Special relationships granted privileged status for many years include lawyer-client and clergy-confessor ("sacerdotal privilege"). However, by excluding relevant matters, the doctrine of privilege restricts the right to a fair trial and therefore, any extension in the doctrine requires constitutional justification. Per Finlay C.J. in ***Smurfit Paribas Bank Ltd. –v- AAB Export Finance*** [1990] 1 IR 469:

> "The existence of a privilege or exemption from disclosure for communication … clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice."

A new class of special relationship for therapists was recognised by the US Supreme Court in ***Jaffee –v- Redmond*** (13 June 1996). The US Supreme Court held that:

> "Like the … attorney-client privilege, the psychotherapist-patient privilege is rooted in the imperative need for confidence and trust … Effective psychotherapy … depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."

In ***Jaffee***, the Court created an unconditional ("absolute") psychotherapist-patient privilege in federal courts on a par with lawyer-client privilege, concluding that "the need for absolute confidentiality is a "sine qua non" of effective psychotherapy." The Court stated that it was not necessary nor feasible to delineate the full contours of the privilege in a way that would "govern all conceivable future questions in this area" but in a footnote stated "we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." In a later case, USA –v- Archie Monroe Glass, II, the US Court of Appeals (10th Circuit) held that the privilege must give way and communications disclosed if (i) the threat was serious when it was uttered and (ii) disclosure was the only means of averting harm to the third party when it was made.

It is unclear as to whether Irish law recognises that the special relationship of "therapist and client" grants privileged status to their communication. One could argue that a leap from sacerdotal privilege to therapist-client privilege is not such a great one. In ***Cook –v- Carroll*** [1945] IR 515, Gavan Duffy J. held that priests were entitled to claim privilege in respect of matters confided in the confessional and stated that in order for a privilege to arise (i) the communication must be confidential (ii) the confidentiality must be essential to the full and satisfactory maintenance of the relation (iii) the relation must be one which, in the opinion of the community, ought to be fostered (iv) the injury which would ensue by the disclosure of the communication must be greater than the benefit gained for the litigation. Gavan Duffy J. regarded the privilege as belonging to the priest rather than the person who had confided in him. In ***ER –v- JR*** [1981] ILRM 125, Carroll J. extended the sacerdotal privilege to cover communications made with a religious officer acting as a marriage counsellor. However, she regarded the privilege as belonging to the spouses rather than the religious officer and stated that the privilege could be waived by their consent. Furthermore, the Family Law (Divorce) Act 1996 protects communications relating to

the reconciliation/divorce of a married couple. More recently, in ***Johnston –v- Church of Scientology***, [2001] 1 I.R. 682 the plaintiff argued that she had been brainwashed by the defendants and sought disclosure of her own "counselling notes" made during auditing and training, which are part of the spiritual practices of scientology. The defendants tried to resist disclosure on the basis of the confidentiality of the one-to-one sessions and that an auditor was under compulsion not to disclose details of them. Geoghegan J. referred to "counselling privilege" as a privilege belonging not to a counsellor but to a person being counselled. He stated that the person being counselled could choose to waive it, as in the case before him (the plaintiff was seeking the notes and so was waiving any privilege which attached to them). Geoghegan J. indicated that the counseling privilege could extend to secular counselling and made a specific reference to marriage counselling. He stated:

> "I would be inclined to think that in modern times when all kinds of secular counseling is available, and in particular marriage counselling, there may well be a privilege which the courts would uphold in some circumstances, but it would always be capable of waiver unilaterally by the persons being counselled."

While it is apparent that Geoghegan J. was recognising that a counselling privilege existed, the full parameters of that privilege has not been examined. For example there is no explicit guidance as to when exactly the privilege arises, or as to whether the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist. Until a clear authority from the Irish Supreme Court, the law in relation to the disclosure of session notes remains uncertain. In that regard, it is worth noting that in ***Johnson***, the Supreme Court dealt with a discovery aspect of Geoghegan J's judgment, without commenting on the existence of a counselling privilege.

Notwithstanding that the Court recognises the confidential nature of communication between a therapist and his or her client, the reality is that in the legal world, confidentiality is subsumed under another set of concepts – privilege and public interest. Thus, where it is in the public interest for confidentiality to be breached, the Courts will put the public interest first and confidentiality second. This is best illustrated in the area of mandatory reporting of criminal behavior, especially under-age sexual behavior and/or sexual abuse.

There is now a disclosure provision for counselling notes (non-party disclosure) in sexual offence cases pursuant to Section 39 of the Criminal law (Sexual Offences) Act 2017. It introduces a new section 19A of the Criminal Evidence Act, 1992 which commenced on 30th May 2018 in the prosecution of sexual offences.

Section 19A of the 1992 Criminal Evidence Act: Disclosure of counselling records.

The section relates to and defines a **counselling record**. A "counselling record" means any record, or part of a record, made by any means, by a competent person in connection with the provision of counselling to a person in respect of whom a sexual offence is alleged to have been committed ('the complainant'), which the prosecutor has had sight of, or about which the prosecutor has knowledge, and in relation to which there is a reasonable expectation of privacy.

Counselling is further defined in s. 19(A) (1) as "listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration)." This broad definition is capable of capturing a range of situations outside the formal therapeutic environment of counselling.

It is important to note this limitation of the section. It does not apply to medical records or social welfare files, for instance. Thus, one of the real injustices of the current disclosure system is left untouched i.e. where a person has had many interactions with state departments and, most particularly, where a victim of crime has been in the care of a state body, the DPP will generally acquire all such records, in order to ensure that the complainant has no obvious psychiatric problems and to see if there is any description of the offence therein that can be tested against the account in the book of evidence. To be fair to the complainant, one usually confines the request to a limited time-frame but the fact remains that those who have had a more privileged upbringing are much less likely to have left a paper-trail of files in their wake, detailing their daily lives, which files may be studied in order to inform an effective cross-examination.

Under the Act, the prosecutor must disclose the existence of any counselling records and the defence must then apply for disclosure, stating the reasons grounding the application. A prosecutor may also make a written application for disclosure. The person who has possession or control of the counselling record, the complainant *and any other person to whom the counselling record relates* shall be entitled to appear and be heard at the disclosure hearing. She or he may also apply for legal aid and be

represented in this hearing, which will take place before the trial (rules of court as to the timing of such applications are referred to but they are not yet in place).

Per Section 19(A) (10) of the Act, the court shall take the following factors into account:

(a) the extent to which the record is necessary for the accused to defend himself;

(b) the probative value of the record;

(c) the reasonable expectation of privacy with respect to the record;

(d) the potential prejudice to the right to privacy of any person to whom the record relates;

(e) the public interest in encouraging the reporting of sexual offences;

(f) the public interest in encouraging complainants of sexual offences to seek counselling;

(g) the effect of the determination on the integrity of the trial process;

(h) the likelihood that disclosing, or requiring the disclosure of, the record will cause harm to the complainant including the nature and extent of that harm.

"(11) (a) Subject to paragraph (b) and subsection (12), after the hearing referred to in subsection (8), the court **may** order disclosure of the content of the counselling record to the accused and the prosecutor **where it is in the interests of justice to do so**.

(b) The court **shall** order disclosure of the content of the counselling record to the accused where there would be a real risk of an unfair trial in the absence of such disclosure.

(12) (a) Where an order is made pursuant to subsection (11), in the interests of justice and to protect the right to privacy of any person to whom the counselling record relates, the court may impose any condition it considers necessary on the disclosure of the record.

The section goes on to deal with issues such as redaction and how the distribution of the disclosed material may be limited. Importantly, the section is expressly **not** to apply to the complainant or witness who waives his right to non-disclosure of the record without leave of the court. Such a waiver will now require a full consultation allowing the complainant to consider the provision/obtain legal advice.

Not only is there no explicit guidance from the courts as to whether confidentiality/privilege must give way, for example, if a serious threat of harm to the client or to others can be averted only by disclosure by the therapist, there is currently no law in Ireland making it a criminal offence if one does not report criminal behaviour uncovered during the counselling process *per se*. However, legislation grounded on "Children First" principles – the Children's First Act 2015 and the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 are of importance. Moreover, the National Vetting Bureau Act 2012 was passed and signed into law at the end of 2012 and is relevant for all persons working with children.

While professional bodies and the Health Boards have their own internal rules on the matter of reporting criminal behavior and/or suspected criminal behavior, therapists have now mandatory reporting as the stimulus to inform their clients of the need to depart from confidentiality in the event of sexual abuse or other criminal behaviour being uncovered and can impress this upon their clients when dealing with confidentiality issues.

Children First Act 2015 (fully operational from 11th December 2017)

In 2015, the Irish Oireachtas passed the Children First Act 2015, a diluted version of the original Bill. The Act saw Children First Guidance placed on a statutory footing, meaning changes to the area of child protection in Ireland.

Under the legislation, all organisations where children are in attendance without their parents have to meet legal requirements to ensure a safe environment for children.

The legislation asserts that the Child and Family Agency (Tusla) which "shall, in performing a function under this Act, regard the best interests of the child as the paramount consideration" – Section 7. Part 2 of the Act provides for Child Safeguarding Statements.

Section 10

Provides that providers of services shall ensure, as far as practicable, a child availing of a service is safe from harm while availing of that service.

Section 11

Provides for a safeguarding statement. This is required for all child therapists. There is a useful section on Tusla's website - (http://www.tusla.ie/uploads/content/4214-TUSLA_Guidance_on_Developing_a_CSS_v3.pdf).

Section 14

Mandated persons - Reporting

The mandatory reporting requirements have recently been enabled and will come into effect from 11th December 2017

"14 (1) Subject to subsections (3), (4), (5), (6) and (7), where a mandated person knows, believes or has reasonable grounds to suspect, on the basis of information that he or she has received, acquired or becomes aware of in the course of his or her employment or profession as such a mandated person, that a child— (a) has been harmed, (b) is being harmed, or (c) is at risk of being harmed, he or she shall, as soon as practicable, report that knowledge, belief or suspicion, as the case may be, to the Agency.

(2) Where a child believes that he or she— (a) has been harmed, (b) is being harmed, or (c) is at risk of being harmed, and discloses that belief to a mandated person in the course of the mandated person's employment or profession as such a person, the mandated person shall, subject to subsections (5), (6) and (7), as soon as practicable, report that disclosure to the Agency.

(3) A mandated person shall not be required to make a report to the Agency under subsection (1) where— (a) he or she knows or believes that— (i) a child who is aged 15 years or more but less than 17 years is engaged in sexual activity, and (ii) the other party to the sexual activity concerned is not more than 2 years older than the child concerned, (b) he or she knows or believes that there is no material difference in capacity or maturity between the parties engaged in the sexual activity concerned, (c) he or she is satisfied that subsection (2) does not apply, and (d) the child concerned has made known to the mandated person his or her view that the activity, or information relating to it, should not be disclosed to the Agency and the mandated person relied upon that view.

(4) A mandated person shall not be required to make a report to the Agency under subsection (1) where the sole basis for the mandated person's knowledge, belief or suspicion is as a result of information that he or she has acquired, received or become aware of from another mandated person that a report has been made to the Agency in respect of the child concerned by that other mandated person.

(5) Subsections (1) and (2) apply only to information that a mandated person acquires, receives or becomes aware of after the commencement of this section irrespective of whether the harm concerned occurred before or after that commencement.

(6) Subject to subsection (7), a report under subsection (1) or (2) shall be made by the completion of such form as shall be specified for that purpose by the Agency (in this Act referred to as a "mandated report form") and may be made by the mandated

person— (a) himself or herself, or (b) jointly with one or more than one other mandated person.

(7) Where a mandated person acting in the course of his or her employment or profession knows, believes or has reasonable grounds to suspect that a child may be at risk of immediate harm, he or she may, subject to subsection (8), make a report to the Agency under subsection (1) or (2) in a manner other than by means of a mandated report form.

(8) Where a mandated person makes a report under subsection (7), he or she shall provide that report to the Agency by the completion of a mandated report form as soon as may be but in any event not later than 3 days after the making of the first-mentioned report.

(9) Any of the following matters may be prescribed: (a) the procedures that are to apply to a mandated person making a report under this section; (b) the making of a report by a mandated person jointly with one or more than one other mandated person under this section.

(10) The Agency shall make a mandated report form available in such form and manner (including on the internet) as the Agency considers appropriate.

(11) The obligations imposed on a mandated person under this section are in addition to, and not in substitution for, any other obligation that the person has to disclose information to the Agency (whether or not in his or her capacity as a mandated person), but, subject to subsection (8), this section shall not require the mandated person to disclose that information to the Agency more than once.

(12) Nothing in subsection (3) shall operate to affect any other obligation that a person has to disclose information to a member of An Garda Síochána under the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 or to any other person by or under any other enactment or rule of law.

Thus, non-reporting of harm is breach of a statutory duty.

Section 15

Authorised persons

15. (1) The chief executive officer of the Agency shall authorise in writing such member or members of staff of the Agency as he or she considers appropriate for the purposes of receiving reports under section 11 and such person or persons shall, in this Act, be referred to as an authorised person or authorised persons.

(2) An authorised person shall be deemed to be duly appointed to be a designated officer within the meaning of the Protections for Persons Reporting Child Abuse Act 1998 and the provisions of that Act apply to the authorised person in his or her capacity as such a designated officer accordingly.

(3) Where an authorised person receives a report under section 11, he or she shall forward, or cause to be forwarded, an acknowledgement in writing stating the date of receipt of the report to the mandated person or persons who made the report.

Section 16

Section 16 allows for the Child and Family Agency to request mandated persons to assist with assessments

Section 17-19

Sections 17 -19 allows for various administrative matters.

Section 20

Children First Inter-Departmental Implementation Group

Section 20 states:

"As soon as may be after the commencement of this section, the Minister shall establish a group to be known as the Children First Inter-Departmental Implementation Group, and in this Act referred to as the "Implementation Group", to perform the functions assigned to it by this Act."

Section 28

Section 28 abolishes the defence of reasonable chastisement

"28. The Non-Fatal Offences Against the Person Act 1997 is amended by the insertion of the following section after section 24:
"24A. (1) The common law defence of reasonable chastisement is abolished.
(2) Subsection (1) shall not apply in respect of proceedings brought against a person for an offence consisting in whole or in part of any act done by the person before the commencement of section 28 of the Children First Act 2015, whether those proceedings were brought before, on or after such commencement. (3) This section shall not affect the operation of section 24."

Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012

The Minister for Justice, Equality and Defence enacted the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 to create a criminal offence of withholding information in relation to serious specified offences committed against a child or vulnerable person.

"2.—(1) Subject to this section, a person shall be guilty of an offence if— (a) he or she knows or believes that an offence, that is a Schedule 1 offence, has been committed by another person against a child, and (b) he or she has information which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.

(2) Subsection (1) applies only to information that a person acquires, receives or becomes aware of after the passing of this Act irrespective of whether the Schedule 1 offence concerned was committed before or after that passing. (3) The child against whom the Schedule 1 offence concerned was committed (whether or not still a child) shall not be guilty of an offence under this section."

This offence comes on top of a number of other offences in recent times relevant to the handling of child abuse cases, including:

- Section 176 of the Criminal Justice Act 2006, which created the offence of reckless endangerment of children; and
- Section 13 of the Non Fatal Offences Against the Person Act 1997 which makes it an offence to engage intentionally or recklessly in conduct which creates a substantial risk of death or serious harm to another.

The Act only applies to offences in Schedule 1. The Withholding Information Act makes clear that participation as an accomplice and attempting or conspiring to commit, or inciting the commission of an offences are included within its scope. However, it shall not include such an offence of participating, attempting, conspiring or inciting, as the case may be, if it is not an arrestable offence.

The offence only arises for failure to report these offences against a child or vulnerable adult, and not the general population. The offence only arises where somebody knows or believes that that an arrestable offence has been committed and knows or believes that he or she has information which might be of material assistance. Therefore, the General Scheme is about **consciously** withholding information, rather than merely failing to report.

Equally, in relation to vulnerable persons, Section 3 applies:
3.—(1) Subject to this section, a person shall be guilty of an offence if— (a) he or she knows or believes that an offence, that is a Schedule 2 offence, has been committed

by another person against a vulnerable person, and (b) he or she has information which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána.

(2) Subsection (1) applies only to information that a person acquires, receives or becomes aware of after the passing of this Act irrespective of whether the Schedule 2 offence concerned was committed before or after that passing. (3) The vulnerable person against whom the Schedule 2 offence concerned was committed (whether or not still a vulnerable person) shall not be guilty of an offence under this section. (4) This section is without prejudice to any right or privilege that may arise in any criminal proceedings by virtue of any rule of law or other enactment entitling a person to refuse to disclose information.

(5) For the avoidance of doubt it is hereby declared that the obligation imposed on a person by subsection (1) to disclose information that he or she has to a member of the Garda Síochána is in addition to, and not in substitution for, any other obligation that the person has to disclose that information to the Garda Síochána or any other person, but that subsection shall not require the first-mentioned person to disclose that information to the Garda Síochána more than once.

4.—(1) Subject to this section, in any proceedings for an offence under section 2 or 3, it shall be a defence for the accused person to show— (a) that the child or vulnerable person against whom the Schedule 1 offence or the Schedule 2 offence, as the case may be, concerned was committed made known his or her view (provided that he or she was capable of forming a view on the matter) that the commission of that offence, or information relating to it, should not be disclosed to the Garda Síochána, and (b) that he or she (the accused person) knew of and relied upon that view.

(2) Without prejudice to the right of the child or vulnerable person against whom the Schedule 1 offence or the Schedule 2 offence, as the case may be, concerned was committed to disclose the commission of that offence, or information relating to it, to the Garda Síochána, it shall be presumed for the purposes of subsection (1), unless the contrary is shown, that if—

(a) the child concerned has not attained the age of 14 years, or (b) the vulnerable person concerned falls under paragraph (a) of the definition of vulnerable person in section 1(1) (whether or not he or she also falls under paragraph (b) of that definition), he or she does not have the capacity to form a view as to whether the commission of that offence, or information relating to it, should be disclosed to the Garda Síochána.

(3) Where— (a) in the case of a child referred to in paragraph (a) of subsection (2), or (b) in the case of a vulnerable person referred to in paragraph (b) of that subsection, the presumption in that subsection is not rebutted, then, any of the defences provided for in subsections (4), (5) and (8) may be raised by an accused person in any proceedings for an offence under section 2 or 3 in accordance with whichever of those subsections applies

(4) Subject to subsections (6) and (7), in any proceedings for an offence under section 2 or 3, it shall be a defence for the accused person to show, in the circumstances specified in subsection (3)— (a) that a parent or guardian of the child or vulnerable person concerned against whom the Schedule 1 offence or the Schedule 2 offence, as the case may be, concerned was committed made known his or her view, on behalf of that child or vulnerable person, that the commission of that offence, or information relating to it, should not be disclosed to the Garda Síochána, and (b) that he or she (the accused person) knew of and relied upon that view.

(5) Subject to subsections (6) and (7), in any proceedings for an offence under section 2 or 3, it shall be a defence for a parent or guardian of a child or vulnerable person against whom a Schedule 1 offence or Schedule 2 offence, as the case may be, was committed to show, in the circumstances specified in subsection (3), that he or she formed the view, on behalf of that child or vulnerable person, that the commission of that offence, or information relating to it, should not be disclosed to the Garda Síochána.

(6) The defence provided for in subsection (4) or (5) shall be established only if the parent or guardian concerned had reasonable grounds for forming the view concerned on behalf of the child or vulnerable person concerned and, in so doing, he or she acted and is continuing to act bona fide in the best interests of that child or vulnerable person.

(7) The defence provided for in subsection (4) or (5) shall not apply if the parent or guardian of the child or vulnerable person concerned who formed the view that the commission of the Schedule 1 offence or the Schedule 2 offence, as the case may be, concerned, or information relating to it, should not be disclosed to the Garda Síochána is a family member of the person who is known or believed to have committed that Schedule 1 offence or Schedule 2 offence, as the case may be.

(8) Subject to subsection (11), in any proceedings for an offence under section 2 or 3, it shall be a defence for the accused person (including a parent or guardian of the child or vulnerable person concerned) to show, in the circumstances specified in subsection (3) but where subsection (7) applies to the parent or guardian concerned— (a) that a member of a designated profession who provided or is providing services to the child or vulnerable person concerned in respect of the injury, harm or damage caused to him or her as a result of the Schedule 1 offence or the Schedule 2 offence, as the case may be, concerned made known his or her view, on behalf of that child or vulnerable person, that the commission of that offence, or information relating to it, should not be disclosed to the Garda Síochána, and (b) that he or she (the accused person) knew of and relied upon that view.

(9) A parent or guardian of a child or vulnerable person or a member of a designated profession shall, for the purposes of considering on behalf of the child or vulnerable person whether or not the commission of the Schedule 1 offence or the Schedule 2 offence, as the case may be, concerned against that child or vulnerable person, or information relating to it, should be disclosed to the Garda Síochána, insofar as practicable have regard to the wishes of that child or vulnerable person.

(10) Subject to subsection (11), in any proceedings for an offence under section 2 or 3, it shall be a defence for the accused person who is a member of a designated profession to show that— (a) he or she is a member of a designated profession who provided or is providing services to the child or vulnerable person concerned in respect of the injury, harm or damage caused to him or her as a result of the Schedule 1 offence or the Schedule 2 offence, as the case may be, concerned, and (b) he or she formed the view, in relation to that child or vulnerable person, that the commission of that offence, or information relating to it, should not be disclosed to the Garda Síochána.

(11) The defence provided for in subsection (8) or (10) shall be established only if— (a) the member of the designated profession concerned had reasonable grounds for forming the view concerned in relation to the child or vulnerable person concerned for the purpose of protecting the health and well-being of that child or vulnerable person, and (b) the member of the designated profession concerned, in forming that view in relation to the child or vulnerable person, as the case may be, concerned— (i) acted and continues to act in a manner, and (ii) applied and continues to apply the standards of practice and care, that can reasonably be expected of a member of that profession in forming such a view in the circumstances concerned.

(12) Subject to subsection (13), in any proceedings for an offence under section 2 or 3, it shall be a defence for the accused person who is a prescribed person to show that— (a) he or she is a prescribed person employed or otherwise engaged by a prescribed organisation who provided or is providing services to the child or vulnerable person concerned in respect of the injury, harm or damage caused to him or her as a result of the Schedule 1 offence or the Schedule 2 offence, as the case may be, concerned, and (b) he or she formed the view, in relation to that child or vulnerable person, that the commission of that offence, or information relating to it, should not be disclosed to the Garda Síochána.

(13) The defence provided for in subsection (12) shall be established only if— (a) the prescribed person concerned had reasonable grounds for forming the view concerned in relation to the child or vulnerable person concerned for the purpose of protecting the health and well-being of that child or vulnerable person, and (b) the prescribed person concerned, in forming that view in relation to the child or vulnerable person, as the case may be, concerned— (i) acted and continues to act in a manner, and (ii) applied and continues to apply the standards of practice and care, that can reasonably be expected of a prescribed person forming such a view in the circumstances concerned.

(14) This section is without prejudice to any other defence recognised by law as a defence to a criminal charge that may be available to a person charged with an offence under section 2 or 3.

National Vetting Bureau (Children and Vulnerable Persons) Act 2012

The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 provides a statutory basis for the use of Garda criminal records in the vetting of persons applying for employment working with children or vulnerable adults. The Act also provides for the use of "soft" information, (which is referred to as "specified information" in the Act) in regard to vetting. This is information other than criminal convictions where such information leads to a bona-fide belief that a person poses a threat to children or vulnerable persons.

Vetting procedures were already a requirement under the Children First National Guidelines. The primary purpose of the Act is to put the procedures that have been developed to vet applications into law, to provide for the use of soft information and to ensure those working with children or vulnerable adults are properly vetted.

The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 makes it mandatory for persons working with children or vulnerable adults to be vetted. The Act contains offences and penalties for persons who fail to comply with its provisions. The schedule to the Act lists in detail the types of work or activities that require vetting. These include:

· Childcare services
· Schools
· Hospitals and health services
· Residential services or accommodation for children or vulnerable persons
· Treatment, therapy or counselling services for children or vulnerable persons
· Provision of leisure, sporting or physical activities to children or vulnerable persons
· Promotion of religious beliefs

In announcing the passing of the legislation Minister Shatter stated:

> "**The recent children's rights referendum has enshrined in the Constitution key principles to protect children which will guide our legislation into the future. I think it is therefore very timely that the Oireachtas has now passed this important piece of legislation. The Bill makes it mandatory that persons who are working in positions which provide regular access to children or vulnerable adults be vetted. It also now makes it a criminal offence for organisations to fail to carry out the necessary vetting of their employees and volunteers. The Vetting Bill forms part of a suite of legislation prioritised by this Government to enhance the protection of children, including the Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults Act) 2012 and the Children First Bill 2012 being progressed by my colleague Minister Frances Fitzgerald."**

Protection for Persons Reporting Child Abuse Act 1998

Section 3 of the Protection for Persons Reporting Child Abuse Act 1998 ("the PPRCA Act") provides that a person "shall not be liable in damages in respect of the communication, whether in writing or otherwise, by him or her to an appropriate person of his or her "opinion" that a child has been assaulted, ill-treated, neglected or sexually abused or that a child's health, development or welfare has been or is being avoidably impaired ore neglected unless the person making the referral did not act reasonably and in good faith.

The Ombudsman for Children has made the following recommendation-:

> "In order to ensure legal protection for those who make reports in line with Children First, it is recommended that s.3 of the Protection for Persons Reporting Child Abuse Act 1998 be amended to ensure that reporters have protection whether or not they have formed the opinion that the child has been abused or neglected …
>
> It is recommended that s.3 of the Protection for Persons Reporting Child Abuse Act 1998 be amended to ensure that the reporting of **potential risk** is protected from civil liability."

Civil Liability for disclosure/breach of confidentiality

The need to amend s.3 of the Protection for Persons Reporting Child Abuse Act 1998 to ensure that the reporting of "potential risk" is protected from civil liability (as opposed to merely an opinion of actual harm) is very important for therapists/counsellors.

Disclosure of matters gleaned during the confidential relationship between therapist and client opens up the potential for litigation not only from a client aggrieved at a disclosure. Litigation may also ensue from those who claim they suffered damages from non-disclosure when a therapist did not disclose information where it was reasonably foreseeable that they would suffer harm.

A counsellor may not merely owe a duty of care to the client but also others who are affected by his or her actions/omissions. This is best demonstrated by the UK decision which came to be the cornerstone of the modern law of negligence, that of ***Donoghue –v- Stevenson*** [1932] AC 562.

> "The rule that you are to love your neighbour becomes in law you must not injure your neighbour; the lawyer's question "who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be liable to injure your neighbour. Who then in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

In the United States, the situation of disclosure of confidential information to prevent a risk of harm to an individual was litigated in a very famous case, called *Tarasoff v Regents of the University of California*, under negligence law. A student in Berkeley University had confessed to a College-appointed psychologist that he harboured feelings of hatred and violence towards a student named Tarasoff. The psychologist did not take any steps to intervene by attempting to communicate with the female student herself. The patient subsequently shot and killed the girl. The deceased's family sued the psychologist and the University in a negligence action and the court found in favour of the family, saying:

> *"If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can be reasonably expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest"*

An English Court felt that it would not be possible to hold a doctor liable for an attack carried out on someone by a patient unless the potential victim is identifiable: *Palmer v Tees Health Authority* [1999] Lloyd's L Rep (Med) 351 (CA). Thus, under English law, a doctor and other professionals are only under a duty to disclose confidential information regarding potential risk if a victim is identifiable. Because English law is of high precedential value in Ireland, the situation is probably the same in Irish law.

Thus, one may be sued in negligence if one does not report anticipated criminal behavior and it later happens. It is respectfully submitted that therapists are under a duty of care to report suspected child abuse and this may also extend to preventing clients from committing suicide. Often, it is difficult to know in advance whether one is over-reacting and thus, breaching confidentiality or whether one is not acting quickly enough and thus, failing to prevent harm/suicide. Hindsight is a wonderful perspective but the therapist is often alone in making decisions as to what is the best step to take. Seeking assistance from supervisors is helpful, although this may also pull a second person into the "negligence" net. There is a lack of reported case law on negligent therapy and while this can be fleshed out by recourse to medical negligence principles, one must be careful. Psychiatry is part of a profession heavily regulated by statute, unlike therapy. Also, unlike therapy, psychiatry involves diagnosis of illness, use of medication and/or surgical procedure and again, one should be wary of over-applying these cases to cases of negligent therapy.

However, at the least to avoid negligent therapy claims, make sure to:

- Provide a safe working environment
- Update your levels of professional training
- Work within the levels and areas of your competence
- Have appropriate selection and referral systems for your clients
- Keep professional boundaries with clients in therapy
- Use informed consent, therapeutic contracting and review same with clients
- Comply with a Code of Ethics
- Be aware of potential liability to third parties and act accordingly
- Maintain adequate levels of insurance cover, if in private practice
- Get legal advice, if concerned

Data Protection

Therapists working as sole practitioners are data controllers as clearly they manage, control and have primary responsibility for their client's information. Therapists in employment are not 'de facto' the data controller as the employers subsumes that responsibility but they should be aware of the data protection regime. A therapist in private practice and agencies offering therapy services may be obliged to register as a Data Controller with the Data Protection Commissioner and should seek advice from their representative body and or the Commissioner's office as much will depend on the size of any organisation or practice.

EU General Data Protection Regulation (GDPR)

The EU General Data Protection Regulation (GDPR) came in to force on the 25th May 2018, replacing the existing data protection framework under the EU Data Protection Directive. Data protection has always been important under EU law. Indeed, Article 8 of the EU Charter of Fundamental Rights states:

> "1. Everyone has the right to the protection of personal data concerning him or her.
> 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
> 3. Compliance with these rules shall be subject to control by an independent authority."

As a regulation, the GDPR did not by necessity require transposition into Irish law (regulations have 'direct effect') so organisations involved in data processing of any sort need to be aware the regulation addresses them directly in terms of the obligations it imposes. The GDPR emphasises transparency, security and accountability by data controllers, while at the same time standardising and strengthening the right of European citizens to data privacy.

Many of the main concepts and principles of GDPR are much the same as those in the Data Protection Acts 1988 and 2003 (the Acts) so if you are compliant under current law, then much of your approach should remain valid under the GDPR. However, GDPR introduces new elements and significant enhancements which will require detailed consideration by all therapists involved in processing personal data.

The GDPR is designed to give individuals more control over their personal data. The key principles under the GDPR are: -

- Lawfulness, fairness and transparency;
- Purpose Limitation;
- Data minimisation;
- Accuracy;
- Storage Limitation;
- Integrity and confidentiality and
- Accountability.

Personal data

There is no definitive list of what is or isn't personal data and this will depend on an interpretation of the GDPR's definition in Art.4 , which is as follows:

"'[P]ersonal data' means any information relating to an identified or identifiable natural person ('data subject')."

In other words, the information must be clearly related to a particular person. The GDPR also states that:

> "[A]n identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more

factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."

Whether particular data is considered personal data often comes down to the context and circumstances in which data is collected. Therapists usually collect many different types of information on people, and even if one piece of data doesn't individuate someone, it could become relevant alongside other data.

Thus, session notes are clearly personal data even if anonymised as it will be capable of being identifiable (even if only by the therapist). Also, other material such as art work created during art therapy sessions, if retained, may amount to personal data identifiable to the subject and thus come under the GDPR. Much will depend on context and circumstances.

Right to be informed (Article 13 & 14 of the GDPR)

Where personal data is collected from a person, the data controller must provide that person with the following information:

1. Identity and contact details of the data controller (and where applicable, the controller's representative);
2. Contact details of the Data Protection Officer (person with responsibility for data protection matters within an organisation);
3. Purpose(s) of the processing and the lawful basis for the processing;
4. Where processing is based on the legitimate interests of the controller or a third party, the legitimate interests of the controller;
5. Any other recipient(s) of the personal data;
6. Where applicable, details of any intended transfers to a third country (non-EU member state) or international organisation and details of adequacy decisions and safeguards;
7. The retention period (how long an organisation holds onto data) or, if that is not possible, the criteria used to determine the retention period;
8. The existence of the following rights – right of access, right to rectification, right to erasure, right to restrict processing, right to data portability, right to object and the right to request these rights be complied with by the data controller.
9. Where processing is based on consent, the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal;
10. The right to lodge a complaint with a supervisory authority;
11. Whether the provision of personal data is a statutory or contractual requirement, necessary to enter into a contract, an obligation, and the possible consequences of failing to provide the personal data;
12. The existence of any automated decision making processes that will be applied to the data, including profiling, and meaningful information about how decisions are made, the significance and the consequences of processing.

This information should be provided to a client at the time the personal data is collected. Moreover, where a data controller intends to process personal data for another purpose (other than the purpose for which the data was originally collected),

the controller must provide the client, prior to that other processing, with any further relevant information as per 1 – 12 above.

Right to access information (Article 15 of the GDPR)

A client has the right to obtain from the data controller the following:

1. Confirmation of whether or not personal data concerning him is being processed;
2. Where personal data is being processed, a copy of your personal information;
3. Where personal data is being processed, other additional information as follows:

    a. Purpose(s) of the processing;
    b. Categories of personal data;
    c. Any recipient(s) of the personal data to whom the personal data has or will be disclosed, in particular recipients in third countries or international organisations and information about appropriate safeguards;
    d. The retention period or, if that is not possible, the criteria used to determine the retention period;
    e. The existence of the following rights – i. Right to rectification ii. Right to erasure iii. Right to restrict processing iv. Right to object – and to request these from the controller.
    f. The right to lodge a complaint with a supervisory authority (in Ireland, the Data Protection Commissioner);
    g. Where personal data is not collected from the data subject, any available information as to their source;
    h. The existence of automated decision making, including profiling and meaningful information about how decisions are made, the significance and the consequences of processing.

Right to rectification (Articles 16 & 19 of the GDPR)

If a client's personal data is inaccurate, he has the right to have the data rectified, by the controller, without undue delay. If the personal data is incomplete, he has the right to have data completed, including by means of providing supplementary information.

Right to erasure (Articles 17 & 19 of the GDPR)

This is also known as the 'right to be forgotten'. A client has the right to have data erased, without undue delay, by the data controller, if one of the following grounds applies:

1. Where personal data is no longer necessary in relation to the purpose for which it was collected or processed;
2. Where he withdraws consent to the processing and there is no other lawful basis for processing the data;

3. Where he objects to the processing and there is no overriding legitimate grounds for continuing the processing (See point 6 below).
4. Where he objects to the processing and the personal data is being processed for direct marketing purposes (See point 6 below);
5. Where the personal data has been unlawfully processed;
6. Where the personal data have to be erased in order to comply with a legal obligation;
7. Where the personal data has been collected in relation to the offer of information society services to a child.

Where the data controller has made personal data public and, on the basis of one of the above grounds, is obliged to erase the data, he must communicate any rectification or erasure of personal data to each recipient to whom the personal data has been disclosed, unless this is impossible or involves disproportionate effort. If a client requests information on recipients of the personal data, the data controller must inform him about the recipients. The data controller shall take reasonable steps to inform other controllers, who are processing the personal data, that the client has requested the erasure by them of any links to or copies of the data. Taking reasonable steps means taking account of available technology and the cost of implementation including technical measures.

The right to be forgotten will not apply where processing is necessary for: -

1. Exercising the right of freedom of expression and information;
2. Compliance with a legal obligation, the performance of a task carried out in the public interest or in the exercise of official authority;
3. Reasons of public interest in the area of public health (See Article 9(2)(h) & (i) and Article 9(3), GDPR)
4. Archiving purposes in the public interest, scientific or historical research purposes or statistical purposes;
5. Establishment, exercise or defence of legal claims.

Right to data portability (Article 20 of the GDPR)

In some circumstances, a client may be entitled to obtain his personal data from a data controller in a format that makes it easier to reuse the information in another context, and to transmit this data to another data controller of his choosing without hindrance. This is referred to as the right to data portability. This right only applies where processing of personal data (supplied by the data subject) is carried out by automated means, and where one has either consented to processing, or where processing is conducted on the basis of a contract between a client and the data controller. This right only applies to the extent that it does not affect the rights and freedoms of others.

When this right applies, data controllers must provide and transmit personal data in structured, commonly used and machine readable form. Data is structured and machine readable if it can be easily be processed by a computer. Under this right, one can ask a data controller to transmit data to another data controller, if such transmission is technically feasible.

Right to object to processing of personal data (Article 21 of the GDPR)

A person has the right to object to certain types of processing of personal data where this processing is carried out in connection with tasks in the public interest, or under official authority, or in the legitimate interests of others. One has a stronger right to object to processing of personal data where the processing relates to direct marketing. Where a data controller is using personal data for the purpose of marketing something directly to a client, or profiling him for direct marketing purposes, one can object at any time, and the data controller must stop processing as soon as they receive the objection. One may also object to processing of personal data for research purposes, unless the processing is necessary for the performance of a task carried out in the public interest.

In order to object to processing, one must contact the data controller and state the grounds for objection. These grounds must relate to the person's particular situation. Where one has made a valid objection, the data controller must cease processing the personal data, unless the data controller can provide compelling legitimate reasons to continue processing the data. Data controllers can also lawfully continue to process personal data if it is necessary for certain types of legal claims.

Where the right to object applies, data controllers are obliged to notify the person of this at the time of their first communication with him. Where processing is carried out online, data controllers must offer an online method to object.

Right of restriction (Article 18 of the GDPR)

A person has a limited right of restriction of processing of his personal data by a data controller. Where processing of the data is restricted, it can be stored by the data controller, but most other processing actions, such as deletion, will require the person's permission.

This right applies in four ways. The first two types of restriction of processing apply where the person has objected to processing of data under Article 21, or where the person has contested the accuracy of the data. In these cases, the restriction applies until the data controller has determined the accuracy of the data, or the outcome of the objection. The third situation whereby one can request restriction relates to unlawful processing. In these cases, if one does not want the data controller to delete information, one can request restriction of the personal data instead. The fourth type of restriction of processing applies where one requires data for the purpose of a legal claim. In this case, the person can request restriction even where the data controller no longer needs the data.

Where a person has obtained restriction of processing of data, the data controller must inform the person before lifting the restriction.

Rights in relation to automated decision making, including profiling (Article 22 of the GDPR)

A person has the right not to be subject to a decision based solely on automated processing. Processing is "automated" where it is carried out without human intervention and where it produces legal effects or significantly affects a person. Automated processing includes profiling. Automated processing is permitted only with express consent, when necessary for the performance of a contract or when authorised by EU or national law. Where one of these exceptions applies, suitable measures must be in place to safeguard rights, freedoms and legitimate interests. This may include the right to obtain human intervention on the controller's part, the right to present the person's point of view and the right to challenge the decision. In respect of special category personal data ('sensitive'), automated processing is only lawful where the person has given express consent to the processing, or where it is necessary for reasons of substantial public interest.

Restrictions on exercising rights (Article 23)

The GDPR allows all these rights (namely 1. The right to be informed; 2. The right of access; 3. The right to rectification; 4. The right to erasure; 5. The right to restrict processing; 6. The right to data portability; 7. The right to object; 8. Rights in relation to automated decision making and profiling) to be restricted by national law in certain circumstances for example, the prevention and detection crime. The Data Protection Bill, 2018 is currently progressing through the Houses of the Oireachtas and currently provides for certain restrictions on the exercise of data subject rights. The Bill (once enacted) will set out clearly the circumstances in which the rights will be restricted.

Providing information

When a person exercises rights under the GDPR, the information provided to him must be:

- Provided in a concise, transparent, intelligible and easily accessible form, using clear and plain language, particularly for any information addressed to a child.
- The information must be provided in writing, or by other means, including, where appropriate, by electronic means.
- Where the data subject makes the request by electronic form means, where possible, the information must be provided by electronic means, unless otherwise requested by you.
- When requested by you, the information may be provided orally, provided that your identity is proven by other means.
- Except in the cases where your rights are restricted, a data controller cannot refuse to act on your request to exercise your rights unless the controller demonstrates that it is not in a position to identify you.
- Where a data controller has reasonable doubts about your identity, the data controller may request the provision of additional information necessary to confirm your identity. This is only applicable in respect of the rights of access,

to rectification, erasure, restrict processing, data portability, to object and in relation to automated decision making and profiling.

Timeframes for dealing with requests to exercise rights

When a request to exercise rights is made, a data controller must:

- Provide information on action taken without undue delay;
- In any event, within 1 month of receipt of the request;
- The 1 month period may be extended by 2 further months, where necessary, taking into account the complexity and number of requests, where necessary. In this case, the data controller shall inform the person of any extension within 1 month of receipt of the request and the reasons for the delay.
- If the controller does not take action on foot of the request, the data controller must inform the person without delay and, at the latest, within 1 month of receipt of your request, of (i) the reasons for not taking action; (ii) the possibility of lodging a complaint with a supervisory authority and seeking a judicial remedy.

What are the charges?

All requests are to be dealt with free of charge. However, where requests from a data subject are considered 'manifestly unfounded or excessive' (for example where an individual continues to make unnecessary repeat requests or the problems associated with identifying one individual from a collection of data are too great) the data controller may charge a reasonable fee, taking into account the administrative costs of providing the information/ taking the action requested; or refuse to act on a request. If this occurs, it is up to the organisation to prove why it believes the request is manifestly unfounded or excessive.

Complaints to the Data Protection Commission

Under Article 77 of the GDPR, one has the right to lodge a complaint with the Data Protection Commission if one considers that processing of personal data is contrary to the GDPR.

Under Article 78 of the GDPR, one has a right to an effective judicial remedy where the Data Protection Commission does not handle a complaint, or does not inform one within three months on the progress or outcome of a complaint.

Under Article 80, a person may authorise certain third parties to make a complaint on his behalf.

Importance of explicit consent

In general, consent has always been and continues to be an essential element to process sensitive information. Consent must be explicitly given. Moreover, there is an obligation on therapists to get explicit consent if sessions are being recorded in the training process and they should advise clients that confidentiality will be breached for the purposes of supervision.

Legally speaking, a written signature is not necessary to obtain explicit consent. A firm indication that the patient agrees to the processing will be sufficient. However, from a practical point of view, a written signature is the best evidence that a patient has agreed to the processing and signatures should be obtained where possible.

Using Client Consent as grounds to process data

If you use client consent when you record personal data, you should review how you seek, obtain and record that consent, and whether you need to make any changes. Consent must be '**freely given**, **specific**, **informed** and **unambiguous**' under the GDPR. Essentially, your client cannot be forced into consent or be unaware that they are consenting to processing of their personal data. They must know exactly what they are consenting to and there can be no doubt that they are consenting. Obtaining consent requires a positive indication of agreement – it cannot be inferred from silence, pre-ticked boxes or inactivity. If consent is the legal basis relied upon to process personal data, you must make sure it will meet the standards required by the GDPR. If it does not, then you should amend your consent mechanisms or find an alternative legal basis. Note that consent has to be verifiable, that individuals must be informed in advance of their right to withdraw consent and that individuals generally have stronger rights where you rely on consent to process their data. The GDPR is clear that controllers must be able to demonstrate that consent was given. You should therefore review the systems you have for recording consent to ensure you have an effective audit trail.

Processing Children's Data under GDPR

The GDPR contains specific rules designed to boost the protection of children's personal data. It restricts the age at which data subjects can lawfully give consent, introduces rules for the language used in consent requests targeted at children and regulates the way online services obtain children's consent.

Data Protection, Consent and Children

in Ireland in the case of information society services offered directly to children

Article 8 specifies conditions applicable to the processing of the personal data of children (e.g. collection, use, sharing, storage) in the context of their usage of information society services. It imposes an obligation on providers of online goods and services offered to children to seek to obtain the consent or authorisation of a child's parent or guardian where the child in under the age of 16 years. Member States are given the option of adopting a lower age, but no lower than 13 years.

Under the GDPR, Article 8 specifies conditions applicable to the processing of the personal data of children (e.g. collection, use, sharing, storage) in the context of their usage of **information society services**. It imposes an obligation on providers of online goods and services offered to children to seek to obtain the consent or authorisation of a child's parent or guardian where the child in under the age of 16 years. Member States are given the option of adopting a lower age, but no lower than 13 years. Data controllers therefore must know the digital age of consent in particular member states and cannot seek consent from anyone under that age. Instead, they must obtain consent from a person holding "parental responsibility". They must also make "reasonable efforts" to verify that the person providing that consent is indeed a parental figure. The Irish legislation has kept 16 as the digital age limit.

For "real life" transactions as opposed to collection of data for **information society services**, there is a contractual age of consent of 18. One should be aware of the principles in Gillick, the constitutional rights of children in Article 42A of the Constitution and thus an independent right of children to avail of counselling, if sufficiently mature - see page 44 herein. This creates an anomaly: a child may be sufficiently mature to avail of counselling without parental consent and the therapist may not need consent from a person holding parental responsibilty for the retention of data in that context. If it is inappropriate to receive parental consent, the best rule of thumb is to obtain consent from someone with parental responsibility, even if it may have to be another relative, for example, a grandparent and if this cannot avail, seek advice as to whether the child is sufficiently mature to consent to therapy, without parental or guardian involvement.

If your work or the work of your organisation involves the processing of data from underage subjects, you must ensure that you have adequate systems in place to verify individual ages and gather consent from guardians, if appropriate. It should be noted that consent needs to be verifiable, and therefore, you will need to communicate to your underage clients in language they can understand.

Privacy notices for children

Where services are offered directly to a child, data controllers must make sure that privacy notices are written in a clear, plain way that a child will understand. Although the Regulation calls for similar rules about clear language in general, it is important that data controllers know the age of the intended audience and provide an appropriately phrased notice.

Online services offered to children

Most consent requests for children are likely to be for information society services (i.e. online services). This is defined as "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service".

Examples of information society services are online shops, live or on-demand streaming services, and companies providing access to communication networks. The reason for these rules, the GDPR states, is because children "may be less aware of the risks, consequences and safeguards" of handing over their personal details. The Regulation emphasises that this is particularly the case with services offered directly to a child, and when children's personal data is used for marketing purposes and creating online profiles. Reference to "information society services" specifically does not include a reference to preventative or counselling services.

Reporting Data Breaches

The GDPR will bring in mandatory breach notifications, which will be new to many organisations. All breaches must be reported to the Data Protection Commissioner (DPC), typically within 72 hours, unless the data was anonymised or encrypted. In practice this will mean that most data breaches must be reported to the DPC. Breaches that are likely to bring harm to an individual – such as identity theft or breach of confidentiality – must also be reported to the individuals concerned. Now is the time to assess the types of data you hold and document which ones which fall within the notification requirement in the event of a breach. Larger organisations will need to develop policies and procedures for managing data breaches, both at central or local level. It is worth noting that a failure to report a breach when required to do so could result in a fine, as well as a fine for the breach itself.

Data Protection Impact Assessments (DPIA)

A DPIA is the process of systematically considering the potential impact that a project or initiative might have on the privacy of individuals. It will allow organisations to identify potential privacy issues before they arise, and come up with a way to mitigate them. A DPIA can involve discussions with relevant parties/stakeholders. The GDPR introduces mandatory DPIAs for those organisations involved in high-risk processing; for example where a new technology is being deployed, where a profiling operation is likely to significantly affect individuals, or where there is large scale monitoring of a publicly accessible area. Where the DPIA indicates that the risks identified in relation to the processing of personal data cannot be fully mitigated, data controllers will be required to consult the DPC before engaging in the process. It has always been good practice to adopt privacy by design as a default approach; privacy by design and the minimisation of data have always been implicit requirements of the data protection principles. However, the GDPR enshrines both the principle of 'privacy by design' and the principle of 'privacy by default' in law. This means that service settings must be automatically privacy friendly, and requires that the development of services and products takes account of privacy considerations from the outset.

Data Protection Officers

The GDPR will require some organisations to designate a Data Protection Officer (DPO). Organisations requiring DPOs include public authorities, organisations whose activities involve the regular and systematic monitoring of data subjects on a large scale, or organisations who process what is currently known as sensitive personal data

on a large scale. The important thing is to make sure that someone in your organisation, or an external data protection advisor, takes responsibility for your data protection compliance and has the knowledge, support and authority to do so effectively. Therefore you should consider now whether you will be required to designate a DPO and, if so, to assess whether your current approach to data protection compliance will meet the GDPR's requirements.

Registering with the Data Protection Commissioner.

Any Person who is a health professional processing personal data related to mental or physical health may have an obligation to register with the Data Commissioner. Registration can be processed online or via post. The registration application form (DPA1) is largely self-explanatory and is available from **www.dataprotection.ie**. The cost of the application ranges from €40 for somebody registering with between 1-5 employees, €100 with 6-25 employees and €480 with 25+ employees. There is a discount available of approximately 10% for registering online.

Children and the independent right to therapy

In **Gillick –v- West Norfolk and Wisbech Area Health Authority** (1986) the United Kingdom House of Lords held in favour of the legal capacity of a child to make independent decisions based on maturity rather than age. In *Gillick*, a mother had objected to Department of Health advice that allowed doctors to give contraceptive advice and treatment to children without parental consent. Per Lord Scarman:

> "As a matter of Law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to enable him or her to understand fully what is proposed."

In subsequent English cases, the argument that Gillick had undermined parental rights was rejected by the Courts. In Re R (1991), a local authority sought to administer anti-psychotic drugs to a 15 year old girl with a history of severe behavioural problems. The Court held that the parents of the girl and the Court could overrule the girl's refusal to take the medication. Also, in Re W (1991), it was held that a 16 year old girl suffering from anorexia nervosa could not veto her move to a unit specializing in anorexia nervosa, which was against her will. The English courts engage in a balancing exercise where the rights of young people are not absolute but are given serious consideration.

Article 42A of the Irish Constitution was brought about by the 31st Amendment to the Constitution which was passed by the people in the Constitutional Referendum of November 2012. It states thus:

> "42A.1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

> 42A.2. 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child …
> 42A.4. 1° Provision shall be made by law that in the resolution of all proceedings – i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected … the best interests of the child shall be the paramount consideration.
> 42A.4.2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."

The new Article 42A in the Constitution increases the chances that the Irish Supreme Court will follow the Gillick reasoning. Again, this is another area ripe for legislative intervention. Such would allow professionals know where they stand with the law. As things stand, the common law is reactionary. A case comes along. The Courts react and set out what the law is and retrospectively applies it to the set of facts before the Court. It is respectfully submitted that this is an unsatisfactory set of circumstances.

Supervisor/Supervisee: The Responsibility of the Supervisor

Unlike other supervisors, the therapist who acts as a supervisor is in a unique position. He or she acts as a mentor and educator for the supervisee. In that regard, he or she knows that the supervisee is less experienced and is relying on the advice and guidance of the supervisor. While a supervisee will be legally responsible for his or her own professional actions, the supervisor may also be liable for damage caused to a client of the supervisee under the law of tort. Unlike other words with a legal meaning, the word 'tort' does not immediately yield up its meaning to someone who is not versed in the law. It means a 'civil wrong' and when committed, the injured party can take the initiative and sue the wrongdoer/wrongdoers. This type of legal action is usually taken to obtain compensation for the loss, injury or damage suffered. Tort is concerned with civil liability as distinct from criminal liability. Whether or not a supervisor is liable will depend largely on the nature of the relationship between the supervisor and the supervisee in any given case. The Court will decide whether the supervisor had a duty of care towards the supervisee's client and whether any injury or loss to the client was due to a negligent act or omission on behalf of the supervisor. In essence, the court will look to see whether or not the supervisor took reasonable care for the safety of the supervisee's client. In this respect, the ordinary principles of tort law apply in this case, as in any other. A supervisor has a duty not to act negligently or make a negligent omission if he knows or foresees or ought reasonably to foresee that injury, loss or damage may be caused to a person because of the action/omission. This is best demonstrated by the UK decision which came to be the cornerstone of the modern law of negligence, that of ***Donoghue –v- Stevenson*** [1932] AC 562

> "The rule that you are to love your neighbour becomes in law you must not injure your neighbour; the lawyer's question "who is my neighbour?" receives

> a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be liable to injure your neighbour. Who then in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Thus, where a supervisor undertakes an activity (supervision of a therapist), if it is foreseeable that another person may be affected by such activity, the supervisor is under a duty to take reasonable care to ensure that by his actions/omissions, the safety of that other person is not endangered.

Function of Your Records

The **function** of your records is twofold:-

Communication

- Assessing client status (well being)
- Evaluating client assessment/improvement
- Ensuring continuity of assessment/improvement
- Ensuring effective team communication

Client Assessment

Record may need to show the present circumstances, past history and client's concerns/history for proper communication

Plan of Care

Record may need to show clients' problems, planned interventions, and any recommendations made

Client Progress

Record may need to show an outline of updates on progress, all referrals/consultations, client's response to sessions

Protection

To fulfil evidentiary requirements

Accuracy and Adequacy - Accurate notes are far from being the same as **adequate** notes

- The context of a note is a critical element of notes
- Accuracy or the correctness of notes is an essential element of record keeping
- Adequacy, however, is no more than a statement that records fulfil the stated purpose behind creating the record
- The key to adequate records is that the information explains and rationalises key decisions
- Be mindful of the possibilities the future holds for the information to be read by other people
- The clearer the notes are the easier it will be to prove the intention and level of care behind what was written

Inadequate Records:

Render it impossible to determine the standard of your work
Make good work practices look bad
Make bad work practices look worse

Good records are the first line of defence in a legal challenge

Ask yourself the following:

- Are your records a help or hindrance?
- How could the records act as a help to you?
- How could the record act as a source of hindrance to you or someone else?

Narrative Case Notes – Guidelines

- Keep sentences short
- Use big words sparingly
- Be simple and direct
- Notes must be legible
- Avoid broad generalities
- Minimise confusion
- Be specific
- Identify purpose of the notes
- Avoid jargon
- Watch abbreviations
- Distinguish facts from opinion
- Is the note clear and objective?
- Is it relevant?
- Support any opinions
- Are you following best practice?
- Does the record convey a high respect for the client?
- Does the design, structure and content assist you in record keeping?
- Evidence of periodic review
- Put line under the end of each entry
- Think before you write!

Management of Records

It is important that records are kept accurately, correctly filed and archived in accordance with good practice principles. Every organisation should have a record management and retention policy.

All records should be maintained and stored in a manner where they are easily retrieved. This must be balanced with the need for confidentiality. Poor standards of recording, failures to maintain records and the consequences of such failures have been highlighted in many legal cases and conduct hearings.

Because of the implications of the Statute of Limitations Act, 1957 records need to be maintained for various lengths of time depending on the status of the patient/client involved. **The Policy for Health Boards on Record Retention Periods** published by the National Freedom on Information Liaison Group (Health Boards) October 1999 gives useful guidance on record retention policies. Since the Statute of Limitations applies a 6 year time limit after which breach of contract claims cannot be brought and a Plaintiff has 1 year in which to serve a Plenary Summons on a Defendant, practitioners are advised to keep records for at least 7 years in order to be in a position to properly defend civil litigation.

All facilities should have in place a system for the safe storage of past and current records and should refer to this Policy for guidance on their own internal policies. Managers and administrative staff have a responsibility to ensure that systems are in place to support practitioners in their clinical work. Confidentiality of course is of paramount importance in determining questions of record management.

Generally the records belong to the owner of the material on which the record was created or to the person who created the record. Patients do have a **right to access** (not a right of ownership over) their records, which derives from two sources. First, the courts give that right to patients who wish to access their own records. Secondly, statutes have been enacted which enable patients to see information held on them and to have it amended or deleted without resorting to the courts.

Methods by which patients can access their records

1. By Direct Request

2. Freedom of Information Act, 1997 & 2003- if held by a public body

- *The Freedom of Information Act, 1997 (the "Act") was enacted on 21* April 1997. Most public bodies became subject to its provisions on 21 April 1998. A list of public bodies, who are or will be subject to the Act, is set out in Schedule 1**.**

- The aim of the Act is:

  To ensure that the activities of public bodies are transparent by stipulating that their records are available to members of the public. There are obviously legitimate concerns in relation to some categories of information that public bodies may possess. To counteract these concerns, the Act exempts a number of categories of information from disclosure.

"Record" - The Act defines "record" in an extremely wide manner as including:

"any memorandum, book, plan, map, drawing, diagram, pictorial or graphic work or other document, any photograph, film or recording (whether of sound or images or both), any form in which data are held, any other form (including machine-readable form) or thing in which information is held or stored manually, mechanically or electronically and anything that is a part or a copy, in any form, of the foregoing or is a combination of two or more of the foregoing, and a copy, in any form, of a record shall be deemed, for the purposes of this Act, to have been created at the same time as the record."

(i.e. records in any format, including e-mail and hand written notes (clinical charts, professional notes) fax, photograph, video or tape recording.)

Part III- Relevant Exemptions

S. 20 - Deliberations of Public Bodies

S. 21 - Functions and Negotiations of Public Bodies

S. 26 - Information Obtained in Confidence
S. 27 - Commercially Sensitive Information

3. Data Protection

Separate requests may be made under the FOI Act and Data Protection. Each will be dealt with separately. The requirements of the GDPR are discussed herein at p. 33-44 but the key to lawfully retaining data is informed client consent.

Informed Client Consent

The consent of the client should be the guiding principle when obtaining personal data. Such consent should be informed and meaningful. Care should be taken when collecting personal data to ensure the client understands:

- what information is being collected
- why the information is being collected
- who within the agency will have access to the information
- how the information will be used
- the consequences of not providing the information
- what 3rd parties disclosure are contemplated
- the fact that there is a statutory obligation to collect the information
- that he or she can have access to the information once collected
- the identity of the organisation collecting the information

While previously a charge could be levied for making a data protection disclosure, such must now be disclosed free of charge.

4. Discovery

Discovery is the name given to the procedure whereby documentation is sought by either party from the other side, in the context of civil proceedings. Generally speaking, in civil matters one party is entitled to obtain those documents in the possession of the other party (or within their procurement), which are *relevant and necessary* for making their case at trial. Discovery is effectively a two- stage process. Firstly, one party will write to the other side seeking voluntary discovery of the documents which they want sight of. If the other party is not forthcoming, then a motion can be brought to court compelling the other side to make discovery on the basis that the documents are relevant and necessary. If the Court agrees that they are relevant and necessary then an order for discovery is made.

The second stage is where affidavit of discovery is made. This will be made by the party, who is producing the documentation, which is requested. This affidavit will list out all the documents they have in their possession. However, the affidavit is divided into those documents, which are available for inspection, and those documents which are in the party's possession but which are not available for inspection due to being privileged.

Once the affidavit of discovery is furnished, the other party will have a right to inspect and get copies of those documents available for inspection and reasonable opportunity must be provided to allow this to happen. If one wishes to challenge the claim of privilege made over certain documents the parties will have to bring a motion to court to settle this matter.

Legal Privilege

Legal professional privilege is specific to communications emanating from legal advice and litigation. The public interest is said to lie in the preserving of the integrity of the litigation process by protecting the confidentiality of the relationship between lawyer and client. Legal privilege covers communications between lawyer and client, client and third party or lawyer and third party where these communications were in preparation of contemplated litigation. The privilege also applies between communications between lawyer and client for the purposes of giving legal advice. Legal privilege has been deemed not to attach to a legal document such as a lease or a will created following legal advice, since this is not a "communication" for the purposes of litigation or legal advice.

A significant exception to legal professional privilege was created in respect to expert reports in personal injury cases. Under Rules of the Superior Courts and by virtue of SI 391 of 1998, in High Court personal injury proceedings, the parties must exchange all reports and statements prepared by experts whom they intend to call as witnesses.

The rules of the Superior Courts provide that any party may apply to court for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power. The court may order an affidavit to be filed listing all the documents in the party's possession relating to the matters in question. The order may relate to a person not a party to the action who may appear to the court to have relevant documents in his possession.

Discovery can be made in the following ways:

Inter-party discovery, where a plaintiff takes legal action against the defendant. The plaintiff's Solicitor may ask the defendant for discovery of documents relevant to the patient.

Non-party discovery, where a plaintiff is a party to legal proceedings, which do not involve the non-party. Either party may seek discovery of relevant records that the non-party may hold.

Voluntary Discovery

The first step in discovery is for the party seeking it to write to the other party asking for voluntary discovery of the records. If the party does not consent to release the records, they can refuse to do so, in which case the party seeking the discovery can apply to the court for an order for discovery.

Documents

Documents include but are not limited to:

- Any written documents
- Photographs and x-rays
- Video and audio-tapes
- Electronic/computerised information.

5. Search Warrant

Compliance with a search warrant is required by law and record personnel are advised that they should advise their supervisor of any official demand for access to records. The warrant must be specific regarding the records required.

6. Requests for Information by the Gardai

Where a client or patient has authorised Gardai to have access to his records this may be supplied. Other request without the client's authorisation will only be supplied where legally authorised by a Court Order or Search Warrant.

7. Subpoena

Increasingly subpoenas are used by solicitors, as a means of protecting themselves from liability for costs of cancelled hearings when key witnesses fail to turn up at court. In such circumstances solicitors should contact the witness in question beforehand, preferably by means of an explanatory letter or telephone call, to explain why a subpoena is to be issued.

Where it is necessary to issue a subpoena to compel attendance of the witness it should also be remembered that the solicitors who have requested the subpoena be issued are responsible for the expenses of the witness in attending to give evidence.

The subpoena is a court order, which may require the witness to bring any relevant documentation in their possession to court.

Compellability

Many counsellors are reluctant to act as an expert witness even when they are requested to do so by their client. The reasons for such reluctance vary from counsellor to counsellor. Some are fearful about the prospect of giving evidence and want to avoid the prospect at all costs. Others have concerns about their duty of confidentiality, which is the bedrock of the counsellor/client relationship.

It is found that most experts have spent large sums of money and huge chunks of their time on their professional careers yet few focus on their skills as a witness. Most learn by experience, on an ad hoc basis. Lack of knowledge and confidence are usually the factors that make experts fearful about the process. Yet witnesses can familiarise themselves with the court environment and procedures and know how to hold a line of argument, thus making the process less intimidating. Although a witness may know a lot about their subject, they often do not know how to communicate that knowledge to a non-expert in a courtroom. Preparation is the key. Training is also important. Once witnesses are fully prepared they can represent themselves and their profession well in court. Going to court is not something to be feared, it is just another professional experience to learn from.

Codes of Ethics often deal with the question of counsellors' obligations to treat in confidence personal information about clients, whether obtained directly, indirectly or by inference. Disclosure of confidential material however can occur in a number of circumstances including where the client consents, by order of a court or Tribunal, under statutory powers of investigation, and where the public interest requires disclosure. A client can release the obligation of confidentiality and often does so when they are involved in litigation. In that instance it is important that if the clients' solicitor makes the request you are fully satisfied that your client has consented to the release of information. It is good practice to ensure that your client understands fully to whom disclosure is being made, the purpose of the disclosure and the extent of the material being disclosed. You should be alert to litigants who all too often fail to realise that their medical and professional advisors must disclose all relevant information in a legal report. The client cannot cherry pick what is disclosed and what is withheld and it is good practice to verify that your client understands the implications of their consent to disclosure. If your client has not agreed to a Solicitor's request you are under no obligation to comply and can decline the request. In that instance however you can be compelled to release your case notes by virtue of a Court Order for Discovery.

In the event that the counsellor refuses to attend court they can be compelled to testify if a court so orders. A Subpoena is a court order to attend and testify in court. A Subpoena does not oblige you to answer questions or disclose confidences until you are in the witness box. Any concerns you have about disclosing information can be communicated to the Judge. If you are greatly concerned about disclosure in open court you can request the Judge to hear you in chambers. In practice Judges will only order the disclosure of confidential information where the interests of justice would be served by so doing.

For counsellors unclear about their legal rights or obligations you should turn to and be guided by any policies and guidelines of your employer organisations and insurers. In the absence of any specific guidelines you should seek independent legal advice. Professionals find it difficult to deal with these important issues where policies and guidelines are not in place. Those in positions of responsibility should ensure that subordinates are not operating in a vacuum. This is often where things go wrong.

Statutory Regulation

Counsellors and psychotherapists are now designated under the Health and Social Care Professionals Act 2005 ("the 2005 Act").

The Health and Social Care Professionals Act 2005

Regulation under the 2005 Act is primarily by way of the statutory protection of professional titles rather than restricting scopes of practice. The use of protected titles is restricted to practitioners granted registration under the Act. Registrants must comply with a code of professional conduct and ethics and are subject to "fitness to practice" rules similar to those applying to nurses and doctors. The structure of the system of statutory regulation comprises registration boards for the professions, a committee structure to deal with disciplinary matters and the Health and Social Care Professionals Council with overall responsibility for the regulatory system. These bodies are collectively known as CORU (the website for CORU is available at CORU).

The Act provides that the Minister for Health, after consulting the Health and Social Care Professionals Council, may designate a health and social care profession that has not already been designated if he or she considers that it is in the public interest to do so and if specified criteria have been met.

While counsellors and psychotherapists are subject to legislation similar to other practitioners including consumer legislation, competition, contract and criminal law, they are only regulated under the 2005 Act since 21st March 2018. Thus, statutory oversight of counsellors and psychotherapists now exists so that their competence and conduct and that some practitioners lack the qualifications and professional training needed to work with such vulnerable clients.

The Minister for Health, in bringing counsellors and psychotherapists under the regulatory regime of the 2005 Act, is ensuring that those registered will have minimum qualifications, that only registrants could use the title or titles protected under the Act, and that registrants will be subject to a range of sanctions (including suspension or cancellation of registration) in the case of a substantiated complaint of professional misconduct or poor professional performance.

Council report

The Health and Social Care Professionals Council was consulted in accordance with the Act. The Council, in its report to the Minister said that much work would be needed to ensure that counsellors and psychotherapists were well prepared for registration. Unlike the other professions that are designated under the 2005 Act, the estimated 5,000 counsellor and psychotherapy practitioners do not form a cohesive

professional body. There are 25 subgroups within the two professions, albeit the majority are in 2 bodies; the Irish Council for Psychotherapy – which has 5 discipline groups representing 10 organisations (claims approximately 1,250 members) – and the Irish Association of Counsellors and Psychotherapists, which claims 3,500 members.

Proposals

The Minister, having considered the Council's views, decided to designate two professions under the Act (counsellor and psychotherapist) each with its own register. Those with the required qualifications could be granted registration on both registers.

The Minister has established one registration board for both professions that will establish and maintain the two registers. On the date that the Oireachtas approved the Regulations designating both professions, the Minister stated:

> *"The approval by the Oireachtas today of the Regulations designating the professions of counsellor and psychotherapist under the Health and Social Care Professionals Act 2005, establishes one registration board for both professions and creates two new professional positions (for the professions of counsellor and psychotherapist) on the Health and Social Care Professionals Council.*
>
> *"Registrants will have minimum qualifications and only those registered will be entitled to use the title or titles protected under the Act. Registrants will be subject to a range of sanctions (including suspension or cancellation of registration) in the case of a substantiated complaint of professional misconduct or poor professional performance.*
>
> *"I am conscious of the work done to date by a number of professional bodies and interested parties in seeking to have these professions regulated by the State and I am pleased that I am now in a position to make the Regulations and to commence work on the appointment of the 13 member registration board following the submission of suitable candidates for my consideration by the Public Appointments Service.*

It is proposed that the level of qualifications would be set by the Minister on the advice of the registration board who will determine the number of existing practitioners that will be granted registration. The registration board will set the approved qualifications for future practitioners. Standards for educational and training awards in counselling and psychotherapy were presented by Quality and Qualifications Ireland (QQI) in May 2014. These standards will assist in the process of assessing applications for approval of the relevant education and training programmes.

It is proposed that title protection will also be a key issue from a public protection point of view. The legislation may need to ensure that those who are not practising a health profession within the meaning of the Act but who have occupational or professional titles that include the title of counsellor (financial counsellors, career counsellors, counsellors in the diplomatic service, for example) will not be subject to the Act.

Section 4(3) of the 2005 Act defines a health or social care profession thus:

"*A health or social care profession is any profession in which a person exercises skill or judgment relating to any of the following health or social care activities:*

(a) the preservation or improvement of the health or wellbeing of others;
(b) the diagnosis, treatment or care of those who are injured, sick, disabled or infirm;
(c) the resolution, through guidance, counselling or otherwise, of personal, social or psychological problems;
(d) the care of those in need of protection, guidance or support."

Next steps

The Minister, having made regulations designating the professions of counsellor and psychotherapist under the Act, now must continue and the following sequence of steps is envisaged:

- The Minister will establish and appoint the 13-member registration board under the Act in accordance with Government guidelines on appointments to State boards;
- The registration board will be requested to advise the Council and the Minister on titles to be protected and on grand-parenting qualifications for existing practitioners;
- The Minister will make regulations protecting titles (subject to prior approval of the Houses of the Oireachtas) and prescribing the minimum grand-parenting qualifications for existing practitioners;
- In tandem, the registration board, with the approval of Council and following public consultations, will make a number of bye-laws to include qualifications (other than grand-parenting) bye-laws that will allow the establishment of its registers.
- The registration board will establish its registers and the two-year transitional period, after which only registrants will be permitted to use the protected titles, will begin.

Expert Witness Reports - The Basics

An ***expert witness*** is a specialist in a particular field who is asked by a solicitor to give an independent opinion on the facts of a case. Their role in court is to help the decision maker(s) (judge, jury, etc.) to understand the case. They need both the qualifications and experience in their specialist field. ***Qualifications*** include degrees, professional qualifications, training courses, certificates and membership of learned societies. ***Experience*** is indicated by the length of time spent in a particular specialist field.

The structure of both written and oral evidence of an expert witness is:-

Issue

Fact

Opinion

Because.....

(give your reasons and refer back to the facts)

Model Format

It is important to create your own personalised format for your particular field. Your format should contain the key points for an excellent report. The essentials are as follows:

- Have a front page with the title of the case
- Have a contents page with page numbers (if report exceeds 8 pages)
- Identify who you are at the outset of your report
- Detail the purpose of the report
- Have a brief summary at the beginning for quick reference by the reader
- Have an introduction where you clearly define the issues you are addressing in your report
- Give all background information/history where relevant
- State the facts of the case, as you know them
- Provide information on any examination, interview, meetings or investigations you carried out yourself
- Give your professional opinion, if required based on the facts and any published research, standards or guidelines available
- Have a conclusion, which summarises the main points of the case and your opinion, if required
- Make sure to distinguish between facts, information reported to you and your professional opinion
- Do not stray from your area of expertise
- Convey a high respect for the client in the report
- Use simple, clear, plain English
- Explain any technical terms
- Keep the report as short as possible but include all relevant information
- Any published material referred to or consulted in the preparation of the report should be included in the appendices
- Re-read the report and ensure you are satisfied with your conclusions
- Ask a colleague to read the report and comment on it.
- Keep a copy for yourself on file

The Three P's - Prepare, Prepare, Prepare
Effective preparation is vital to successful evidence giving. I strongly recommend to witnesses that that they are systematic in their preparation for court. A checklist is vital to ensure they take control of all the variables. Pointers to remember are :

- Meet with your lawyers as early as possible
- Tell your lawyers the questions to ask you, do not presume what they know about the practices in your industry
- Review your files, particularly your own records that were discovered
- Have all your notes and records in order
- Clarify what the issues are and what aspects of the case you are dealing with
- Identify the strengths and weaknesses in your case
- Do a SWOT analysis on the case (strengths, weaknesses, opportunities, threats)
- Anticipate likely questions and your answers in cross –examination
- Update yourself on recent developments in your area
- Practice your introduction
- Dress
- Transport arrangements
- Identify venue
- Visit the court before to watch another hearing
- Ask about anything you do not understand

In Court

Lawyers use many techniques during cross-examination to test and undermine their opponent's witness. They will use the witness to advance their own case and to undermine their opponent's case. During this process remember at all times that you are not on trial. Your role as a witness is to assist the Judge in making a decision. You are there simply to tell the truth. Giving evidence is something that you can manage and indeed excel at. You are not there to win the case but merely to present your information. It is the lawyer's job to test you. The following guidelines will help you when you are in the witness box :

- Visualise how you want to come across and keep that in your mind's eye
- Use all questions as gifts, i.e. use them as opportunities to clarify and explain where necessary
- Keep coming back to your essential points
- Always remain calm
- Never take it personally; you are not your evidence
- Don't argue with the lawyer
- Remember you are there to assist the court
- Appeal to the Judge, if necessary
- Don't read from notes as you are talking, refer first and then respond

- Position yourself so that you are facing the Judge, turn to the lawyer for the question, then turn back to the Judge to whom you should be addressing your answer

Directing Your Answers to the Decision Maker

***** As soon as you enter the witness box, sit and align your feet directly to the judge. If your back is to the lawyer, then all the better!

* Do not move your feet. Twist at the hips until facing the questioning lawyer. Listen carefully to the question the lawyer is asking. Also notice if he is using any techniques. When he has finished his question, and not before, turn back to face the judge.

* This is your natural, comfortable position and your feet will remind you to face the judge. You are now making eye contact with the judge or at least looking in his direction if he is making notes. You cannot see the lawyer at this stage and so his looks of disbelief do not apply! Answer slowly and clearly using the ***gift*** in this question.

* When you have finished your answer turn back to the lawyer, slowly. This is your signal of readiness and allows you to control the speed of questioning.

* If there is a jury, then you should direct you answers to both the judge and the jury, but again do not answer the lawyer. Remember: only speak to the decision makers.

Procedure in Court

- **Oath/Affirmation**
- **Examination -in-chief**
- **Cross-examination**
- **Re-examination**

The correct titles are as follows:-

Courts

High Court - Judge

Circuit Court - Judge

District Court - Judge

As a witness, it is not sensible to speak directly to the barrister in court. You may be tempted to enter into a discussion with them if you do that but remember, you are there to answer questions for the benefit of the decision maker – the Judge and/or Jury. Never use the words "My learned friend" – this is language that you may hear barristers use when speaking about each other. Pass questions to counsel via the judge, e.g. "Judge, would Counsel please rephrase the question. I did not understand it." Refer to a barrister as counsel or by their last name.