THE DUTY TO DISCLOSE PREVIOUS CRIMINAL INFORMATION IN IRISH INSURANCE LAW

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INTRODUCTION

The doctrine of utmost good faith (uberrimae fides) is one of the most important doctrines in insurance law. In its application to assureds, it obliges proposers of insurance to disclose facts which are material to the risk so as to enable insurers to make informed decisions on whether or not to resile from the negotiations or to accept the risks and, if so, at what premiums. The locus classicus in respect of the test to determine what constitutes a material fact in Irish insurance law is Chariot Inns Ltd v. Assicurazioni SPA and Coyle Hamilton Phillips Ltd. In that case the Supreme Court held that what was to be regarded as material "is a matter of circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk and, if so, in determining the premium he would demand". A proposer for insurance is, accordingly, obliged to answer all material questions asked by an insurer truthfully and honestly and, in addition, to volunteer material facts which are not made the subject of specific enquiry. Failure in relation to either requirement will enable the insurer to avoid the contract. Avoidance of the contract in its entirety is the only remedy available to the insurer.

As regards the duty to disclose previous criminal information, the law in Ireland, particularly as it relates to adults, remains unsettled. It is accepted that convictions of 20 years' standing need not be recounted and that, with some exceptions, offences committed before a person reaches 18 years of age will become spent three years after a finding of guilt. In other cases it seems that a proposer must disclose the fact that a crime has been committed, but little else can be stated with certainty. In particular, there has been no judicial evaluation of the need for a direct relationship between the offences committed and the risk posed, the status of "moral hazard" as it relates to previous criminal information, the need to disclose charges pending trial where the proposer is innocent of the charges, and the standing of criminal information relating to associates of the proposer.

The purpose of this article is to examine the law governing the disclosure of previous criminal information in Ireland, to highlight features of it that may produce coercive effects and to suggest avenues of reform. In arguing for the need for reform, a two-tiered approach will be adopted. In the first instance, reforms will be suggested which are premised on prevailing law.

Such reforms will include the need to impose obligations on insurers to establish a nexus between the criminal offences committed by the proposer of insurance and the risk posed, to expand the circumstances in which a "prudent insurer" determination of materiality will be replaced with a "reasonable assured" test and to introduce statutory expungement provisions. Secondly, further support for those reforms will be provided by drawing upon various contextual and penological arguments. As regards the contextual avenue of enquiry, it will be argued that the current rules and remedy that exist in respect of the duty of disclosure are ahistorical given that they remain closely connected with economic conditions that existed in the mid-eighteenth century. In the penological context, the article will seek to demonstrate that the existing rules operate in a manner that is inconsistent with current more inclusionary policies which are designed to re-integrate offenders into society and that such rules may contribute to a process of stigmatisation and continued exclusion. The article will commence with an analysis of existing rules on the duty to disclose previous criminal information, particularly as they relate to convictions, charges pending trial and criminal associates of proposers of insurance.

CRIMINAL CONVICTIONS

In *Aro Road and Land Vehicles v. The Insurance Corporation of Ireland*, a case which would not have reached the courts in England and Wales as a result of section 4(3)(a) of the Rehabilitation of Offenders Act 1974, the Irish courts had to consider the doctrine relating to non-disclosure of previous criminal convictions. In July 1981, the plaintiff company agreed to sell and deliver goods to a firm in Maize, Co. Antrim. At the request of the plaintiff, the goods were to be delivered by C.I.E. The goods were to be transported at the plaintiff's own risk, and it was suggested by the carriers that the goods be insured. The carriers, acting as agents for the defendant insurance company, arranged insurance cover. The only information given to the plaintiff relating to the terms of the insurance was the extent of the cover; the only information sought by the underwriters was the names and addresses of the consignor and consignee and the nature and value of the goods. No opportunity was given to the plaintiff to provide the defendant with additional information. The goods were to be delivered in four separate consignments. Three arrived safely, but the fourth was hijacked, set on fire and destroyed. The plaintiff issued proceedings seeking an indemnity under the policy for the loss. The defendant sought to repudiate liability on the basis that the plaintiff company had failed to disclose the fact that the managing director had been convicted on 10 counts of receiving stolen motor parts and sentenced to 21 months' imprisonment in 1962.

In the High Court, Carroll J, while personally of the opinion that the assured’s non-disclosure was immaterial, deferred to the expert testimony which suggested that a reasonable and prudent underwriter would regard the matter of previous convictions as material and would have regarded its non-disclosure as a good reason for refusing to underwrite the risk. Accordingly, the learned judge held that the insurer was entitled to avoid the policy in question and to repudiate liability. In the Supreme Court, it was held that the trial judge, as sole and final arbiter, had erred in substituting the view of an underwriter for her own view in determining the question of what a reasonable underwriter was entitled to have disclosed: “[i]n disputes concerning professional competence, a profession is not to be permitted to be the final arbiter of standards of competence. In the instant case, the assurance profession is not to be permitted to dictate a binding definition of what is reasonable.” Accordingly, the Supreme Court held inter alia that convictions of almost 20 years standing may remain unrevealed.

The vagueness of approach in this decision, as it relates to the relevance of criminal information to the formation of insurance contracts, has left many questions unanswered. What, to begin with, of the need for a nexus between the offences committed and the risk posed? In England and Wales, for example, in *Roselodge v. Castle* the plaintiff diamond merchants sought indemnity under an all risks policy from the defendant insurer after the principal director of the plaintiffs had been robbed of diamonds worth £304,590. The defendant insurer sought to repudiate liability inter alia on the grounds that the director had failed to disclose that he had been convicted of bribing a police officer in 1946, some 18 years prior to entering the relevant insurance contract, and was fined £75. In respect of this plea of non-disclosure, McNair J held that it was not established that the director’s offence and conviction “on a matter which has no direct relation to trading as a diamond merchant” was a material fact which ought to be disclosed.

3. [1986] IR 403 at 442 per McCarthy J. The relevant principle had previously been stated by Kenny J in *Chariot Inns v. Assicurazioni Generali* [1981] IR 199 at 225, a case which was relied on in *Aro Road*: “[t]he standard by which materiality is to be determined is objective and not subjective. In the last resort the matter has to be determined by the court: the parties to the litigation may call experts in insurance matters as witnesses to give evidence of what they would have regarded as material, but the question of materiality is not to be determined by such matters.” For the conclusiveness of expert testimony in Ireland, see D Kelliher, “Expert Evidence In Ireland” (1996) 14 ILT 42-45. In England and Wales, see also *Reynolds and Anderson v. Phoenix Assurance Co. Ltd and Others* [1978] 2 Lloyd’s Rep 440 at 457-458 per Forbes J.


6. However a further plea of non-disclosure, that the plaintiff sales manager had been convicted eight years previously of smuggling diamonds and jewellery into the United States, was successful and, accordingly, the defendant insurer was entitled to avoid the policy.
If there is no nexus between a conviction for an offence and the risk posed the question still arises whether the offence, or conviction, would nevertheless be material if it affects the moral hazard? In England and Wales, some judicial support is evident for the view that a conviction for an offence unrelated to the risk may be material if it falls under the rubric of moral hazard. More recently, support for the broadness of this view has been circumscribed. In *Reynolds and Anderson v. Phoenix Assurance Co. Ltd.*, for example, it was held that a conviction for receiving stolen goods was not material to a fire policy. Forbes J noted:

... receiving is always a crime of dishonesty but the professional receiver is in a different category from someone who may, on one occasion only, have succumbed to the temptation not to ask the obvious question about the provenance of some goods offered to him. In deciding questions of fact and degree such as this it is often difficult to define with accuracy the precise line of demarcation but usually comparatively easy to decide whether a given set of circumstances falls on one side of the line or the other... I conclude that the defendants [insurers] have failed to prove to my satisfaction that this particular conviction 11 years previously was a material fact.

Similarly in *Deutsche Ruckversicherung v. Walbrook Insurance Co. Ltd.*, where the plaintiffs sought to avoid a contract for non-disclosure on the grounds that the defendant’s agents acted fraudulently in misappropriating


8. The latitude which this argument allowed for is evident in the following passage from McNair J in *Roselodge v. Castle* [1966] 2 Lloyd’s Rep 113 at 132: “Turning now to the evidence of Mr Lindley and Mr Archer [underwriters] as to the materiality of [the assured’s] conviction 20 years before, it is true that both these witnesses stated in plain terms that they would not have written the risk had the fact been disclosed; but they were driven in cross-examination to state such extreme views that I was unable to accept their evidence on this point. It is not necessary to cite examples of their extreme views. But I would mention one. Mr Archer stated that in his view a man who stole apples at the age of 17 and had lived a blameless life for 50 years is so much more likely to steal diamonds at the age of 67 that if he had been told him this when putting forward a proposal at the age of 67, he would not have insured him. Many other instances of the like character can be cited from the transcript.” Insurers have not been deterred from raising such arguments. Recently in England and Wales, it was suggested by an underwriter in *Inversiones Manria S.A. v. Sphere Drake Insurance Company Plc (The Dora)* [1989] 1 Lloyd’s Rep 69 at 93 that moral hazard was a most important consideration and that “the offence of smuggling as much as a single bottle of whisky would be material.”


overriding commissions that should have been credited to the defendant, Philipps J held:

I see the force of the argument that reinsurers are likely to be disinclined to accept risks from brokers or agents who have behaved dishonestly, but where the dishonest conduct has no impact on the risks being reinsured, I question whether it can entitle the reinsurers to avoid contracts placed by such brokers or agents on the grounds of non-disclosure. The doctrine of non-disclosure is founded in equity. Avoidance in circumstances such as those in this case is liable to have results that are inequitable.

In summary, it is submitted that the assured must disclose an offence, which involves a level of criminality which is contrary to standards of honesty and integrity and which has a direct connection to the risk posed, or, would by its constitution and temporal closeness (but excluding offences which fall within the ambit of the Rehabilitation of Offenders Act 1974) to the proposed insurance reveal to an insurer, having regard to the nature of the risk, the probability of recurring dishonest conduct by the assured.

CHARGES PENDING TRIAL

To date, the examination of previous criminal information has only focused on convictions for criminal offences. What of the need for a proposer of insurance to disclose charges pending trial and the previous criminal conduct of his or her associates? In England and Wales, in March Cabaret v. London Assurance, the defendant insurer sought to avoid a fire policy inter alia on the grounds that the plaintiff assured had failed to disclose that he had been charged with handling stolen property prior to renewal of the policy. The assured was committed for trial on June 14, 1969; the policy fell due for renewal on April 20, 1970. On June 22, 1970, the assured was convicted, after he pleaded not guilty, and was fined £2,000 and ordered to pay £500 costs. The learned judge, May J, held, on the balance of probabilities, that the assured had committed the criminal offence alleged and this was a fact which was necessary to disclose to insurers on the basis that it went to the moral integrity of the proposer. To the argument that an assured was only

11. The plaintiffs claimed that knowledge of the fraud should be imputed to the defendant company since the agents in question were the directing mind of that company.
bound to disclose his arrest and committal for trial in keeping with his right to silence and privilege against self-incrimination, May J noted:

I was concerned at one stage in this case about how one could reconcile the presumption of innocence and the privilege of non-incrimination with the duty of disclosure... After argument I realise that my doubts were based upon a fallacy. One must remember that there is no estoppel by acquittal save as between the Crown and the person acquitted. There is nothing to prevent one party to civil proceedings, if the fact be material and relevant, attempting to prove that another party to those proceedings has in truth committed the crime of which that other party has been previously acquitted in a criminal court... Thus even if [the assured] had been acquitted prior to renewal... there would... have been nothing to prevent insurers attempting to prove that he had committed the offence. If they had succeeded and if [the assured] had, as here, failed to disclose that he had committed the offences, then this would, notwithstanding his acquittal, have been a material non-disclosure entitling insurers to avoid the policy. No one has a right to a contract of insurance, and if a proposer has committed a criminal offence which is material and ought to be disclosed he must disclose it, despite the presumption of innocence which is only a presumption, and despite the privilege of non-incrimination, which is only a privilege or he must give up the idea of obtaining insurance at all.15

The learned judge went on to suggest: "[t]here is one thing I would like to add; had it been material I would have been prepared to hold in this case that in any event...[the assured] ought to have disclosed his arrest, charge and committal for trial at the date of renewal even though in truth he was

15. [1975] 1 Lloyd’s Rep 169 at 177. See also Insurance Corporation of the Channel Islands v. Royal Hotel Limited and Others [1998] Lloyd’s Rep 151. Abrogating the right to silence or privilege against self-incrimination through requiring an insurance proposer in a non-judicial investigation to disclose the committal of criminal offences, for which he or she has not been tried, raises questions about the admissibility of any such statement in subsequent criminal proceedings. The admissibility of such statements will depend on their voluntariness. In Saunders v. UK (1996) 23 EHRR 313 at 340, which concerned the interpretation of s. 436 of the Companies Act 1985, in England and Wales, as it applied to Article 6 of the European Convention on Human Rights, the European Court of Human Rights held: “The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings... Moreover the fact that such statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right.” In Ireland, see Re National Irish Bank Ltd [1999] 3 IR 190; People (Attorney General) v. Cummins [1972] IR 312 at 322 per Walsh J.
innocent.\textsuperscript{16} In respect of this last submission, that a proposer for insurance ought to disclose the fact of his arrest, charge and committal for trial at the date of renewal, even though he was innocent of the charges, Forbes J stated in Reynolds and Anderson \textit{v.} Phoenix:

With the greatest respect to Mr Justice May, I must decline to follow him in this suggestion. The object of requiring disclosure of circumstances which affect the moral risk is to discover whether the proposer is a person likely to be an additional risk from the point of view of insurance. The most relevant circumstance for disclosure is therefore that he actually committed an offence of a character which would in fact influence the insurer's judgment. The proposer is bound to disclose the commission of that offence even though he has been acquitted or even if no one other than he has the slightest idea that he committed it: the material circumstance is the commission of the offence. A conviction for a criminal offence is itself, it seems to me, also material... even though the proposer may protest his innocence or in fact has not committed the offence; for a responsible insurer is himself entitled to assume that \textit{prima facie} the proposer was rightly convicted and has therefore in fact committed the offence. If therefore an allegation of a relevant criminal offence is made and the allegation is true the proposer must disclose it not because the allegation has been made but because the offence has been committed; it is not then the allegation which must be disclosed but the underlying fact that a crime has been committed.\textsuperscript{17}

In Ireland in \textit{Dermot Latham v. Hibernian Insurance Company Ltd and Peter J. Sheridan and Company Limited}\textsuperscript{18} Blayney J approved broadly of Reynolds and Anderson \textit{v.} Phoenix Assurance Company Limited and Others: "[i]n that case [Reynolds and Anderson] it was held that the material circumstance was not the fact that a party had been charged with an offence, but that he had committed the offence. What had to be disclosed was the underlying fact that a crime had been committed." Interestingly, in the English case of Inversiones Manria S.A. \textit{v.} Sphere Drake Insurance Co. Plc (The Dora),\textsuperscript{19} Philipps J submitted \textit{obiter} that he preferred the reasoning of May J in March to that of Forbes J in Reynolds and, accordingly, charges of smuggling, whether or not they were well-founded, should have been disclosed.

Given the broad application of Reynolds in Ireland, it is unclear whether the proposer for insurance must disclose his or her arrest, charge and

\textsuperscript{16} [1975] 1 Lloyd's Rep 169 at 177.
\textsuperscript{17} [1978] 2 Lloyd's Rep 440 at 460. For support for Forbes J's position, see the judgment of Fisher J in the High Court in New Zealand in \textit{Gate v. Sun Alliance Insurance Ltd.} [1995] LRLR 385.
\textsuperscript{18} High Court, March 22, 1991, at p. 7.
\textsuperscript{19} [1989] 1 Lloyd's Rep 69 at 93-94.
committal for trial even if the allegations are unfounded or only if the offence has been committed. It is submitted that the former proposition casts the net too widely. Moreover, where England and Wales is concerned, that proposition is inconsistent with the objective of the Rehabilitation of Offenders Act 1974: applying such a proposition, a proposer for insurance could, *ex hypothesi*, be required to disclose spurious and baseless allegations but would be excused from having to disclose a spent conviction "of comparatively recent date" under the 1974 Act. Accordingly, the latter proposition is to be preferred.  

It would seem to follow that the law as it currently exists requires, or should require, a proposer for insurance to disclose the facts of an arrest, charge or committal for trial for an offence - where the offence has been committed - and, it also appears, the commission of an offence for which the proposer was acquitted or which remains undetected at the time of proposing the risk.

Two additional matters should be noted. First, disclosure of the facts of an arrest, charge or committal for trial for an offence, where the offence has been committed, should only be material if it relates directly to the risk sought to be insured, or by its nature indicates a strong likelihood of continuing dishonesty. Second, it is doubtful if the requirement to disclose offences for which a proposer has been acquitted in criminal proceedings, or which remain undetected, is of any real deterrent or practical value. To begin with, the threat of a subsequent civil action by the insurer to prove the commission of the offence and, consequently, if successful, to avoid the policy, may not be sufficient to displace the proposer's impulse to conceal the commission of the offence given that when the duty arises, the offence still remains undetected or unproven.

More pertinently, it is submitted that while an insurer is not estopped from pursuing the proposer in civil proceedings to prove that the crime was committed, the degree of probability required within the preponderance of probability may be considerable particularly in the light of the purpose of the action.  

In other words, the more probable success rate of an insurer in a civil action, following the assured's acquittal or non-prosecution in a criminal action, may be more imaginary than real given the essential nature of the action and the all or nothing nature of the remedy available to the insurer - avoidance of the insurance contract - if successful. Furthermore, the proposer cannot be certain in incriminating himself or herself to the

20. But see the *dictum* of Colman J in *The Moonacre* [1992] 2 Lloyd's Rep 501 at 521: "if the proposer is in possession of information which, if true, would be material to the risk and he fails to disclose it, the insurer will be entitled to avoid the policy even if the information in the possession of the assured is subsequently found to have been completely untrue."

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insurer that any such statement will not be adduced in evidence at a subsequent criminal action. Finally, should the proposer disclose criminal wrongdoing to an insurer and the proposed risk is declined (and it invariably will be), in addition to incriminating himself or herself, the proposer may also be bound to disclose the fact of the refusal, and/or the reasons for the refusal, to other insurers.

CRIMINAL ASSOCIATES

Finally, not only are an applicant’s own convictions capable of being construed as material, so too are those of persons with whom he or she associates - though presumably there should be a nexus between the offences and the risk insured against or a likelihood of continuing dishonesty as it relates to that risk. Although there is no authority precisely to this effect, such a proposition also applies, mutatis mutandis, to other kinds of criminal information concerning associates of the assured including arrest, charge, and committal for trial (where well founded) and where the offence has been committed but which remains undetected or in respect of which the associate has been acquitted.

In Lambert v. Co-op Insurance Society Limited, for example, an assured signed a proposal form for an all risks insurance policy to cover her own and her husband’s jewellery. Though no questions were asked in the proposal form, the assured failed to disclose that her husband had been convicted “some years earlier” of receiving stolen goods and fined £25. She also failed to disclose that four months prior to renewing the policy her husband was convicted a second time of conspiracy to steal and theft and was sentenced to 15 months’ imprisonment. When a claim was made on the policy, the defendant insurers repudiated liability on the basis that the assured failed to disclose her husband’s previous two convictions. It was held on appeal that the second conviction was a material fact which required disclosure. Similarly, in The Dora the plaintiff assured claimed

22. But see supra, n. 15.
23. [1975] 2 Lloyd’s Rep 485
24. The defendant insurer’s branch manager had testified at the trial to the effect that though his company would have wanted to know of the first conviction, they would in all probability have issued the policy just the same. If, however, they had known of the second conviction, they would not have invited renewal of the policy.
25. MacKenna J did however state [1975] 2 Lloyd’s Rep 485 at 491: “The present case shows the unsatisfactory state of the law. Mrs Lambert [the assured] is unlikely to have thought it necessary to disclose the distressing fact of her husband’s recent conviction when she was renewing the policy on her little store of jewellery. She is not an underwriter and has presumably no experience in these matters. The defendant company would act decently if, having established the point of principle, they were to pay her. It might be thought a heartless thing if they did not, but that is their business not mine.”
under a contract of marine insurance in respect of the total loss of a yacht. The defendant insurers alleged *inter alia* that the assured failed to disclose that the manager and skipper of the yacht were facing smuggling charges, and, that the skipper had a previous criminal record – in the five years prior to the proposal, he had been convicted seven times under a foreign law of drawing cheques against insufficient funds. It was held that the defendant insurers had made good their right to avoid the contract on the grounds of non-disclosure in respect of both the smuggling charges and previous criminal record.

The question of association as it relates to previous criminal information has never been dealt with by the Irish courts. The opportunity did however present itself in *Latham* but Blayney J declined to deliberate on the matter. As noted, the plaintiff and Oliver Byrne obtained a 35 year old lease for a property in Dublin in May 1983 and opened a 24-hour grocery shop. Insurance cover was obtained from Hibernian Insurance Company, initially in the names of the plaintiff and Oliver Byrne. Before the policy was renewed in August 1984, it was completed in the plaintiff’s own name. The material facts were that the plaintiff had on November 22, 1983 committed an offence of receiving stolen goods – and had admitted doing so – which ought to have been disclosed at renewal. Similarly Oliver Byrne had been arrested and charged with the same offence at the same time as the plaintiff. Moreover, it was adduced in evidence that even though Oliver Byrne was not a party to the renewal of the insurance policy, he had a private arrangement with the plaintiff under which he would receive 50 per cent of any claim which was recovered from the insurer.

*Latham* was decided on the basis that the plaintiff had failed to disclose that he had committed the relevant offence and had admitted it. The question that decision begs, however, is whether or not the plaintiff’s association with Byrne, as it related to the property in question, and the fact of the latter’s arrest and charge for the same offence, was also a material fact which ought to be disclosed. Presumably such a fact would be material provided there was some form of continued association in respect of the insured property.\(^{27}\) As noted, no reference was made to the issue in the judgment. Indeed the ambiguity of the judgment on the question of previous criminal information is heightened by the fact that Blayney J, in response to a submission by counsel for the plaintiff that the mere charge and arrest of the plaintiff was not a material fact which ought to be disclosed, suggested as follows:

> It is not necessary in the circumstances to consider another issue

\(^{27}\) On this point, it should be noted that Oliver Byrne was joined as a plaintiff, along with Latham, in the claim against the defendant brokers for negligence and breach of contract. See *Dermot Latham v. Hibernian Insurance Company Limited and Peter J Sheridan and Company Limited*, High Court, December 4, 1991, *per* Blayney J.
which was raised in the course of the argument, namely, whether the mere charge and arrest of the plaintiff was a material fact which ought to have been disclosed. It was part of the plaintiff’s submission that it was not. Since it is not necessary to consider the issue I make no finding in respect of it.  

Given that the learned trial judge approved of Reynolds and Anderson as it related to the disclosure of the fact of having committed an offence, as opposed to having been charged with an offence, it would not be difficult to refine the principle further, in a manner consistent with Reynolds and Anderson, by suggesting that a charge and arrest would stricti juris be material if, and only if, the assured knew them to be well-founded.

AN AGENDA FOR REFORM

The law on disclosure of criminal information by adults in Ireland is latently coercive by virtue of its ambiguity. Beyond the fact that convictions of approximately 20 years’ standing need not be recounted, and that what is material to disclose is that a crime has been committed, little else can be expressed with certainty. Within such a broad and potentially oppressive net there remains a grey area of undetermined issues. These include whether or not there is a requirement of a nexus between offences committed and the risk posed (and if so the threshold of proof in respect of the establishment of such a nexus); the status of criminal information vis-à-vis the moral hazard; the circumstances in which a proposer for insurance will be required to disclose his or her arrest, charge and committal for trial; whether or not a proposer will be obliged to disclose offences which remain undetected or for which he or she has been acquitted and the standing of previous criminal information as it relates to associates of the proposer.

A number of reforms can be suggested. First, given the lack of clear judicial guidance consideration should be given to a number of matters. Second, it has been suggested by Hasson – in arguing for a reversion to a more restrictive and credible reading of the decision in Carter v. Boehm, the locus classicus in respect of uberrimae fides contracts in insurance law, than that espoused in later judgments – that where questions about previous criminal information are not asked in a proposal form insurers should be taken to have waived their right to this information.  

The difficulty with this approach, however, is that the current position is that the presumption that matters dealt with in a proposal form are material is

not matched by a corresponding presumption that matters not so dealt with are not material. As Scrutton LJ noted in *Rozannes v. Bowen*:\(^{30}\)

As the underwriter knows nothing and the man who comes to him to insure knows everything, it is the duty of the assured, the man who desires to the policy, to make full disclosure to the underwriters without being asked of all the material circumstances; because the underwriter knows nothing and the assured knows everything.\(^{31}\)

Given the uncritical affirmation by the judiciary of the proposition that the scope of the duty extends beyond questions asked in the proposal form,\(^{32}\) it is doubtful whether the courts would revert to a narrow interpretation of *Carter*.\(^{33}\) From an Irish perspective, however, the *obiter* proposition of McCarthy J in *Aro Road* holds out a flicker of hope. The learned judge suggested in his judgment that in circumstances where an insurer does not ask a question in the proposal form, the materiality emphasis should switch from a prudent insurer to a reasonable assured test:

In my view, if the judgment of an insurer is such as to require disclosure of what he thinks is relevant but what a reasonable assured if he thought of it at all, would not think relevant, then, in the absence of a question directed towards the disclosure of such a fact, the

30. (1928) 32 LlLR 98 at 102.

31. Hasson would argue that this proposition reflects "only very recent judicial doctrine and not a rule of great antiquity". R.A. Hasson, *op. cit.*, n. 29, p. 616. Moreover, he would argue more generally: "[t]he doctrine is in error in assessing the strength of the parties with regard to knowledge. The doctrine assumes that the assured is in a stronger position than the insurer because...he has more knowledge than the insurer. But the possession of greater knowledge, it is submitted, puts the insured in a weaker position, since he...does not know which parts of that information the insurer wishes to have. It is submitted, however, that it is the insurer who should be seen as the stronger party since he...is aware of what information he seeks to have. As against this, the insured, even under the limited formulations of the doctrine requiring him to disclose only facts within his knowledge, may well be in a position of either not knowing, or else being uncertain, as to the materiality of a particular fact." *Ibid.*, pp. 633-634.

32. In Ireland, see the dictum of Kenny J in the Supreme Court in *Chariot Inns v. Assicuazioni Generali* [1981] IR 199 at 225: "[b]ut the correct answering of any questions asked is not the entire obligation of the person seeking insurance: he is bound, in addition, to disclose to the insurance company every matter which is material to the risk against which he is seeking indemnity." See also the dictum of Henchy J in the Supreme Court in *Aro Road and Land Vehicles v. Insurance Corporation of Ireland* [1986] IR 403 at 409.

33. Nonetheless, and given the current ambiguity in Irish law as regards criminal information, every effort should be made to construe such questions in a proposal form restrictively. See *Revell v. London General Insurance Company Limited* (1934) 50 LlLR 114.
insurer, albeit prudent, cannot properly be held to be acting reasonably.  

Applying this proposition to the issues in hand, if an actual insurer requires criminal information to be disclosed but there are no specific questions to this effect in the proposal form, the insurer will be taken to have acted unreasonably and the prudent insurer test will be replaced by a reasonable assured test. Though on the facts of this case it is submitted that the reasoning of Henchy J was more convincing in that he indicated that in over-the-counter insurance, where there is minimal formal inquiry and little opportunity for full disclosure to be made of facts which an insurer may ex post facto deem material, waiver of information will be deemed to have occurred. It may be possible for the Irish judiciary in the future to rely on McCarthy J’s dictum, in circumstances where waiver has not occurred, to expand the circumstances in which the test of materiality will be transposed from a prudent insurer to a reasonable assured’s perspective. Though such reasoning does not explicitly mirror that called for by Hasson it is as close as is reasonably and credibly possible without puncturing the proposition that materiality extends beyond questions asked in the proposal form.

Thirdly, there is also a need for the Irish courts to impose an obligation on insurers who seek to avoid policies for non-disclosure of previous criminal information to establish a nexus, and/or impact by the moral hazard, between offences committed and the risk posed. The threshold set for insurers in this regard should be high. Moreover, a similar nexus and impact threshold should also be required vis-à-vis the previous criminal information of an associate of the assured and the term “associate”, by definition, should be construed restrictively given the remedy available to insurers and the high degree of protection the doctrine affords them. Finally, what is perhaps most striking about Irish law as regards previous criminal information in

34. [1986] IR 403 at 412.
35. This seems more plausible. Why subject the assured to even a reasonable assured test as a result of an insurer’s conduct, when the duty of disclosure can be circumscribed by waiver as a consequence of the said conduct thereby ensuring that the question of materiality, albeit only a reasonable assured one, never arises?
36. See also para. 1(c) Irish Insurance Codes of Practice, 1992 (non-life) and para. 1(c) Irish Insurance Codes of Practice, 1992 (life) which provide that on those matters which insurers have commonly found to be material, clear guidelines should be asked on the proposal form. Para. 3 (a)(i), (non-life), and para. 3(a)(iii) (life) also provide that an insurer should not invalidate a policy unless it is a fact which the proposer could reasonably be expected to disclose. It should be pointed out, however, that the Insurance Codes of Practice do not have binding legal authority and only apply to private policyholders. See also Regulation 6(1) of the Life Assurance (Provision of Information) Regulations 2001 (S.I. No. 15 of 2001), enacted pursuant to the Insurance Act 1989, as amended by the Insurance Act 2000, which require suppliers of life assurance in Ireland to provide detailed information to clients about, inter alia, the consequences of failing to disclose material facts.
respect of adults is the lack of expungement provisions. This increases the current ambiguity in the common law. Indeed, every European Union country, with the exception of Ireland, makes available some form of spent conviction scheme as regards a person’s criminal record.\textsuperscript{37} In England and Wales, for example, section 4(3)(a) of the Rehabilitation of Offenders Act 1974 provides that an applicant for insurance is never bound to disclose a conviction which has become spent under the terms of the Act.\textsuperscript{38} This legislation has however been the subject of criticism and is under review.\textsuperscript{39} For example, under the current Act, a sentence of imprisonment of more than 30 months can never be expunged. Moreover, section 7(3) of the Act gives the Court a discretion to admit evidence as to previous criminal convictions which fall within the ambit of the legislation in circumstances where it is satisfied that “justice cannot be done in the case except by admitting or requiring evidence relating to a person’s spent convictions”\textsuperscript{40} Though the provisions in the UK are currently quite restrictive, particularly as they relate to sentences of more than 30 months’ imprisonment, reform in Ireland, whether by way of further judicial incorporation or, more appropriately, by statutory enactment, would benefit from careful consideration of expected recommendations of the UK review group. More generally, the expungement provisions in other EU countries,\textsuperscript{41} as well as common law jurisdictions such as Canada and Australia, can provide a model for reform. Reform along these lines would alleviate


\textsuperscript{38} A term of imprisonment exceeding six months but not exceeding 30 months will become spent after ten years; a sentence of imprisonment not exceeding six months will become spent after seven years. These periods are halved in respect of offenders under the age of 17.

\textsuperscript{39} See J. Broadhead, “Denying the Past” (2001) 151 NLJ 566.

\textsuperscript{40} See also Better Regulation Task Force, \textit{Review of Fit Persons Criteria}, (London, 1999), p. 24 where it was suggested that the rehabilitation periods which determine when certain types of convictions become spent “have arisen more from political expediency than any rational justification.”

\textsuperscript{41} In Spain, Article 73 of the General Law for the Penitentiary System states that people who have completed their sentences fully regain their rights as citizens and that “under no circumstances can criminal records serve as a motive for social or judicial discrimination”. According to Directives issued pursuant to Article 118 of the Penal Code and in Royal Decree 2012/83 at the Ministry of Justice, criminal records can be erased after six months for non-serious offences and two years for serious offences. In circumstances where a prison sentence was imposed three years must have elapsed and five years must have elapsed for sentences requiring confinement in a closed regime or high security establishment. See NIACRO, \textit{Regulating the Yellow Ticket: the laws, policies and practices which affect the employment of people with criminal records in the European Union} (Belfast, 1996), p. 40. In Italy, Article 179 of the Penal Code provides that rehabilitation will be deemed to have occurred five years after the principal punishment has been completed. \textit{Ibid.}, p. 39.
some of the harshness created by the current anomalous state of the law in this country.\textsuperscript{42}

FURTHER JUSTIFICATIONS FOR REFORM

The purpose of this final section is briefly to touch upon other avenues of enquiry which relate to the need for reform beyond a strict interpretation of the \textit{uberrimae fides} doctrine. It will focus on the collateral repercussions following an insurer’s decision to avoid or refuse a policy of insurance on the grounds of an individual’s previous criminal history which the existing legal rules on disclosure have the capacity to generate. Such an analysis will be undertaken by concentrating on a variety of current proposals in Ireland which are designed to challenge the “multiple disadvantages” that are often experienced by the criminalised. It will be argued that the current rules on disclosure are at variance with these proposals given their potential to act as a “criminogenic force” and to prolong the marginalisation of ex-offenders. It will also highlight the historical conditions in which the law on disclosure emerged in the mid-1700s and question whether it remains appropriate in the 21st century.

In recent years attempts have been made to facilitate the re-integration into society of disadvantaged and marginalised groups.\textsuperscript{43} A number of government strategies and initiatives that are directed towards achieving this goal can be identified. Thus, the \textit{National Development Plan (2000-2006)} observes that:

research into the causal factors of crime conclusively demonstrates that offenders...generally come from the most disadvantaged backgrounds in society and, typically, that they are unemployed, unqualified, addicted and likely to re-offend. The label of having been in prison becomes a further layer of disadvantage in the community. Offenders ...experience multiple disadvantages which accumulates leading to economic and social exclusion and to an extreme form of marginalisation from the labour market.\textsuperscript{44}

\textsuperscript{42} Some amelioration has already occurred in respect of persons under 18. S. 258 of the Children Act 2001, provides that where such a person has been found guilty of an offence (and it is an offence not required to be tried before the Central Criminal Court), and a period of three years has elapsed since the finding of guilt (and the person has not been dealt with for any other offence in the three year period), he or she shall be treated “for all purposes in law as a person who has not committed or been charged with or prosecuted for or found guilty of or dealt with for the offence or offences which are the subject of the finding of guilt.”


\textsuperscript{44} \textit{National Development Plan, 2000-2006} (PN 7780) (Dublin, 1999), p. 194
Similarly, the Department of Justice, Equality and Law Reform, the Department of Trade, Enterprise and Employment, and the Department of Education and Science all point to the issue of exclusion experienced by many offenders and the need to counteract such inequality. More particularly, the National Economic and Social Forum recently recommended that legislative changes should be introduced to allow for the criminal records of adults to be expunged after a period of time (which would be dependent upon the seriousness of the offence, the length of time since the offence and the lack of offences in the interim period) and that the Employment Equality Act, 1998 should be amended to include protection against discrimination on the grounds of a criminal record. At present the law relating to the duty to disclose previous criminal information in insurance law is out of step with these initiatives. It is submitted that


47. A Department of Education and Science White Paper recently suggested: “[r]esearch has consistently shown that offenders generally come from the most marginalised groupings in society and typically are at high risk of being unemployed, unqualified, addicted, experiencing multiple disadvantage and finding it exceptionally difficult to re-integrate into the labour market...A key priority for the education sector in this context will be to enhance the relevance and diversity of provision within the prison education service and to strengthen the linkages between in-prison provision and that available for prisoners on release, in collaboration with other agencies.” Department of Education and Science, Learning For Life: White Paper on Adult Education (PN 8840), (Dublin, 2000), pp. 175-176. See also K. Warner, “Penal Policy and the Adult Education of Prisoners” in P. O’Mahony, op. cit., n. 45, pp. 726-745.

48. Such an analysis should not be taken to imply that the criminal justice system can primarily be characterised by re-integrative impulses. Indeed the Irish penal system demonstrates some remarkably antithetical traits. On the one hand, attempts have been made to adopt re-integrative and inclusionary strategies. On the other hand, and existing concurrently, more exclusionary and containment orientated strategies are also being adopted, as typified, for example, by prison expansionist policies and the enactment of legislation such as the Sex Offenders Act 2001: see I. O’Donnell and E. O’Sullivan, Crime Control in Ireland: the Politics of Intolerance, (Cork, 2001), pp. 5-6. More generally, see P. O’Malley, “Volatile and Contradictory Punishment” (1999) 3(2) Theoretical Criminology 175. On the lack of a re-integrative ethos in the Sex Offenders Act, 2001 (particularly in relation to its provisions for notification, post-release supervision and increases in the maximum penalties for sexual assault), see C. White, “Controlling Sex Offenders: raising critical questions about the Sex Offenders Bill 2000” (2001) 2 IJFL 8.

49. The National Economic and Social Forum, op. cit., n. 37, p. 91.
expungement provisions might be introduced with a view to concealing a person’s criminal past in appropriate circumstances.

In addition to creating a further tier of disadvantage, the law on the duty to disclose previous criminal information is open to the criticism that it may cause rather than inhibit criminal behaviour. Labelling individuals as “ex-offenders” can have the unintended consequence of unduly prolonging the stigma associated with criminal conviction. In as far as it can affect an individual’s self-definition it may also work as a self-fulfilling prophecy. The legal rules on previous criminal information in Ireland, and the ability of insurers to rely on vague exclusionary terms such as “moral hazard”, may further contribute to such a process. The ability of the legal framework to operate as a counterpoint to this tendency seems much more developed at the criminal pre-trial and trial process than it does in relation to the scope of criminalisations. The law asymmetrically treats suspects and accused persons on the one side and convicted persons on the other. For example, the strict rules that apply as regards the ability of the prosecution to cross-examine an accused as to previous criminal convictions in a criminal trial may be contrasted with those that apply, or more appropriately do not apply, in relation to adults with previous criminal information in the realm of insurance law.

The concept of proportionality in sentencing appears to be protected in the Constitution and is designed to prevent the infliction of excessive punishment. It operates most effectively as regards the imposition of particular formal punishments and ancillary formal measures (such as

53. See The People (D.P.P.) v. John McGrail [1990] 2 IR 38 at 49-50 where the relevant provisions of the Criminal Justice (Evidence) Act, 1924 and constitutional principles of fairness of procedure, as they relate to cross-examination, are discussed by Hederman J.
54. See State (Healy) v. Donoghue [1976] IR 325 at 353 per Henchy J; People (DPP) v. WC [1994] ILRM 321 at 325 per Flood J; People (DPP) v. M [1994] 3 IR 306 at 316 per Denham J. Slight doubts still remain about its constitutional status. As O’Malley noted: “[a]lthough the judgments in WC and M provide impressive authority for granting constitutional status to the proportionality principle, it is possible that the matter has never has never been fully argued before the superior courts...[Nonetheless], even if proportionality was held not to be mandated by the Constitution it still has an independent existence at common law...” T. O’Malley, Sentencing: Law and Practice (Dublin, 2000), p. 122.
55. Albeit peripheral, this raises interesting questions about the status of post-release supervision orders under the Sex Offenders Act 2001. Part 5 of the Act empowers the Court, at sentence stage, to order such supervision of offenders following their
disqualifications, forfeitures, confiscation of assets and compensation). The principle of proportionality may occasionally take account of informal ancillary punishments that occur immediately before sentence and it often accommodates post-conviction consequences such as the loss of a business. The concept of proportionality is least effective where the link between the formal criminal punishment and the subsequent informal ancillary measure is governed by a degree of remoteness as is the case where a decision to refuse insurance cover on the grounds of previous criminal information is taken. This element of remoteness, however, should not detract from the view that informal measures often have a greater impact on a person's "identity, career and life-chances" than formal measures. If nothing else, such considerations should make us aware of the variety of potential control mechanisms that exist in modern society and the need to constantly scrutinise the safeguards put in place to counteract such devices.

release from prison. Though the cumulative term of the custodial sentence and the subsequent supervision may not exceed the maximum sentence applicable for the offence in question, s. 29(3) of the Act provides that any prison term "shall not be less than the term the Court would have imposed if it had considered the matter apart from the provisions of this Part." O'Malley, with characteristic acuity, notes the following in respect of the provision: "[i]n other words, the supervision element may not influence the decision on the amount of primary punishment to be imposed when the primary punishment is imprisonment...[i]s the supervision element to be treated as a penalty or punishment? It flows directly from the conviction and, while it may be defended in the interests of public safety, it certainly imposes some restrictions on the offender's liberty after release from prison. It is, therefore, a type of collateral hardship." T. O'Malley, "Principles of Sentencing: some recent developments" (2001) 1(1) Judicial Studies Institute Journal, 50 at 55-56.

56. See, for example, Cox v. Ireland [1992] IR 503. See also The People (DPP) v. Redmond, Court of Criminal Appeal, December 21, 2000, at p. 24 per Hardiman J.

57. This could include, for example, a "punishment beating" of the accused before trial. See The People (DPP) v Hamilton, Court of Criminal Appeal, January 25, 1999, at p. 2 where Lynch J noted: "[t]he Court takes into account the fact that the applicant in this case was beaten up by vigilante citizens...He has been rightly held up to opprobrium...but on a basis which is rather excessive and in the circumstances...the Court will reduce the sentence."

58. See The People (DPP) v. Z., Court of Criminal Appeal, March 14 1995, at pp. 17-18 where the Court granted a reduction in sentence to a sex offender, noting that he had lost his livelihood as a result of his conviction. As O'Flaherty J noted: "[w]hile we are obliged to impose a sentence that is commensurate with the crime we must also hold out some possibility of hope and redemption for this applicant...He has suffered grievously. He has lost his business and, therefore, his livelihood. His was not the type of business that others could look after for a time in his absence. It was totally dependent on him." See also The People (DPP) v. Brophy [1992] ILRM 709 at 721 per O'Flaherty J.


60. See C. Shearing, "Punishment and the Changing Face of the Governance" (2001)
More particularly, a review of the current state of the law can bring attention to the fact that the doubts surrounding the protections of ex-offenders may have the unintended consequence of prolonging the effects of labelling.

Finally, in seeking compelling reasons for reform of the duty to disclose previous criminal information, one should not ignore contextual issues regarding the historical conditions in which the law on the duty of disclosure emerged. The rules developed out of the social and commercial conditions prevailing in mid-eighteenth century merchants’ practices at Lloyds of London and the need to protect the emerging insurance market. Given the formidable communication and travel difficulties that were faced in those days, often the most effective way to determine the risk to be covered was to demand full disclosure on the part of the assured. Principles of utmost good faith and the drastic remedy of avoidance for non-disclosure were, accordingly, commensurate with the prevailing social, commercial and geographical conditions. The fact that the principle and the remedy remain closely tethered today with conditions that existed in the mid-eighteenth century appears anachronistic and untenable, especially given the resources now available to insurers. Detailed statistical data, complex actuarial analyses and loss-forecasting techniques, elaborate investigative practices, the pooling of risks and comprehensive proposal forms have all reduced the lack of parity between insurers and assureds. This continuity in the rules of disclosure from the mid-eighteenth century, operating independently of broader changes in the commercial and social world, has had the paradoxical effect of tipping the balance in favour of the insurer, a development that has been strongly criticised by commentators.


64. By comparison, the assureds’ position has remained relatively static, particularly as regards the obligations the duty imposes on them. As Clarke noted: “[i]t is not obvious to the consumer why, if he sells a car, he is not obliged to promise anything at all about the car but, if he insures the same car, he effectively guarantees all manner of things to the insurer.” M. Clarke, The Law of Insurance Contracts, (2nd ed., London, 1994), p. 55. For attempts to address this situation, see supra., n. 36.


submitted that the enactment of expungement provisions for ex-offenders is wholly appropriate and reasonable when construed against a backdrop of these considerations.

CONCLUSION

A number of reforms were suggested including the need to impose an obligation on insurers to establish a nexus between the previous criminal information of assureds and the risk posed. There is also a need for the judiciary to further define the contours of the duty particularly as regards arrest, charge and committal for trial, the legal standing of criminal associates of the proposer and the test of materiality to be applied in such circumstances. In particular, the introduction of expungement provisions, and the possible re-examination of the grounds of discrimination under the Employment Equality Act, 1998 and the Equal Status Act, 2000 with a view to including ex-offenders, is desirable. The need for such reform seems unquestionable. Whether this course of action is adopted remains a matter of conjecture, particularly given the “culture of severity” that currently exists and the lack of significant interest groups available to carry the fight to the powerful insurance lobby. In seeking to end on a less despondent note, however, the success achieved in placing expungement provisions for young offenders on a statutory footing can act as an emboldening reference point for those endeavouring to effect similar change in the adult realm.


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