

**THE HIGH COURT**  
**CONSULTATIVE CASE STATED**

**Record Nos.2015/522 SS, 2015/624 SS**

**IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL (PROVISIONS) ACT 1961 (AS AMENDED)**

**(1) DIRECTOR OF PUBLIC PROSECUTIONS**

**Prosecutor**

**AND**

**RONAN STACK**

**Accused**

**(2) DIRECTOR OF PUBLIC PROSECUTIONS**

**Prosecutor**

**AND**

**JOHN FOLEY**

**Accused**

**JUDGMENT of Mr Justice Max Barrett delivered on 5th April, 2016.**

**Part 1**

**Overview**

1. For some years now it has been the practice of the Gardaí to precede a breath-alcohol test with a 20-minute observation period. The practical object of this standard observation period, the court understands, is to ensure that there is a sufficient period before the breath-test within which an arrested person does not introduce alcohol to his mouth by drinking, or re-introduce alcohol to his mouth by vomiting. Avoiding such a visitation or re-visitation of alcohol to the mouth during the 20-minute period is considered necessary to ensure that the breath test which follows that period is a true breath test and not contaminated by the presence of alcohol in the mouth. At least it was considered necessary when the Gardaí used the 'Intoxilyser', a particular brand of what is popularly known as a 'breathalyser'. The two cases stated for the court and considered hereafter are essentially concerned with whether this 20-minute precautionary period continues to be necessary and lawful now that Gardaí use a type of breathalyser known as the 'Evidenzer'.

**Part 2**

**The Case of Mr Stack**

2. Following the arrest of Mr Stack on 4th August, 2013, pursuant to s.4(8) of the Road Traffic Act, 2010, he was brought to Bandon Garda Station at 9.25a.m. There he was informed by Sergeant Thomas Lehane that he would be assessed by use of an Evidenzer and that he would be observed for a period of twenty minutes beforehand. A demand was subsequently made of Mr Stack at 9.47a.m., pursuant to s.12(1)(a) of the Road Traffic Act 2010, to provide two specimens of his breath by exhaling into an Evidenzer. Mr Stack complied with this requirement and provided two specimens of his breath at 9.50a.m. and 9.53a.m. The result of the analysis was 33ig of alcohol per 100ml of breath, a reading in excess of that allowed under the road traffic legislation.

3. At Mr Stack's later trial for what is commonly referred to as 'drunk driving', Sergeant Lehane gave evidence that he was a trained operator of the Evidenzer breathalyser and that he had undergone an Intoxilyser training course and a later Evidenzer 'conversion course', both arranged by the Medical Bureau of Road Safety. (This is the body with responsibility under the Road Traffic Acts for, *inter alia*, the approval and supply of breathalysers). Sergeant Lehane indicated that he was instructed at the later Evidenzer course that a 20-minute observation period was necessary to eliminate the presence of mouth alcohol and to give an accurate reading of the machine. Under cross-examination, it was put to Sergeant Lehane that the manufacturer guidelines for the Evidenzer (unlike those, it seems, for the Intoxilyser) do not include a requirement for a 20-minute observation period. Sergeant Lehane reiterated that the continuing need for a 20-minute observation period was a matter that had been instilled in him during the conversion course.

4. Arising from the foregoing, Judge McNulty of the Macroom District Court has referred the following question to the court:

*"In circumstances where it is acknowledged that the Manufacturer's Manual for guidance of the Operator of the Evidenzer machine for breath testing does not require an observation period of twenty minutes prior to a test, and evidence has been heard that the Accused was detained for a period of twenty minutes prior to the formal requirement being communicated to him, pursuant to Section 12(1)(a) of the Road Traffic Act 2010 for the provision of breath specimens, did this constitute an unnecessary and unreasonable prolongation of his detention, thus rendering his detention unlawful and leaving the evidence, obtained by way of breath sample provided during such detention, tainted and inadmissible evidence against the Accused?"*

**Part 3**

**The Case of Mr Foley**

5. Following the arrest of Mr Foley on 27th October, 2014, pursuant to s.4(8) of the Road Traffic Act, 2010, he was brought to Bandon Garda Station at 3.32a.m. There he was informed by Garda Kieran Hayes that he would be assessed by use of an Evidenzer and that he would be observed for a period of twenty minutes beforehand. A demand was subsequently made of Mr Foley at 4.15a.m., pursuant to s.12(1)(a) of the Road Traffic Act 2010 to provide two specimens of his breath by exhaling into an Evidenzer. Mr Foley complied with this requirement and provided two specimens of his breath at 4.18a.m. and 4.21a.m. respectively. The result of the analysis was 66ig of alcohol per 100ml of breath, a reading in excess of that allowed under the road traffic legislation.

6. At Mr Stack's later trial for what is commonly referred to as 'drunk driving', Garda Hayes gave evidence that he was a trained operator of the Evidenzer breathalyser. Garda Hayes said that he had undergone an Intoxilyser training course and a later Evidenzer course, both arranged by the Medical Bureau of Road Safety. Garda Hayes indicated that he was instructed at the later Evidenzer course that it was best international practice that a 20-minute observation period should precede the administration of a breath-test with the Evidenzer. Under cross-examination, it was put to Garda Hayes that the manufacturer guidelines for the Evidenzer do not include a requirement for a 20-minute observation period. Sergeant Lehane reiterated that the continuing need for a 20-minute observation period was a matter that had been instilled in him during the Evidenzer course. It was also put to Garda Hayes that the Evidenzer is specifically manufactured with five filters to eliminate any possibility of mouth alcohol contamination. To this, Garda Hayes reiterated that the continuing need for the 20-minute observation period had been instilled in him as part of his Evidenzer training. When it was then put to Garda Hayes that the Evidenzer had been designed by its manufacturer with the intention of eliminating or reducing the need for the 20-minute observation period, Garda Hayes indicated that he was not competent to answer such specific technical questions.

7. Arising from the foregoing Judge McNulty of the Macroom District Court has referred to the court effectively the same question as is mentioned above in the context of Mr Stack's case.

#### Part 4

##### Some Applicable Law

###### *i. A Harmonious Quintet.*

8. The court has been referred by counsel to a quintet of cases relevant to the consultative cases stated. These are *DPP v. Finn* [2003] 1 I.R. 372, *DPP v. McNiece* [2003] 2 I.R. 614, *DPP (Curran) v. Foley* [2006] IEHC 11, *DPP v. O'Sullivan* [2015] IEHC 693 and *DPP v. Dardis* [2015] IECA 284, all of which chime neatly on the points of law arising, and each of which is considered below.

###### *ii. DPP v. Finn.*

9. Mr Finn was arrested pursuant to the Road Traffic Act 1961 and conveyed to a Garda station. He was then brought to an interview room where he remained for a period of 20 minutes. A Garda observed Mr Finn for this period and verified that he (Mr Finn) consumed nothing during this period. The Garda then made a requirement of Mr Finn, pursuant to the Road Traffic Act 1994, to provide two specimens of his breath. Mr Finn refused to comply with this requirement and was charged with an offence arising from this refusal. Pursuant to a consultative case stated from the Circuit Court, the Supreme Court deemed the period of Mr Finn's detention to be unlawful, in effect because there was no justification given for the detention other than a hazy reference to 'Garda guidelines', a justification which did not suffice to explain and justify the period of Mr Finn's detention.

10. Counsel for Messrs Stack and Foley in the within proceedings placed great reliance on *Finn*, suggesting that it is a case on 'all fours' with those now presenting, in that there (as here, it is claimed) there was, to borrow from ordinary parlance, a 'woolly' explanation for the 20-minute observation period and it was this 'woolliness' to which the Supreme Court took objection. Counsel for the DPP suggested that *Finn* needs to be seen in the context of the case-law that followed it, almost as though the decision in *Finn* is somehow aberrant when viewed in and of itself. In fact, what is striking from a reading of all the cases to which the court has been referred, has been the constant adherence of the courts, from *Finn* right through to *Dardis* to (a) the notion of reasonableness, by which the lawfulness of delay which, in effect, arises from the chance circumstance of life falls to be gauged, and (b) the need for justification by reference to objective reasons where one moved beyond the chance circumstance of life to the deliberate introduction of a discrete and defined minimum (20 minute) period of detention – i.e. a conscious prolongation in all instances – of the period between the arrival of an arrestee at a Garda station and the taking of samples.

11. It is worth quoting at some length from the judgment of Murray J. in *Finn* to appreciate the dual yardsticks arising, depending on the nature of the delay presenting. Per Murray J., at 377 *et seq*:

"Delay

*The decision in Dunne v. Clinton [1930] I.R. 366 concerns, inter alia, the duty of arresting gardaí towards a person whom they have arrested on suspicion of a felon. As regards the duty of the arresting gardaí, Hanna J. had this to say at p.374:-*

*'...[O]nce a person is detained by the guards, or, in other words, in custody of the guards, on suspicion of having committed a felony, it is the duty of the police officer arresting him to take him with reasonable expedition before a Peace Commissioner. He can be retained in custody only during such time as is reasonable for that purpose.'*

*Later Hanna J. went on to say at p.375, "[n]ow, what is a reasonable time after arrest? No hard and fast rule can be laid down to cover every case. It must depend on many circumstances....*

*These principles were applied by this court in The People v. Walsh [1980] I.R. 294 where O'Higgins C.J. stated...*

*'Reasonable expedition is required but more than this cannot be demanded. Regard must be had to the circumstances and to the time of the arrest'...*

*Although the defendant in the present proceedings was not arrested on a criminal charge for the purposes of being brought before a court he was arrested and deprived of his liberty for a purpose authorised by statute namely the taking of specimens of his breath for analysis in connection with a possible offence of driving a vehicle while he had an excessive amount of alcohol in his blood. In my view the principles set out in Dunne...and applied in...Walsh...govern the duty of the arresting gardaí in this case who were under duty to take appropriate steps to make the statutory requirement of the defendant to provide specimens of his breath 'with reasonable expedition', within a 'reasonable' time or without 'unreasonable delay', adopting the language used by Hanna J. in Dunne....Whether there was unreasonable delay would fall to be considered having regard to all the circumstances of the case. Central to this must be the actual duration of the delay.*

*In criminal proceedings the onus is on the prosecution to establish beyond reasonable doubt that a defendant, while held*

*in custody, has at all times been in accordance with the law. Not every delay is unreasonable and if it is not unreasonable it does not require to be objectively justified....Generally speaking, I would be very much disinclined to consider that a delay of 20 minutes simpliciter in dealing with an arrested person is the kind of delay which could be treated as rendering an otherwise lawful custody, unlawful, at least in the absence of some other special circumstances."*

12. Murray J. moves on to find that the delay at issue in *Finn* went beyond, in effect, the chance circumstance of life and was the deliberate introduction of a discrete and defined minimum (20 minute) period of detention between the arrival of an arrestee at a Garda station and the taking of samples. This being a conscious prolongation of an arrested person's detention in all instances, he considered that the issue presenting went beyond the simple question of whether delay was reasonable and became instead a procedure, the 'reasonable necessity' of which fell to be justified by reference to objective reasons, if it was to prove lawful. Per Murray J., at 380 *et seq*:

*"In my view, if the procedure according to which an arrested person must be observed for 20 minutes is capable of being justified, it must be justified by a competent witness who can give appropriate evidence. I do not wish to speculate unduly as what that evidence might or might not be in this case but it may involve establishing that, for example, such a procedure is necessary in order to comply with manufacturers' instructions concerning the use of an apparatus or accords with a generally recognised and established practice...[T]he need to follow procedural steps in...a process may...become so notorious as to become the subject of judicial knowledge.*

*Neither do I think that such procedural steps, if thus objectively justified, require to be authorised by statute or statutory regulations in order to be lawful, provided they are shown on the evidence to be reasonably necessary in order to give effect to the purpose for which the arrest was authorised by law in the first place. Of course, it is also a procedure which could be given specific authorisation by statute or statutory regulation.*

*This case falls to be decided on its own particular facts. There being no evidence before the Circuit Court Judge as to why observance of the guidelines in question were reasonably necessary for achieving the purpose for which the defendant had been arrested, the discrete and prescribed period of detention has not been justified in law..."*

iii. *DPP v. McNiece*.

13. If it was evidence the Supreme Court was looking for, it was evidence a-plenty that it was going to get. In *McNiece*, a case that was decided just under five months after *Finn*, the same template of facts presented as had arisen in *Finn*: arrestee observed at Garda station for 20 minutes; arrestee refused to provide breath test; case stated by Circuit Court as whether the 20 minute observation period was lawful (and also whether it was appropriate to add that 20 minute period to the period between his car being halted and his later arrival at the Garda station). A member of An Garda Síochána, Garda Traynor, gave evidence in the Circuit Court that was not very far removed from that given by Sergeant Lehane and Garda Hayes in the Stack and Foley cases, his explanation for the 20-minute observation period being that this was what he had been taught to do when he attended an Intoxilyser training course under the auspices of, *inter alia*, the Medical Bureau of Road Safety. He was then followed into the witness-box by a Ms Pauline Levy, a chief analyst with the Medical Bureau of Road Safety, and an unusually senior person to be called; she gave an exhaustive account as to why the 20-minute observation period was needed.

14. In his judgment for the court, Murray J. noted the substance of the decision in *Finn*, in particular that what had been missing in that case was any evidence which could be considered capable of objectively justifying a practice of observing an arrested person for a period of 20 minutes before requiring him or her to provide breath specimens and thus prolonging a period of detention. Murray J. continued, at 623 *et seq*:

*"It seems quite clear to me that the evidence given by Garda Traynor who had been trained in the use of the intoxilyser, if accepted by the Circuit Court judge demonstrates objectively that the observation period of twenty minutes prior to the accused exhaling into the intoxilyser was reasonably necessary in order that to take effective or reliable samples of his breath. This was a purpose for which he was lawfully arrested and brought to the garda station.*

*The evidence of Ms Pauline Levy goes further in terms of the depth and analysis of the appropriate procedures which should be followed in the use of the intoxilyser....This may have been a case of 'painting the lily' on the part of the prosecution but her evidence is nonetheless further evidence which corroborates that of Garda Traynor..."*

15. Notable in the above-quoted text is the fact that Murray J. clearly considered that the evidence of Garda Traynor, which again is akin to that of Sergeant Lehane and Garda Hayes in the Stack and Foley cases, would have sufficed by way of objective demonstration that the 20-minute observation period was "reasonably necessary". The evidence of Ms Levy was corroborative but not necessary – and one suspects that what was done by the DPP in that case was not so much 'painting the lily' as providing such a surfeit of evidence that, all else being equal, the Supreme Court could not but be satisfied that the threshold of 'reasonable necessity' identified in *Finn* and reiterated in *McNiece* as the standard to be met where it was sought to justify the deliberate introduction of a discrete and defined minimum period of detention between the arrival of an arrestee at a Garda station and the taking of samples, was met in abundance.

16. Striking about both *Finn* and *McNiece* is the consistent and unyielding view of the Supreme Court as to the law arising and the practical application of same. There is no embarrassing retreat by the Supreme Court from anything that was said in *Finn* barely five months previously. The law as stated by the Supreme Court in either case did not change. It was the evidence that changed, and it is clear that with or without the evidence of Ms Healy, the evidence of Garda Traynor would have sufficed in *McNiece* to meet the threshold of 'reasonable necessity'. This is clearly a matter of some significance when it comes to the facts of the Stack and Foley cases now presenting and the evidence given in the District Court before Judge McNulty by Sergeant Lehane and Garda Hayes as to the reason for the 20-minute observation period applied by each of them.

iv. *DPP (Curran) v. Foley; DPP v. O'Sullivan*.

17. The *Curran* and *O'Sullivan* cases can be considered together. Both are 'breath test' cases. In *Curran*, O'Neill J. applies the 'reasonable necessity' standard applied by Murray J. in *Finn* and *McNiece*, observing, at 6:

*"It would seem to me that if the period of twenty minutes for the purposes of observation is justified by way of evidence as indicated in the judgment of Murray C.J. in the Finn case as being necessary for the purposes of obtaining a suitable sample of breath for the purposes of validly carrying out the breath test, it necessarily follows that the twenty*

*minute period is an integral part of the detention for the purpose for which arrest was made namely to detain a person so that samples can be required....Thus in the McNiece case where there was evidence which explained and justified the twenty minute period, it was held that the detention remained at all times lawful."*

18. Having applied the 'reasonable necessity' test, O'Neill J. went on to observe that, insofar as applying that test was concerned, the courts could take judicial notice of the twenty minute notice period as being reasonably necessary. Thus, per O'Neill J., at 7:

*"In this case the learned District Judge took judicial notice of the necessity for the twenty minute period of observation for the purposes of carrying out a valid test....The learned District Judge having taken judicial notice of the need for the twenty minute observation period and being in my view lawfully entitled to do so, it necessarily follows in my opinion, that in this case the detention was justified..."*

19. The last-quoted text has recently been referred to favourably by Keane J. in *O'Sullivan*.

20. There was some flavour in the argument of counsel for Messrs Stack and Foley that, as a consequence of *Curran* the courts can take judicial notice of the reasonable necessity of a 20-minute observation period in the context of the Intoxilyser, and no more. However, to the extent that this is contended, the court respectfully does not accept that it is correct. All that O'Neill J. is doing in *Curran* is applying – as he had to – the 'reasonable necessity' test identified by the Supreme Court in *Finn* and *McNiece*. He adds the gloss that when it comes to the 20-minute observation period in the use of the Intoxilyser, that was by then so standard that judicial notice could be taken of the fact that it met the threshold of reasonable necessity. He is not saying that in another case, and with another breathalyser, a 20-minute period, or whatever period, could not also be found to meet the standard of reasonable necessity. It is just that in such other case, judicial notice of the fact that the applicable observation period would not necessarily arise in the manner that it did in respect of the standard 20-minute observation period that applied in the context of the Intoxilyser.

v. *DPP v. Dardis*.

21. The application of an observation period in the context of the administration of a breath test came was the subject of a Court of Appeal judgment late last year in *Dardis*. That was an appeal by the DPP against the decision of the High Court on a case stated as to whether the dismissal of a 'drunk driving' case against Mr Dardis was correct as a matter of law. The 'problem' that arose in that case was that the observing Garda had been distracted during the 20-minute observation period and also discovered during the observation period that the Evidenzer machine was otherwise in use. So he commenced a second 20 minute observation period. The defence contended that a 40-minute observation period was unnecessary and unjustified in the circumstances and that the Garda's momentary distraction during the first observation period did not justify the commencement of another.

22. Much of the judgment of the Court of Appeal was concerned with the issue of whether the learned District Judge had raised a question of fact or law. That is not in issue here. The reason the decision in *Dardis* is of interest is because one sees in it yet another application of the 'reasonable necessity' test identified by Murray J. in *Finn* and *McNiece*. So, per Ryan P., at 13:

*"Mr Dardis was not detained for longer than was necessitated by the availability of the machine. The only point is that he was 'observed' by the Garda for an unnecessary period of 20 minutes. That cannot justify an acquittal. The accused was not in unlawful custody, still less was there anything unconstitutional. In fact, there was not any extra detention, but even if there had been, it was not unreasonable or unjustified or unexplained."*

23. However, what is especially notable about the Court of Appeal's decision in *Dardis* is that the Court of Appeal clearly considers that an additional 20-minute delay at a Garda station in the circumstances presenting before the Court was, in truth, a *de minimis* delay without legal consequence for the prosecution that ensued. Per Ryan P., at 14:

*"[T]he delay at issue here – some additional 20 minutes or so – must be regarded as another example of a 'human delay of a routine or modest nature' to adopt the words of Murray C.J. in...[DPP v. Fox [2008] 4 I.R. 811] and was in the circumstances essentially de minimis."*

24. In other words, both the Supreme Court and the Court of Appeal accept that the application of the 'reasonable necessity' test comes subject to a *de minimis* proviso whereby 'reasonable necessity' may not be established but the number of minutes of additional delay (in *Dardis*, an additional 20 minutes on top of the standard 20-minute delay) is so slight in all the circumstances as to be of no consequence when it comes to the legality of an arrestee's detention. This recognition of a *de minimis* period in the context of the 'reasonable necessity' test would appear to blur, in cases of minor delay, the historical distinction between (a) the reasonableness test applicable to delay through chance circumstance and (b) the 'reasonable necessity' test recognised in *Finn* as applicable to the deliberate introduction of a discrete and defined minimum period of detention – i.e. a conscious prolongation in all instances – of the period between the arrival of an arrestee at a Garda station and the taking of samples.

v. *An Attempted Synthesis of Relevant Principle*.

25. Is it possible to arrive at some synthesis of relevant principle from the foregoing analysis of case-law? It appears to the court that the below-mentioned key principles can be identified from the above cases and are of relevance to the cases now presenting. Other principles arise to be drawn but do not appear central to a resolution of the issue that District Judge McNulty has referred to the court by way of case stated.

#### I. General principle regarding lawful detention.

[1] In criminal proceedings the onus is on the prosecution to establish beyond reasonable doubt that a defendant, while held in custody, has at all times been held in accordance with law.

#### II. Delay through chance circumstance.

[2] Subject to lawful statute, the identification of a reasonable time for detention post-arrest cannot be the subject of a hard-and-fast rule; regard must be had to individual circumstances.

[3] Arresting Gardaí must seek specimens with reasonable expedition, within a 'reasonable' time and without unreasonable delay.

[4] Whether there is unreasonable delay falls to be considered having regard to all the circumstances presenting. Central

to this is the duration of the delay.

[5] Not every delay is unreasonable. If it is not unreasonable it does not require to be objectively justified.

[6] Generally speaking, a delay of 20 minutes *simpliciter* in dealing with an arrested person is not the kind of delay which could be treated as rendering an otherwise lawful custody, unlawful, absent special circumstances.

### III. Delay through standard prolongation of detention.

[7] In cases where delay arises in the course of Garda detention because of the deliberate introduction of a discrete and defined minimum period of detention – i.e. a conscious prolongation in all instances – this must be justified by reference to one or more objective reasons, if it is to prove lawful.

[8] If the procedure according to which an arrested person must be observed for a defined period of time is capable of being justified, it must be justified by a competent witness who can give appropriate evidence.

[9] Such evidence may, but need not, involve establishing that, *e.g.*, an observation period is necessary in order to comply with manufacturers' instructions or otherwise accords with a generally recognised and established practice.

[10] Appropriate evidence may be forthcoming from a Garda witness alone.

[11] The need to follow procedural steps in a process may become so notorious as to become the subject of judicial knowledge. Judicial notice can be taken of the 20-minute observation period applicable to the Intoxilyser.

[12] Procedural steps, if objectively justified, do not require to be authorised by statute or statutory regulations to be lawful, provided they are shown on the evidence to be reasonably necessary to give effect to the purpose for which the arrest was authorised by law. (Of course, such steps may be given specific authorisation by statute or statutory regulation).

[13] A delay of 20-minutes on top of the standard 20-minute delay for an Intoxilyser test could be regarded, in particular circumstances, as an example of a human delay of a routine or modest nature, and essentially *de minimis*.

### Part 5: Conclusion

26. In criminal proceedings the onus is on the prosecution to establish beyond reasonable doubt that a defendant, while held in custody, has at all times been held in accordance with law. In cases where delay arises in the course of Garda detention because of the deliberate introduction of a discrete and defined minimum period of detention – i.e. a conscious prolongation in all instances – this must be justified by reference to one or more objective reasons, if it is to prove lawful. Such evidence may, but need not, involve establishing that, *e.g.*, an observation period is necessary in order to comply with manufacturers' instructions. Appropriate evidence may be forthcoming from a Garda witness alone. The need to follow procedural steps in a process may become so notorious as to become the subject of judicial knowledge. However, the fact that it has not yet become so notorious does not preclude a finding that the delay arising has been justified by the prosecution and is lawful.

27. In each of the instances now before the court – i.e. in the cases of both Mr Stack and Mr Foley – the Garda witnesses gave uncontroverted evidence before the District Court that they respectively applied a 20-minute observation period in accordance with such training as had been provided by the Medical Bureau of Road Safety – the body with responsibility under the Road Traffic Acts for, *inter alia*, the approval and supply of breathalysers. Uncontroverted evidence was provided by the Garda witness in the Stack case that the observation period was to avoid contamination by mouth alcohol, and in the Foley case that such an observation period accorded with best international practice in the application of the test that was administered, and in both cases that the 20-minute period was instilled in the relevant Garda witness, at the training courses administered by the Medical Bureau for Road Safety, as being necessary. It is clear therefore that the Garda witnesses gave reasonable and objective reasons for the detention period arising sufficient to satisfy the 'reasonable necessity' test identified by the Supreme Court in *Finn* and applied consistently in the years since.

28. In light of the finding just reached, and having regard to all of the foregoing, the court's respectful answer to the question posed by District Judge McNulty in the proceedings concerning, respectively, Mr Stack and Mr Foley, is 'No'.