Neutral Citation [2013] IEHC 80

THE HIGH COURT

[1997 No. 13003 P]

BETWEEN

PATRICK NEVIN AND MARGARET LAVELLE

PLAINTIFFS

AND

CATHERINE NEVIN

DEFENDANT

JUDGMENT of Kearns P. delivered on the 1st day of March, 2013

Thomas Nevin, late of Jack White's Inn, Brittas Bay, County Wicklow was murdered on 19th March, 1996 on the said licensed premises. The said Thomas Nevin was married to Catherine Nevin, the defendant herein. There were no children of the marriage and he died intestate. Thomas Nevin and Catherine Nevin were jointly registered as full owners of Jack White's Inn and jointly operated and managed the premises from the date of purchase in 1986 until the time of his death. Following her husband's death, the defendant re-opened Jack White's Inn and operated same for a period of time before the premises were sold in 1997 for £620,000.

These proceedings were commenced by plenary summons issued on 4th November, 1997 wherein Nora Nevin, mother of the late Thomas Nevin, claimed against the defendant as follows:-

(a) a declaration that the defendant is disinherited at common law from taking any share in the estate of the deceased;

(b) a declaration that by virtue of s. 120 of the Succession Act 1965 the defendant is precluded from taking any share either as a legal right or otherwise in the estate of the deceased;

(c) a declaration that the defendant is not entitled to any share in the public house premises known as Jack White's Inn, Brittas Bay, Co. Wicklow or to any other assets of the deceased;

(d) damages pursuant to the Civil Liability Act 1961 against the defendant for the wrongful death of the deceased;

(e) a declaration that the said licensed premises and other assets form part of the estate of the deceased;

(f) a declaration that the plaintiff is the sole person entitled to share in the deceased's estate;

(g) an order pursuant to s. 27(4) of the Succession Act 1965 appointing the plaintiff personal representative of the estate of Thomas Nevin deceased;

(h) an injunction restraining the defendant from disposing of any assets of the deceased or any part of the said licensed premises or other assets.

On 23rd January, 1998 upon motion of counsel for the defendant, the High Court (Geoghegan J.) made an order, on the undertaking by the plaintiff through her counsel, that *"no further steps of any sort will be taken in these proceedings pending the final determination of the criminal proceedings now pending against the defendant arising from the death of Thomas Nevin"* and ordered, inter alia, that the motion do stand adjourned to the trial of the action and gave liberty to the defendant to apply for an order staying the proceedings in the event of there being any breach of the foregoing undertaking by the plaintiff.

The said Nora Nevin died on 10th September, 1999, intestate, following which Patrick Nevin and Margaret Lavelle, being the brother and sister of Thomas Nevin, extracted letters of administration intestate to her estate on the 18th July, 2000. By order of the High Court dated 5th March, 2001, they were joined as plaintiffs in these proceedings.

The defendant was charged with various offences as set out below arising from the death of the said Thomas Nevin and after a hearing lasting some 42 days before a judge and jury in the Central Criminal Court was found guilty on 11th April, 2000 of :-

(i) Murder, contrary to common law and s. 4 of the Criminal Justice Act 1964 and s. 2 of the Criminal Justice Act 1990 of Thomas Nevin at Jack White's Inn aforesaid;

(ii) soliciting to murder, contrary to s. 4 of the Offences Against the Person Act 1861, one John Jones to murder Thomas Nevin;

(iii) soliciting to murder contrary to s. 4 of the Offences against the Person Act 1861, one Jerry Heapes, to murder Thomas Nevin;

(iv) soliciting to murder, contrary to s. 4 of the Offences against the Person Act 1861, one William McClean to murder Thomas Nevin.

Following her conviction on these four counts, the Central Criminal Court (Carroll J.) sentenced the defendant to imprisonment for life on count 1 and on 7th June, 2000 sentenced the defendant to be imprisoned for a period of seven years on each of the remaining counts, the same to run concurrently with the sentence of life imprisonment imposed on 11th April, 2000.

At all times during her trial and thereafter, the defendant denied any involvement in the said offences and gave evidence at her trial before the Central Criminal Court to that effect.

The defendant appealed her various convictions to the Court of Criminal Appeal, but in a written judgment delivered on 14th March, 2003 that appeal was refused. Leave to bring an appeal to the Supreme Court on a point of law of exceptional public importance pursuant to s. 29 of the Courts of Justice Act 1924 was also refused by the Court of Criminal Appeal on 14th May, 2005. A separate application brought by the defendant in November 2003 to the European Court of Human Rights was also rejected by that court.

Subsequently the defendant brought a further application to the Court of Criminal Appeal pursuant to s. 2 of the Criminal Procedure Act 1993, contending that additional or new information had come to light such as to constitute a miscarriage of justice. The Court of Criminal Appeal did direct further disclosure but thereafter rejected the application by judgment delivered on 22nd November, 2010.

The defendant thereafter lodged a further notice of application to the Court of Criminal Appeal under s. 29 of the Courts of Justice Act 1924 for a certificate granting leave to appeal to the Supreme Court on the basis that its decision involved a point of law of exceptional public importance.

That last-mentioned application appeared in the "for mention" list of the Court of Criminal Appeal in July, 2012. However, submissions had not been filed on behalf of the defendant. The matter re-appeared in the same list on 17th December, 2012 at which point, in the absence of submissions having been filed on behalf of the defendant, the said application was struck out.

THE ISSUE

In advance of the full hearing of the plaintiff's claim herein, to which the defendant has delivered a full defence denying any involvement in the murder of Thomas Nevin, the plaintiff by notice of motion dated 11th April 2012 sought the trial of an issue as to "the admissibility of the evidence of the defendant's trial and subsequent conviction for the murder of her husband, Thomas Nevin".

This application was brought on the basis of the plaintiff's contention that the criminal proceedings were over and that the plaintiffs, being the brother and sister of the late Tom Nevin, were now entitled to a hearing and determination of the claims advanced by them in the plenary summons herein.

Trial of the issue was fixed for hearing before Murphy J. in the High Court at the end of November, 2012 and was heard by him without any application being made for a stay on the proceedings.

It is of some importance to record what then actually occurred. It appears that the defendant's present solicitor, Ms. Ann Fitzgibbon, had prepared a notice of motion seeking a stay on the hearing of the issue on the basis that the undertaking given to the High Court in 1998 some fourteen years previously was still extant in circumstances where an application to the Court of Criminal Appeal remained outstanding. However, the notice of motion seeking such stay was not before the court on the day fixed for the hearing before Murphy J. and in fact had a later return date. The trial of the issue proceeded. At that hearing the defendant was represented in court by Séamas Ó Tuathail, S.C. and the plaintiffs were represented by Mr. George Brady, S.C. The matter was heard in full and judgment was reserved by Murphy J. However, before judgment was delivered, it was ascertained that Murphy J. had sat on some prior division of the Court of Criminal Appeal which had dealt with some aspect of the defendant's appeal many years previously. He thereupon recused himself from the matter and never delivered judgment.

The matter came back therefore into the Chancery list where Laffoy J., on Thursday, 7th February, 2013 arranged through the registrar of the High Court that the hearing of the issue would take place before this Court on the following Thursday, 14th February, 2013. Both sides were appraised of this listing and indeed a report that the said hearing would take place on the 14th February, 2013 appeared in national newspapers on 8th February, 2013.

However, on 14th February, 2013, the day fixed for the commencement of the hearing, the defendant's solicitor made application to this Court that the trial of the issue be stayed, contending that the criminal proceedings were not yet at an end because she had relodged the application together with submissions with the Court of Criminal Appeal which had been struck out on 17th December, 2012. The Court rose to permit inquiries to be made, whereupon it transpired that the application in question had only been made on the preceding day, 13th February, 2013.

Quite apart from the last-second nature of this particular application, both as regards the application for a stay and the further application to the Court of Criminal Appeal, the Court was informed by Mr. Brady, counsel for the plaintiffs, that the hearing of the issue before Murphy J. had proceeded by consent because he and Mr. Ó Tuathail had agreed that the issue itself, notwithstanding the existence of an outstanding application under s. 29, could proceed and indeed was heard by Murphy J. on that basis.

Ms. Fitzgibbon challenged the correctness of the statement by Mr. Brady, whereupon the Court invited Mr. Brady to give evidence of what had transpired between himself and Mr. Ó Tuathail and he gave evidence in accordance with the information he had already given to the Court. It was suggested to him in cross-examination by Ms. Fitzgibbon that her client had given no such authorisation to her legal representatives, but did not call Mr. Ó Tuathail in support of that somewhat surprising contention. The Court accepted as truthful and correct the account of the discussion which passed between Mr. Brady and the defendant's senior counsel and was satisfied that the issue should proceed both for that reason and for the other reasons indicated in its *ex tempore* ruling delivered on 14th February, 2013. In summary, the reasons included the interval of time which had elapsed since the giving of the undertaking to the High Court in January 1998, the fact that there had been a concluded trial in the Central Criminal Court and the dismissal of subsequent appeals and applications by the Court of Criminal Appeal. The Court held, quite apart from the agreement between counsel at the time of the hearing before Murphy J, that the undertaking could now be seen as discharged. In this context the Court had regard to the entitlement of the plaintiffs to exercise their rights of access to the Court after such a lengthy delay and also to the fact that determination of the issue would not – on the basis of the plaintiffs' submissions – be dispositive in any event of the plaintiffs' overall claim against the defendant.

The Court adjourned the hearing of the issue until the following day to enable the defendant's solicitor to make any additional preparations that might be necessary for the hearing, noting that full written legal submissions had already been filed on behalf of the defendant in relation to the issue on 21st November, 2012.

THE ISSUE: IMPLICATIONS

The issue in the present proceedings is a simple one. Is a criminal conviction for murder admissible in a later civil proceeding brought against a person convicted of that murder? If not admissible, then it would follow that a defendant in a civil case would be in precisely the same position as a person who was acquitted or never charged with the offence in question. The conviction could not be used in any way whatsoever in the civil case.

If on the other hand the conviction is admissible, is it conclusive of the fact that the defendant murdered her husband or is it simply *prima facie* evidence of that fact, leaving to the defendant the right to argue that she should not have been convicted? In this

regard it is important to state at the outset that the plaintiffs do not contend that the conviction, if admitted, is conclusive against the defendant nor do they any longer contend that evidence given at the criminal trial is in some way admissible in the civil proceedings.

THE SUCCESSION ACT 1965
Section 120 of the Succession Act 1965 introduced a new legal provision intended to effect "the exclusion of persons from succession" and provided as follows:-

> "(1)—A sane person who has been guilty of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the estate of that other, except a share arising under a will made after the act constituting the offence, and shall not be entitled to make an application under s. 117.
>
> (2) A spouse against whom the deceased obtained a decree of divorce *a mensa et thoro*, a spouse who failed to comply with a decree of restitution of conjugal rights obtained by the deceased and a spouse guilty of desertion which has continued up to the death for two years or more shall be precluded from taking any share in the estate of the deceased as a legal right or on intestacy.
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> (3) A spouse who was guilty of conduct which justified the deceased in separating and living apart from him shall be deemed to be guilty of desertion within the meaning of subsection (2)
>
> (4) A person who has been found guilty of an offence against the deceased, or against the spouse or any child of the deceased (including a child adopted under the Adoption Acts 1952 and 1964, and a person to whom the deceased was *loco parentis* at the time of the offence), punishable by imprisonment for a maximum period of at least two years or by a more severe penalty, shall be precluded from taking any share in the estate as a legal right or from making an application under section 117.
>
> (5) Any share which a person is precluded from taking under this section shall be distributed as if that person had died before the deceased.

In making his submissions to the effect that the criminal conviction was admissible as *prima facie* evidence in this case, Mr. Brady on behalf of the plaintiffs accepted that a significant difference in wording appears in subsection (4) of s. 120 from that contained in subsection (1). The former contains the words 'found guilty', whereas the wording of subsection (1) states only that the person be 'guilty of the murder'.

It is far from easy to see why the legislature, when inserting the words 'found guilty' in subsection (4), omitted the same term from subsection (1), given that the overall thrust of the section is to provide that certain forms of conduct should have particular consequences in terms of succession rights. In McGuire's commentary on the Succession Act, 1965 (2nd Ed., at 291) the author does not address this particular difficulty, noting merely that:-

> "It was a rule of public policy at common law that a person should not be permitted to benefit from a crime. For that reason, where a sane person was guilty of murder or manslaughter, he was precluded from taking any benefit from the will or intestacy of his victim."

A similar statement appears in Spierin's Succession Act 1965 (3rd Ed. at par 757) who in addition notes: -

> "In the previous edition of this book it was suggested that the wording of the section, referring as it does to a person 'who has been guilty' rather than to a person 'who has been found guilty' (as in sub-s (4) does not appear to require a conviction before the disqualification on benefit applies. However the terms 'murder', 'attempted murder' and 'manslaughter' are terms of art in the criminal law and it is perhaps difficult to imagine that a court would apply the disqualification if there is no conviction."

It is an extraordinary omission from s. 120 (1) for which it is difficult to find any rational explanation, given that a 'finding of guilt' is required under s.120 (4) for lesser offences and having regard further to the fact that 'guilt' is a finding appropriate to the criminal rather than the civil process. One is left not knowing what the section is to mean, unless one supplies the word 'found' to subsection (1) where in the text it does not appear. In those circumstances of uncertainty, and given that the section is undoubtedly punitive and conclusive in both nature and effect, its terms must clearly be subject to rules of strict construction in favour of the person against whom it is sought to enforce it.

It seems to me the defendant must be the beneficiary of this ambiguity so I am satisfied that the issue before the Court cannot be resolved by reference to the specific provisions of section 120 (1). I am satisfied that, as presently worded, the section cannot be invoked in aid by the plaintiffs to determine the issue in the conclusive way provided for by its terms. Indeed counsel for the plaintiffs, in arguing only that the criminal conviction is admissible as *prima facie* evidence in the civil case, implicitly accepts that this is the correct approach. It seems to me that s.120 (1) only goes so far as to be declaratory of a public policy which is that the perpetrator of the crime of murder should not be its beneficiary.

COMMON LAW
While there are cases of greater antiquity, a useful starting point in the consideration of the admissibility of a criminal conviction in a civil proceeding is to be found in the notorious case of Hawley Harvey Crippen (*In the Estate of Cunigunda (otherwise Cora) Crippen, deceased*) [1911] P. 108. In that case the matter came before the court by way of motion for a grant of administration in respect of the estate of Crippen's wife, passing over the legal personal representative of her husband, who survived her.

Cunigunda (otherwise Cora) Crippen died on February 1st, 1910 leaving Crippen, her lawful husband, her surviving. On 22nd October, 1910, Crippen was found guilty of the wilful murder of his wife and sentenced to death. He appealed to the Court of Criminal Appeal which dismissed his appeal on 5th November, 1910. On 8th November, 1910, he made his will wherein he appointed Ethel Le Neve as sole executrix and universal legatee of his will. She was his secretary and mistress, with whom he had been arrested while trying to flee to Canada after his wife's dismembered body was found in the cellar of his home. Crippen was hanged on 23rd November, 1910. A caveat was entered in the Probate Office in Crippen's estate, but, on the same being warned, no appearance was entered to the warning.

The wife's next of kin included a sister, Theresa Hunn, whose attorney moved for a grant of letters of administration in respect of the estate of the wife. This was served on the solicitors for Crippen's executrix.

While the court's immediate focus was on who should be entitled to extract letters of administration to the estate of Crippen's wife, the court president, Sir Samuel Evans in the course of his judgment stated as follows at p. 112:-

> "It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights (Cleaver v Mutual Reserve Fund Life Association [1892] 1 Q.B. 147). The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence."

He continued as follows at p. 114:-

> "Here the representative of a convicted felon claims to be entitled to administration of an estate because she claims to be entitled to the estate itself – the only claim to the estate being one which results from the felon's crime.
>
> In another Court, she might bring an action to recover the estate from the administrator whom I now appoint.
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> It is exactly the same as the case of the felon himself making the claim, or bringing the action. Would not the fact of his conviction be evidence against him? Would it be right to treat it as *res inter alios acta*, and to say it was not admissible at all in a civil action brought by him?
>
> The complete maxim is *'Res inter alios acta alteri nocere non debet'*. (a thing between others should not injure a third party) There is no question of *'alteri nocere'* here."

In the event, the court decided the issue by reference to a different legal principle, namely, *"Omnia præsumuntur rite esse acta"* (all things are presumed to be done in due form). It did so in circumstances where the court noted that "in the present day" a person before he can be convicted is "admitted to make a defence, to examine witnesses, and to appeal from a judgment he may think erroneous - and, it may be added, to give evidence in his own behalf." (at p. 115)

This last mentioned right did not exist in the United Kingdom until the passing of the Criminal Evidence Act in 1898 or in Ireland until some years later. In *Crippen's* case the court concluded that the presumption should be applied on the facts of the case before it, stating at p.115:-

> "If it be that the rules of evidence ever were as contended for by the executrix in this regard, I think, in the circumstances attending trials for crimes in these days, that they ought to be reconsidered and revised.
>
> In my opinion, where a convicted felon, or the personal representative of a convicted murderer who has been executed, brings any civil proceeding to establish claims, or to enforce rights, which result to the felon, or to the convicted testator from his own crime, the conviction is admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime."

It is interesting to note that neither issue estoppel or abuse of process were factors underpinning the court's decision in that case, which essentially seems to have been decided on grounds of public policy, due regard being given to the panoply of rights enjoyed by Crippen up to and including his appeal. The case presently before the Court bears many similarities to Crippen's case, not least in the fact that the conviction was one which followed a full trial in which guilt was strenuously denied. The convictions in both cases were the subject of appeals which in Crippen's case was a single appeal, while the defendant Catherine Nevin had the benefit of both an appeal against her conviction and a number of applications under statute, all of which were unsuccessful.

A more extensive review of legal commentaries and cases was subsequently undertaken by the Court of Appeal in the United Kingdom in *Hollington v. F.Hewthorn & Co. Ltd. and Anor*. [1943] 1K.B. 587. As this authority stood as the law on this topic in the United Kingdom for the next 25 years, it is clearly a case which requires careful consideration, not least because it is the authority upon which the defendant principally relies in this case also.

The plaintiff in that case was the owner of a motor car driven by his son who died after proceedings were brought claiming damages in respect of an accident which occurred between the plaintiff's car and a car owned by the first named defendant. Owing to the death of the plaintiff's son, the plaintiff was unable to adduce any direct evidence of the accident and tendered in evidence, in addition to evidence as to the position and condition of the two vehicles after the collision, the conviction of the defendant's driver for careless driving at the time and place of the collision. The court held that, both on principle and authority, evidence of the conviction was inadmissible in the subsequent civil proceedings, thereby overruling *Crippen's* case on this point. Before considering the *ratio* of that decision, it is interesting to look at the arguments for and against which were deployed before the Court of Appeal where the plaintiff was represented by Denning K.C. (later, of course, Lord Denning, Master of the Rolls). He noted that the trial judge had ruled that the conviction was inadmissible as *res inter alios acta* and accepted that the conviction would create no estoppel by way of issue estoppel for that reason. He contended however that the conviction was admissible as *prima facie* evidence of the defendant's negligence, arguing that, from the beginning of the 18th century, a conviction was regarded as admissible in subsequent civil proceedings so long as it was not founded on the evidence of the party suing. To admit the conviction in such a case would have been an indirect way of circumventing the disability of the party as a witness.

Considerable emphasis was placed on the fact that the older authorities and commentaries which tended to hold against the admissibility of a criminal conviction derived from the disability of parties and their spouses to give evidence in criminal cases so that to allow in the conviction in subsequent civil proceedings could be characterised as unfair in those circumstances. However, those disabilities had been progressively removed by the Evidence Acts 1851 and 1853, and more particularly by the Criminal Evidence Act 1898 which finally permitted an accused person to give evidence on his own behalf in a criminal cause. Denning K.C. thus contended that a decision of a judicial tribunal, which had gone thoroughly into the evidence in a hearing which provided a full opportunity for an accused person to give evidence, must be admissible in evidence in subsequent civil proceedings.

For its part, the defence argued that the issue which had been before the magistrates who convicted the defendant driver was a different issue from that before the trial judge in the civil proceedings. Any principle laid down for the admission of evidence ought not to cover a case where the *res* is different. If a conviction is to be admissible, the best evidence of it must be given. That would consist of the evidence of each magistrate who would indicate his view or opinion, thereby arrogating to himself the very decision which the civil court had to decide. The principle enunciated in *Crippen's* case amounted merely to a doubtful relaxation of the ordinary rule in a special class of case.

The Court of Appeal held with the defendants' submissions, stating at p.594:-

> "In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages … it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result. The court in reaching its conclusion also had regard to the 'best evidence' rule and the *res inter alia acta* principle before concluding that (at p. 596) 'it is relevancy that lies at the root of the objection to the admissibility of the evidence'."

Finally, the court at p.601 stated:-

> "The contention that a conviction or other judgment ought to be admitted as *prima facie* evidence is hugely supported on the ground that the facts had been investigated and the result of the previous investigation is, therefore, at least some evidence of the facts that thereby have been established. To take the present case, it could be said that the conviction shows that the magistrates were satisfied on the facts before them that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who has been acquitted to prove it, as showing that the criminal court was not satisfied of his guilt, although the discussion by text book writers and in the cases all turn on the admissibility of convictions and not of acquittals. If a conviction can be admitted, not as an estoppel, but as *prima facie* evidence, so ought an acquittal, and this only goes to show that the court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case."

I think it is fair to say that few decisions have been the subject of more criticism, including (perhaps not surprisingly), Lord Denning himself, who in the course of his judgment in *McIlkenny v. Chief Constable of West Midlands Police Force & Anor* [1980] 2 A.E.R. 227 stated at p.237:-

> "Beyond doubt, *Hollington v. Hewthorn* was wrongly decided. It was done in ignorance of previous authorities. It was done *per incuriam*. If it were necessary to depart from it today, I would do so without hesitation. But it is unnecessary. It has been replaced by s. 11 of the Civil Evidence Act 1968."

A further ground of criticism of the decision in *Hollington* was that it failed even to consider a previous decision of the Court of Appeal in *Hill v. Clifford* [1907] 2 C.H. 236 in which an order of the Medical Council was found to be admissible as *prima facie* evidence of the fact that the Cliffords were guilty of acts "infamous or disgraceful in a professional sense" and, there being no rebutting evidence, that fact was proved.

Later, in *Hunter v. Chief Constable of the West Midlands Police & Ors.* [1982] A.C. 529, the rationale of *Hollington* was again criticised by the Court of Appeal, Lord Diplock stating as follows at p. 543:-

> "Despite the eminence of those who constitute the members of the Court of Appeal that decided it that case is generally considered to have been wrongly decided … the judgment of the court delivered by Goddard L.J. concentrates on the great variety of additional issues that would arise in a civil action for damages for negligent driving but which it would not have been necessary to decide in a prosecution for a traffic offence based on the same incident, and on the consequence that it would still be necessary to call in the civil action all the witnesses whose evidence had previously been given in a successful prosecution of the defendant, or a driver for whose tortious acts he was vicariously liable, for careless or dangerous driving, even if evidence of that conviction were admitted. So no question arose in *Hollington v. Hewthorn* of raising in a civil action the identical question that had already been decided in a criminal court of competent jurisdiction, and the case does not purport to be an authority on that matter."

Lord Diplock was clearly of the view that where the "identical question" arose for consideration, public policy considerations prohibited the use of civil actions to initiate a collateral attack on a final decision which has been made by a criminal court of competent jurisdiction.

However, a more comprehensive analysis of the flaws inherent in the *Hollington v. Hewthorn* decision was undertaken by the Court of New Zealand in *Jorgensen v. News Media (Auckland) Ltd.* [1969] N.Z.L.R. 961, which, in its comprehensive treatment of this topic may fairly be characterised as the best common law authority on this particular topic.

In that case the plaintiff Jorgensen was tried for a murder in Auckland and following a trial lasting eight days was convicted. An appeal against conviction was subsequently dismissed. The defendant publishers printed an article in the *Sunday News* on 9th July 1967 which contained the following words:-

> "Jorgensen and John Frederick Gillies – also in the same block – machine-gunned Kevin Speight, 26, seaman, whose body was found in a home in Bassett Road, Remuera, in December 1963, along with the bullet-riddled body of salesman George Frederick Walker."

In July 1967, Jorgensen instituted proceedings against the defendant seeking damages for libel alleging that the words meant and were understood to mean that he was responsible either as a principal or as a party to the murders of Speight and Walker. When the action came on for hearing, counsel for the defendant sought a ruling from the trial judge that the conviction of Jorgensen was admissible for the purposes of establishing its plea of justification and submitted that the judge should not follow the decision of the Court of Appeal in *Hollington v. Hewthorn* and should allow proof of the conviction to be admitted for this purpose.

The trial judge, faced with the necessity of deciding such an important issue in the course of the trial, concluded he should follow the rule laid down in *Hollington v. Hewthorn* and accordingly ruled that the defendant was not entitled to rely on the conviction. The jury in the libel action disagreed and were discharged. The judge thereupon informed the parties that prior to a second trial it was his opinion that a ruling should be sought from the Court of Appeal and the question was duly submitted in the following terms:-

> "… whether the conviction of the plaintiff on 4th March, 1964 for the murder of one Kevin James Speight on 5th December, 1963 is admissible evidence in this action of the guilt of the said plaintiff and whether the said conviction is conclusive of such guilt and whether proof by the defendant of such conviction discharges the onus of proof of the guilt of the plaintiff of such murder …"

Having elaborated the grounds on which the Court of Appeal in *Hollington v. Hewthorn* rested its judgment, North P. stated as follows

at p. 967:-

> "In spite of the confident, and indeed, if I may say so respectfully, the uncompromising terms in which this judgment is expressed, it certainly has not escaped a good deal of criticism. Indeed in the same year in which the judgment was delivered there is a note on the case, which was written by Dr. Goodhart in 59 *Law Quarterly Review* in which that learned legal writer expressed some doubts as to the correctness of the judgment in *Hollington v. Hewthorn*. In particular he raised the question whether a criminal verdict more nearly resembled a judgment *in rem*, than does an ordinary civil action *inter partes*."

He continued:-

> "Although experience shows that law and ordinary practice are not always in accord there is at least a presumption against a legal rule which gives rise to such a conflict. Against this authority can be cited a number of recent cases in which a conviction has been admitted as *prima facie* evidence that the person convicted has done the act with which he has been charged." Dr. Goodhart then went on and expressed surprise that the court had thought it right to liken a conviction to an acquittal. Finally he drew attention to the fact that special weight is given to convictions in the Criminal Procedure Act 1865 which entitles counsel to question a witness whether he has been convicted of a crime and if he does not admit the fact then the conviction may be proved and Dr. Goodhart said:-
>
> 'But, if a conviction does not tend to prove anything except that the person has been convicted then it is difficult to justify the admission of such a question much less to explain the direct encouragement given to it by statute.' It may also be mentioned that in the same year a critical article appeared in the *Canadian Bar Review* in which the learned contributor (Mr. C.A. Wright) pointed out that the decision of the English Court of Appeal in *Hollington v. Hewthorn* was of paramount importance not only because of the wide sweep of the principle it laid down but because it overruled at least three cases which had been followed in Canada and because it manifested an attitude on the subject of evidence which was not as necessary or inevitable as the Court made it appear."

North P. then referred to two later decisions of the Court of Appeal in the United Kingdom, the first of which was *Goody v. Odhams Press Ltd.* [1967] 1 Q.B. 333, otherwise known as the "Great Train Robbery" case. Goody had been convicted of conspiring to stop the mail train, but nevertheless when an article appeared in the newspaper stating that he had been one of the persons who had taken part in the mail raid, he alleged he had been defamed. Lord Denning M.R. had this to say:-

> "They [the defendant] said that all the words were true in substance and in fact. In order to make good that plea, they would have to prove that Goody was *in fact* one of the train robbers and was *in fact* guilty. It would not be sufficient to prove that he was convicted of the train robbery. The reason is because there is a strange rule of law which says that a conviction is no evidence of guilt, not even *prima facie* evidence. This was decided in *Hollington v. F. Hewthorn & Co. Ltd*. I argued that case myself and did my best to persuade the court that a conviction was evidence of guilt. But they would not have it. I thought that decision was wrong at the time. I still think it was wrong. But in this court we are bound by it. It means that when anyone publishes a story about a crime, he is in peril of being sued for libel. In the action he cannot rely on the conviction as proof of guilt. He has to prove it all over again, if he can."

Salmon L.J., in the same case, when referring to *Hollington v. Hewthorn*, agreed with Lord Denning M.R. and expressed the hope that the "rule" might be reconsidered.

The second case considered by the New Zealand Court was *Barclays Bank Ltd. v. Cole* [1967] 2 Q.B. 738. In that case the defendant Cole had been found guilty of robbery in a branch of the plaintiff's bank and had been sentenced to 15 years imprisonment. His appeal was rejected. The bank then sued Cole seeking to recover the money it had lost and in its statement of claim alleged that the defendant had wrongfully entered their branch and robbed a large sum of money. The defendant denied the allegation, wishing to have his guilt or innocence of the robbery retried. In discussing the rule in *Hollington v. Hewthorn*, Lord Denning M.R. said at p. 743:-

> "I hope it will soon be altered. See what it means here. In order to be able to bring this civil action Barclays Bank had first to make sure that Cole was prosecuted in the criminal court: see *Smith v. Selwyn* [1914] 3 K.B. 98. Now after seeing him duly prosecuted and convicted, they are asked to prove his guilt all over again in this civil suit. In the United States of America in similar circumstances it has recently been held that the conviction is not only receivable but is conclusive evidence: see *Hurtt, Trustee v. Stirone* (1965) 416 Pa 493. But here in England at present it is not even admissible evidence."

In the same case Diplock L.J. spoke of the rule in *Hollington v. Hewthorn* as being a technical rule and agreed with Lord Denning that the rule was "ripe for re-examination".

North P. noted in *Jorgensen* that the outspoken views expressed by these eminent judges undoubtedly persuaded the Lord Chancellor to refer the rule in *Hollington v. Hewthorn* to the Law Reform Committee in the United Kingdom. North P. then set out in some detail the introductory section to the report which I replicate here as follows:-

> "In some recent judgments of the Court of Appeal upon whom the rule in *Hollington v. Hewthorn* is still binding it has been suggested that it requires our consideration. We think so too."

Then, after referring to the facts in that case, the report continued:

> "Rationalise it how one will, the decision in this case offends one's sense of justice. The defendant driver had been found guilty of careless driving by a court of competent jurisdiction. The onus of proof of culpability in criminal cases is higher than in civil: the degree of carelessness required to sustain a conviction for careless driving is, if anything, greater than that required to sustain a civil cause of action in negligence. Yet the fact that the defendant driver had been convicted of careless driving at the time and place of the accident was held not to amount even to *prima facie* evidence of his negligent driving at that time and place. It is not easy to escape the implication in the rule in *Hollington v. Hewthorn* that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right. It is not, of course, spelt out in those terms in the judgment of the Court of Appeal, although in so far as their decision was based mainly upon the ground that the opinion of the criminal court as to the defendant driver's guilt was as irrelevant as that of a bystander who witnessed the accident, the gap between the implicit and the explicit was a narrow one. It is in a sense true that a finding by any court that a person was culpable or not culpable of a particular criminal offence or civil wrong is an expression of opinion by the court. But it is of a different character from an expression of opinion by a private individual.

> In the first place, it is made by persons, whether judges, magistrates or juries, acting under a legal duty to form and express an opinion on that issue. In the second place, in forming their opinion they are aided by a procedure, of which the law of evidence forms part, which has been evolved with a view to ensuring that the material needed to enable them to form a correct opinion is available to them. In the third place, their opinion, expressed in the form of a finding or verdict of guilty or not guilty in criminal proceedings or a judgment in civil proceedings, has consequences which are enforced by the executive power of the State. We approach the rule in *Hollington v. Hewthorn* from the premise stated in our *Report on Hearsay Evidence* (Thirteenth Report of the Law Reform Committee: Cmnd. 2964), that any material which has probative value upon any question in issue in a civil action should be admissible in evidence unless there are good reasons for excluding it. Our further premise is that any decision of an English court upon an issue which it has a duty to determine is more likely than not to have been reached according to law and to be right rather than wrong. It may therefore constitute material of some probative value if the self-same issue arises in subsequent legal proceedings. A conviction upon a contested trial is consistent only with the opinion of the criminal court's being that it has been established, not merely on the balance of probabilities, but beyond reasonable doubt, that the conduct of the accused did constitute the criminal offence with which he was charged and that it has been so established upon all the material known to the prosecution or the defence and considered by either to be relevant to the issue of guilt. Any layman would, we think, regard the fact of such conviction as a firm foundation for the belief that the accused had conducted himself in such a manner as to constitute the criminal offence of which he was convicted and, if such criminal offence would also constitute a civil wrong, that the accused had committed a civil wrong also. We, too, share this commonsense view. We consider that such a conviction has high probative value in establishing the cause of action in a subsequent civil action founded upon the same conduct, in which the onus of proof is lower. We have no doubt in principle that evidence of the conviction should be admissible.'"

It should be noted that, as a consequence of that report, the Civil Evidence Act 1968 was introduced in the United Kingdom. Section 11 (2) of that Act provides:-

> "(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere-
>
> (a) he shall be taken to have committed that offence unless the contrary is proved."

Returning to the New Zealand case, all three members of the Court of Appeal there concluded that a certificate of Jorgensen's conviction was not merely conclusive evidence of the fact that Jorgensen had been found guilty of the murder of Speight but was also admissible evidence, while not conclusive, of the fact of guilt of the crime charged against Jorgensen at the time and place named on the indictment. Whether such evidence discharged the evidentiary burden of proof at any stage was for the trial court to decide on the whole of the evidence tendered at that stage.

North P. commenced his analysis by distinguishing the case before the court from the type of road accident case with which the Court of Appeal in *Hollington* was concerned. In noting that little or no inconvenience was experienced by rejecting this class of evidence in road traffic cases it was "plain that outside this limited field very grave problems indeed arise if this rule of rejection is rigorously applied to all classes of cases. As the two recent English cases show, the rejection of evidence of a conviction as providing evidence that the plaintiff had in fact committed the acts which gave rise to his conviction may well result in a denial of justice and leave a defendant amazed that English law should be so irrational. To take the present case, *Jorgensen* was convicted of murder after a trial lasting eight days. Now, nearly five years later, the defendant in order to succeed in a plea of justification is placed in the difficult position of having to call once again the evidence called by the Crown in the criminal charge, otherwise it is obliged to rely on the commonsense of the jury to award nominal or small damages."

He took the view that historic cases were of little assistance, because prior to the passing of the Evidence Act 1843 any person who was or could be interested in the question in issue in a civil action was regarded as an incompetent witness and therefore the fact that he gave evidence in the criminal charge rendered evidence of the conviction inadmissible.

He did however note that in *Harvey v. The King* [1901] A.C. 601 the Privy Council took the view that an order made under the Lunacy Act 1890 was admissible as *prima facie* evidence and, having been made by a competent tribunal in a matter within its jurisdiction, could not be rejected as inadmissible or as no evidence of the truth of the facts recited in them which are essential to their validity. Similarly, in *Hill v. Clifford* [1907] 2 C.H. 236, the Court of Appeal found that an order of the Medical Council striking the Clifford's names off the Register of Dentists on the grounds that they had been guilty of conduct "which was infamous or disgraceful in a professional respect" was, unless or until evidence to the contrary was given, sufficient to prove that the Cliffords were guilty of statutory misconduct.

North P. stated (at p. 972) that this particular decision had been "referred to by a number of legal writers as having been unaccountably overlooked in *Hollington v. Hewthorn*". North P. was equally dissatisfied with the manner in which the Court of Appeal in *Hollington* "swept to one side" the decision in *Crippen's* case: "In my opinion the judgment of Sir Samuel Evans makes good sense and should not lightly be put to one side".

He disagreed strongly with the principal ground upon which the Court of Appeal in *Hollington* relied in rejecting the conviction of the driver of the defendant's vehicle for the purpose for which it was sought to be used when it held that the opinion of the Criminal Court was "irrelevant" and no better than the opinion of a bystander to the accident. In rejecting this characterisation he stated at p. 976:-

> "In my opinion a finding of guilty after a trial in which one of the parties to the subsequent civil action had every opportunity of defending himself cannot possibly be regarded as being of no greater weight than the opinion of a witness. There is, I think, force in the observation of Mr. Wright in the *Canadian Bar Review* that 'To state that a civilised community is willing to see a man hanged on such a finding of fact but to treat such finding as a mere opinion in a subsequent case involving a matter of dollars and cents is a reflection on the administration of justice as well as an offence to common sense'."

He then considered the views of the Law Reform Committee which concluded that "such a conviction has high probative value in establishing the cause of action in a subsequent civil action founded upon the same conduct in which the onus of proof is lower. We have no doubt in principle that the evidence of the conviction should be admissible".

He thus concluded that the principle ground upon which *Hollington* was decided should not be accepted. He was equally unimpressed by the second ground relied on in *Hollington*, namely, that evidence of the conviction should be excluded in that it offended the "best

evidence rule". The son of the driver in *Hollington* had died and accordingly could not give such evidence. Thus, the question as to whether evidence of a conviction should be rejected or admitted in no way depended on whether the plaintiff's son was dead or alive. On the ground that a conviction was inadmissible as offending the Latin maxim *res inter alios acta*, he accepted that a stranger should not be prejudiced by a judgment *in personam* between other parties, but noted, that as had been pointed out by Sir Samuel Evans in *Crippen's* case, there is a difference between the position of a stranger and the position of a person who was a party to the criminal proceedings. Accepting that mutuality or reciprocity was an essential feature of an estoppel, he stated that he could not see what application it had when coming to consider the question of admissibility of evidence of a conviction, noting that Professor Cross (*Cross on Evidence*, 3rd Ed., 49) felt that objections on this ground should not apply where a party to the earlier judgment is also a party to the later proceedings. On the point that evidence of a conviction if admitted should mean that evidence of an acquittal should also be admitted, North P. (at p. 978) saw "no parallel between a conviction and an acquittal, for acquittal on a criminal charge establishes no more than that the Crown failed to prove the accused's guilt beyond reasonable doubt whereas a conviction must be interpreted to mean that the charge was established beyond reasonable doubt".

He finally considered whether, notwithstanding its relevancy, evidence of a conviction was nonetheless inadmissible on the ground that it did not come within one or other of the recognised exceptions to the hearsay rule. North P. in this regard accepted the majority view of the Court of Appeal in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001 that exceptions to that rule were permissible where common sense and the pursuit of truth demanded it, citing (at p. 979) Lord Pearce who said:-

> "No one doubts that the general exclusion of hearsay evidence, subject to exceptions permitted where common sense and the pursuit of truth demand it, is an important and invaluable principle. But it is a disservice to that general principle if the Courts limit the necessary exceptions so rigidly that the general rule creates a frequent and unnecessary injustice."

Noting that Lord Donovan in the *Myers* case had offered a similar view, North P. felt that, if it be necessary, the New Zealand Court, not being bound by judgments of the House of Lords, was entitled to prefer the approach which commended itself to Lords Pearce and Donovan in *Myers*. He regarded the point as one of such importance that if necessary, he was prepared to create a new exception to the hearsay rule given that in his opinion it was within the province of the judges on matters of evidence to adapt the existing laws of evidence to meet modern conditions. However, he doubted if it was necessary to go so far, given that there was already a body of judicial opinion that would justify the conclusion that a certificate of conviction was admissible evidence not merely of the fact of a finding of guilt of murder, but admissible evidence also in proof of the fact of guilt and "that is as far as I feel obliged to go".

In so far as onus of proof considerations were concerned, North P. stated:-

> "If it is a judge alone case he should have little difficulty in determining what weight should be given to the conviction. If it is a jury case no doubt it will require a careful direction by the judge.
>
> In my opinion then the question submitted to this court should be answered thus: in the present case proof of the conviction of the plaintiff Jorgensen of the murder of Speight, while not conclusive of his guilt, is evidence admissible in proof of the fact of guilt. Whether such evidence discharges the evidentiary burden of proof at any stage of the trial will be for the court to decide on the evidence tendered."

A similar conclusion was reached by Turner J. who specifically approved the decision in *Crippen's* case, adopting the rationale of that case and stating at p. 985:-

> "The person whose participation in the crime of murder is now sought to be proved was himself a party to the earlier proceedings, and had all those opportunities to call evidence and to cross-examine witnesses which were absent in the illustration attributed to Blackburn J. in *Castrique v. Imrie* [1870] 4 H.L. 414. It seems to me inept to describe the conviction which we are considering, when it is regarded from the standpoint of the plaintiff, as *res inter alios acta*. It was a conviction of himself, in proceedings to which he was himself a party. Where such circumstances obtain I respectfully agree with Sir Samuel Evans P. that the doctrine *res inter alios acta alteri nocere non debet* can have little force, and if the evidence of the conviction is to be excluded it will have to be for some reason other than reliance upon this maxim."

He queried whether the law of estoppel was applicable generally to the law of evidence. He criticised in particular the Court of Appeal in *Hollington* at p. 986 for giving –

> "far too little weight to the principal consideration upon which a first approach should be made to every question of admissibility – *viz.*, how much logical relevance has the evidence tendered to the question in issue? I cannot doubt but that most men would be shocked by the proposition that the conviction of X in a New Zealand court for murder is logically irrelevant in considering the question whether he committed murder. Such a proposition has only to be stated to be rejected out of hand".

At p. 987 he went on to say:-

> "If, as I am for myself persuaded, a high degree of logical relevance is pre-eminently the test by which questions of admissibility should at least in the first place be judged, then it would seem that principle required the Court of Appeal at least to consider with the greatest care a question to which it gave little consideration – *viz*., whether it could not extend the existing rules of admissibility so as to make evidence of the conviction admissible. This is the way, accordingly, in which I think that this Court should now approach the matter before it, unless prevented from doing so by authority."

He traced a line of authorities thereafter through *Harvey v. The King, Hill v. Clifford* and *Crippen's* case, and concluded that "even on authority, the better view, in this country at least, favours the result reached in *Harvey v. The King* which, if not positively binding upon us, is at least a decision commanding the greatest respect in this Court".

Finally, on the hearsay point he stated as follows (at p. 990):-

> "It is true that to admit a certificate of conviction as proof of guilt is to admit hearsay, but the objection to the admission of hearsay is fundamentally this and no more: (a) the version of the facts given in the Court may not be an accurate transcription of what the original witness said at all; (b) even if correctly recorded, the content of what is said may be unsatisfactory – *i.e*. false, unreliable, biased, prejudiced, *etc.* – and there is no opportunity to demonstrate this by cross-examination of the maker of the statement. Neither of these objections seems to me to apply, or at least to apply in any

> great degree, to the admissibility of a certificate of conviction. If there is any document whose content must be taken as satisfactorily verified it must be a certificate under the seal of the Court. There can I think be no real doubt that a certificate of conviction under the seal of the Court constitutes unimpeachable evidence not only of the fact that the prisoner was convicted, but also of the fact that the Court did in fact consider him guilty of the crime charged. So much for that objection. As regards the other (*viz*. that the opinion of the Court might have been wrong) it is perhaps only necessary to say that before a man be convicted in this country the Court must have come to the conclusion *beyond all reasonable doubt* that he was guilty of the crime charged. It does not seem to me, therefore, that either of the reasons normally operating to exclude hearsay exert any logical force at all in this case, and I would not allow the fact that a certificate of conviction is technically hearsay to deter me from the proposal which I now make, that this Court should abrogate the rule in *Hollington v. Hewthorn.*"

Finally, McCarthy J. in his concurring judgment stated at p. 993:-

> "In my respectful view, if the Court of Appeal, the superior Court in this country, after weighty consideration, reaches the viewpoint that in the interests of justice and to meet the particular conditions of the times, it is desirable to create a new exception to these particular rules of evidence, and that it is not obstructed in so doing by compelling or highly persuasive authority to the contrary, it should take that step. Our existing exceptions to the rules relating to hearsay and opinion evidence were created to meet practical situations rather than as steps in the development of evidentiary theories, and practical considerations must, I believe, continue to be sufficient justification for change, if we are to keep our rules in workable condition …. In my view the considerations which justify the admission of the conviction in this case are overwhelming. First, the English cases are, as the President shows, by no means all the one way: indeed that which should have the greatest influence with us even if because of its interlocutory nature it be not binding in this instance, the Privy Council decision of *Harvey v. The King* [1901] A.C. 601, is strongly in favour of the conviction being admitted. Secondly, the grounds upon which Goddard L.J. rested the judgment in *Hollington v. Hewthorn* are not satisfying. Thirdly, a conviction after trial in the Supreme Court with its requirement of proof beyond reasonable doubt, is as probative a piece of opinion or hearsay evidence as it is possible to imagine. Fourthly, there is something almost of the character of a judgment *in rem* about the decision of a conviction after trial: surely common sense requires us to say that such a conviction should at least be some evidence not only that the convicted was convicted but also that he was guilty of the crime of which he was convicted – the weight to be given to that evidence to be determined in each case by the subsequent tribunal having regard to the circumstances surrounding the conviction and the evidence later proffered by the convicted person. Fifthly and finally, failure to admit a conviction in circumstances like the present leads to positive and manifest injustice."

Even if I had not found the reasoning of the New Zealand Court of Appeal as convincing as I do, I would nonetheless start from the position that decisions of English courts constitute persuasive authority only since this State gained its independence. While decisions of the superior courts in the United Kingdom can be highly persuasive, I am satisfied, principally by reference to the reasoning offered by the Court of Appeal in New Zealand, that the decision in *Hollington v. Hewthorn* is unsatisfactory both for the reasons enumerated in *Jorgensen*, the writings of distinguished commentators referred to therein and in the citations from later cases in the United Kingdom which were unambiguous in their disapproval of *Hollington* and which ultimately led to the introduction in that jurisdiction of the Criminal Law Evidence Act 1968.

The law in this jurisdiction in my view may be taken to be that laid down in *Harvey v. The King* and in *Crippen's* case, cases decided in 1901 and 1911 respectively, unless subsequent Irish authority may be shown to have taken a different course.

IRISH CASES

As a number of Irish authorities were opened to the Court, it is to those more recent cases I must now turn. The first case of importance is *Kelly v. Ireland & The Attorney General* [1986] I.L.R.M. 318. In that case the plaintiff had been convicted in the Special Criminal Court of offences connected with the Sallins train robbery. During the course of his trial, he had sought to have a written statement signed by him excluded from consideration by the court, on the grounds that it had not been freely made, but was given as a result of unlawful violence used against him by members of the Gardaí. The court, having heard evidence from both sides, had rejected these allegations, ruling that the statement had been freely made and was admissible in evidence. The later civil proceedings were brought by the plaintiff claiming damages for alleged assault committed upon him while in custody by members of the Gardaí. These allegations were identical with those upon which he relied in seeking to have his written statement ruled inadmissible during his trial. The defendants contended that these matters were res judicata and that the plaintiff was estopped from raising them anew. They also pleaded that the initiation of the civil proceedings was an abuse of the process of the court.

In dismissing the plaintiff's action, O'Hanlon J. held that where a clearly identifiable issue has been decided against a party in a criminal trial, by means of a judgment explaining how the decision was reached, such decision may give rise to issue estoppel in subsequent civil proceedings in which that party is involved and in the absence of special circumstances, an effort by a party to challenge by means of civil proceedings a decision made against him by a court of competent jurisdiction is an abuse of the process of the court.

However, I believe Mrs. Nevin's solicitor is correct in saying that no question of abuse of process can be said to arise in the instant case for the very simple reason that Catherine Nevin is a defendant and not a plaintiff who, by initiating proceedings, might be characterised as mounting a collateral attack on a final decision made by another court of competent jurisdiction. Further, *Kelly's* case was concerned with the admissibility or otherwise of a statement only. O'Hanlon J. specifically resiled from deciding the issue of whether a conviction in a criminal offence could be proved in later civil proceedings. He stated as follows at p. 327:-

> "It is not necessary for the purposes of the present case to decide whether the fact that a person has been convicted of a criminal offence may be proved in later civil proceedings, and if so in what circumstances, and with what effect. This was the issue debated in *Hollington v. F. Hewthorn & Co.* [1943] K.B. 587, where the Court of Appeal in England decided, *'both on principle and authority'*, that evidence of a previous conviction was inadmissible in civil proceedings.
>
> In reaching that conclusion, however, the court found it necessary to overrule a number of earlier decisions which had stood unchallenged for many years. In one of these, *In the Estate of Crippen* [1911] P. 108, the President of the Probate, Divorce and Admiralty Division admitted evidence of the conviction of Crippen, and also concluded that it amounted to *prima facie* proof that he had murdered his wife.
>
> While the law in England, as declared by the Court of Appeal in *Hollington*, was altered by the enactment of the Civil Evidence Act 1968, the correctness of that decision was also seriously challenged by Lord Denning in *McIlkenny*, when he said at p. 237 (a): 'beyond doubt, *Hollington v. Hewthorn* was wrongly decided. It was done in ignorance of previous

> authorities. It was done *per incuriam*. If it were necessary to depart from it today, I would do so without hesitation'.
>
> Having regard to the great diversity of judicial opinion as between the Court of Appeal which decided *Hollington* and that which decided *McIlkenny* I would prefer to leave open the question whether evidence of previous conviction may be given in civil proceedings in this jurisdiction where it is clearly relevant to the issue the court has to try, and as to whether it can be relied on to establish the guilt of the accused as well as the fact of his conviction. For the purposes of the present case it is sufficient to decide whether evidence can be given as to the decision of a particular issue in the course of the criminal proceedings, other than the issue as to whether the accused was guilty of the offence charged, and to consider the effect of such decision if the evidence is admissible."

O'Hanlon J. concluded that, in the absence of special circumstances, an effort to challenge the correctness of a decision made by a court of competent jurisdiction against a party in the course of a criminal trial, by means of civil proceedings instituted by such a person after that decision has been made, should normally be restrained as an abuse of the process of the court.

On the question of issue estoppel, he was satisfied in that case that the requisite privity for an issue estoppel arose, because the Director of Public Prosecutions in the criminal proceedings acted on behalf of the people of Ireland, and in defending a civil claim against the State, the Attorney General also acted on behalf of the people.

That consideration does, I think, also distinguish *Kelly's* case from the instant case. It is of course true to say that the present plaintiffs represent Thomas Nevin in the sense that they are his legal personal representatives. However, neither they or Nora Nevin (who first extracted letters of administration to Thomas Nevin's estate) could be characterised as pursuing anything other than a private claim of their own in suing Catherine Nevin and cannot in law be equated with "the people" generally or even with the Director of Public Prosecutions who performs a specific, separate and independent function in our criminal law system.

Accordingly, I do not find that this case provides a comprehensive answer to the question which this Court must address, though clearly O'Hanlon J. was sympathetic to the kind of arguments being advanced by Mr. Brady in this case, given that at p. 328 he stated:-

> "In the rare case where a clearly identifiable issue has been raised in the course of a criminal trial and has been decided against a party to those proceedings by means of a judgment explaining how the issue has been decided, I would be prepared to hold that such decision may give rise to issue estoppel in later civil proceedings in which that party is also involved. Such estoppel would arise, not only in relation to the specific issue determined (in this case, whether the statement was made freely and voluntarily) but also to findings which were fundamental to the courts decision on such issue." (Emphasis added)

While the fact that a "reasoned decision" was given in the criminal trial was a consideration taken into account by O'Hanlon J, I do not see it as being a prerequisite for admissibility. No such obstacle or objection arose in *Crippen's* case and I do not see it as an impediment here either, notably in circumstances where full and reasoned judgments meeting any such need were in any event handed down on two occasions by the Court of Criminal Appeal upholding the safety of the conviction. To my mind the decisive consideration in favour of admission is that under the criminal law a far higher standard of proof exists than in a civil case, that is to say proof beyond reasonable doubt.

A similar view to that taken by O'Hanlon J. in *Kelly's* case was taken by Lardner J. in *Breathnach v. Ireland and the Attorney General & Ors.* [1989] I.R. 489, a case arising out of the same facts as in Kelly's case and concerning a similar issue with regard to the admissibility of a statement in evidence in civil proceedings which had been earlier admitted in criminal proceedings. Lardner J. was satisfied (at p. 9) that:

> "Neither justice nor fairness requires that the plaintiff in the present case should be allowed to re-open this issue in civil proceedings. In my judgment the plaintiff is estopped from raising or litigating the issue whether … any member of the Garda Síochána, being a servant or agent of the first defendant, committed acts of assault and battery against the plaintiff as alleged."

At an earlier point, again at p. 9 of his judgment, Lardner J. had stated:-

> "I am satisfied the plaintiff had a full and fair opportunity of presenting his case on this issue to the Special Criminal Court and that he fully availed of this opportunity. The issue clearly received full and careful consideration by the Special Criminal Court which decided against the plaintiff on the issue in two judgments to which I have referred. As Lord Halsbury L.C. said in his speech in *Reichel v. Mcgrath* 14 App. Cas at 668:-
>
> > '… I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.'"

It seems clear that Lardner J., like O'Hanlon J., was disposed to base his judgment on grounds of issue estoppel and abuse of process.

While both authorities may to that extent be seen as supportive of the plaintiffs' case in these proceedings, both relate to cases where the accused in the criminal case sought, as plaintiff in civil proceedings, to bypass the earlier adverse finding, whereas Catherine Nevin, the defendant in this case, raises it by way of shield or defence only.

The final Irish authority opened to the Court in this matter was the judgment of Irvine J. in *Madden v. Doohan & Ors*. [2012] I.E.H.C. 422. In that case Terence Madden was shot dead outside his home in Co. Sligo by the second named defendant, Michael Herron. The plaintiff, the widow of the deceased, brought proceedings under Part IV of the Civil Liability Act 1961 on her own behalf and on behalf of the other statutory dependants of the deceased. Judgment in default of appearance was obtained against the second named defendant and only the first named defendant appeared in person at the trial of the proceedings. In the course of the proceedings which occurred before Irvine J. the court received evidence that the first, second and fourth named defendants were charged and convicted of the murder of the deceased, together with other offences. The criminal trial had taken place before the Special Criminal Court and the judgment of that court was delivered by Morris P. on 26th July, 2000. That judgment fully set forth the court's conclusions in relation to the evidence and submissions of the parties.

In the course of the hearing, counsel on behalf of the plaintiff relied on the decision of O'Hanlon J. in *Kelly's* case. Irvine J construed the decision in *Kelly's* case as meaning that where a clearly identifiable issue is decided against a party in a criminal trial by means of

a judgment explaining how the decision was reached, that decision gives rise to an issue estoppel in subsequent civil proceedings in which that party is involved. She stated as follows at p. 5:-

> "Accordingly, in the absence of special circumstances, any effort by a party to challenge by means of civil proceedings a decision made against them in a court of competent criminal jurisdiction is an abuse of process of the court. Indeed, Lardner J. went a little further in *Breathnach* when he concluded that such estoppel would arise, not only in relation to any specific issue determined in the criminal proceedings but also to findings which were fundamental to the court's decision on the issue. The reasoning in both cases makes perfect legal sense in circumstances where the decision of the criminal court on the same issue is made on the significantly higher level of proof than is required in civil proceedings."

She proceeded to find against the various defendants and assessed damages accordingly.

The learned trial judge in that case did not appear to draw a distinction between the position of a convicted person who thereafter appears as a plaintiff, rather than a defendant, in civil proceedings. Can abuse of process be laid at the door of a defendant as well as a plaintiff? I see no principled reason why it should not be possible but that point was not decided by either O'Hanlon J or Lardner J. No argument appears to have been made in the case before Irvine J. that a necessary requirement for issue estoppel, namely, privity of parties, may not have been fulfilled in that case. It will be remembered that in the *Hollington* case, when he appeared as king's counsel for the plaintiff, Lord Denning did not rely on issue estoppel as the critical legal principle warranting admissibility.

In any event, I am satisfied that none of these three Irish authorities specifically address the issue which this Court is called upon to determine in the present proceedings, and indeed O'Hanlon J. expressly resiled from going further than he felt was required of him in *Kelly's* case.

Finally, while I was referred in a general to contrasting views on admissibility in a number of authorities from various states in the U.S., none provided the detailed reasoning elaborated in *Jorgensen's* case and were of little or no assistance.

DECISION
In the instant case, the defendant was convicted of murder in the Central Criminal Court in 2000. She unsuccessfully exercised her right of appeal, and, having failed in that appeal, brought a further application, by reference to s. 2 of the Criminal Justice Act 1993, that a newly discovered fact rendered her conviction unsafe and failed in that appeal also.

I have already adverted to the further application to the Court of Criminal Appeal which was re-lodged with the Court of Criminal Appeal the day before this issue was due to be heard. That application was not of course an appeal *per se*, but rather an application to that court for a certificate for leave to appeal to the Supreme Court on the basis that some exceptional point of public importance arose in the section 2 proceedings.

Quite apart from my finding that there was an agreement between counsel that the legal issue be dealt with, I am satisfied that now, nearly thirteen years after her conviction, the undertaking given on behalf of the plaintiffs in January 1998 to take no further steps in these proceedings pending final determination of the criminal proceedings has been discharged following the conviction of the defendant and the rejection by the Court of Criminal Appeal of two subsequent appeals. I believe the plaintiffs are entitled to have adjudication upon the issue raised in this case after such a long interval of time having regard to their entitlement to an adjudication within a reasonable time on the matters contended for in these proceedings.

It is argued for all the reasons outlined above that the defendant's conviction for murder is admissible in these civil proceedings brought against her. The defendant's position on the issue is encapsulated in the simple proposition that this court should follow the 'traditional' rule established in the *Hollington v. Hewthorn* case in the United Kingdom to rule out as inadmissible a criminal conviction in subsequent civil proceedings. However, I am satisfied that no convincing case, based on Irish case law, has been made out to support that proposition. Indeed, the Irish authorities evince a strong inclination in the other direction.

To start with, the courts in this jurisdiction were, in the years following independence, spared the consequences and confusion created by the decision in *Hollington's* case which gave rise to the passing of the Criminal Law Evidence Act in the United Kingdom in 1968. It is clear that the Act in question was necessitated by that unsatisfactory decision of the Court of Appeal.

I am satisfied that counsel for the plantiff is correct in stating that this Court can, like the Court of Appeal in New Zealand, take as its starting point the law as enunciated in *Crippen's* case. Sir Samuel Evans remarked in *Crippen's* case on the extended rights which an accused person enjoyed by the time Crippen came to trial. It can hardly be said that since 1910 the rights of an accused person in this jurisdiction have in any way diminished. Indeed, the opposite is the case and any accused person, such as the defendant herein at the time of her trial, has every opportunity to participate fully in their case, challenge witnesses, give evidence and call witnesses. I am satisfied, for all the reasons adumbrated in *Jorgensen's* case, that the conviction of the defendant for her husband's murder is admissible in these civil proceedings as *prima facie* evidence of the fact that she committed such murder.

The identification of the precise legal principle upon which such a conclusion is arrived at has taken different forms over the years. In *Crippen's* case it lay in the application of the principle *omnia praesumuntur rite esse acta* combined with public policy considerations. There are also good grounds for taking the view, as has been taken in the Irish cases, that an issue estoppel arises where the party affected was a party in the criminal proceedings. Equally, the view that for the convicted person to again put in issue the correctness of a conviction in the criminal courts amounts to an abuse of process which the courts will restrain, an approach which has also found favour in the Irish decisions to which I have referred. I have indicated in the course of this judgment some of the slight reservations I have about deciding the issue on the basis of either issue estoppel or abuse of process. In circumstances where several legal principles can be invoked in aid, I prefer to base my view ultimately on the proposition that the admissibility of the murder conviction is either authorised on foot of the decision in *Crippen's* case or comes within an exception to the hearsay rule as suggested and found by the Court of Appeal in New Zealand in *Jorgensen's* case. The reasons for so holding were set out with particular clarity in the judgment of Turner J. in that case and they are (a) that there can be no real doubt that a certificate of conviction constitutes unimpeachable evidence not only of the fact that a person was convicted, but also that the court did in fact consider the person guilty of the crime (in other words any of the usual objections to hearsay – that the version given in court may be unsatisfactory as false, unreliable, biased, untested by cross-examination etc – simply do not arise) and (b) any objection that the court may have been wrong is more than addressed by the requirement that the court before convicting must be satisfied beyond all reasonable doubt that the person was guilty of the crime charged.

This legal principle sits most comfortably with the view that the conviction should be seen as *prima facie* evidence only of guilt.

To rule out the conviction as completely inadmissible would, in my view, be contrary to logic and common sense and offend any

reasonable person's sense of justice and fairness. An alternative interpretation whereby it is admitted as *prima facie* evidence is clearly open on the authorities in this jurisdiction. There is the clearest public policy consideration for so holding and it is set out starkly and unambiguously in s. 120 of the Succession Act 1965. That policy consideration may be characterised as being no more and no less than that the perpetrator of the crime of murder should not be the beneficiary of it.

However, having concluded that evidence of the conviction of Catherine Nevin for murder is admissible in the plaintiff's various civil claims against her, I would go no further than did the Court of Appeal in New Zealand to say that the conviction is *prima facie* evidence only that Catherine Nevin murdered her husband. It is still open to Catherine Nevin on the trial of the civil proceedings to contend that she did not murder Tom Nevin and that she should not have been convicted. While the interval of time which has elapsed since her conviction may create certain difficulties for both sides in these proceedings, such delay has arisen as a result of the full exercise by the defendant of her rights under our criminal law system and I think it would be most unfair to the plaintiffs if they were now locked out from seeking a remedy for that reason.

In conclusion, it would be of considerable assistance if a suitable amendment of s. 120 (1) of the Succession Act 1965 could be effected so as to address the anomaly referred to in the earlier part of this judgment.