

Statutory duties to report criminal activity and negligence in failing to do so

Although the informer holds the future of others in his or her hands, in making the decision to disclose information to the police he or she seldom applies objective, legal reasoning or a painstaking analysis of the evidence before reaching conclusions.

While a number of informers freely choose to reveal their information, others are pressurised into disclosure. This pressure to become an informer is particularly strong when it is reinforced by a criminal sanction for failing to report certain activities or suspicion thereof to the authorities. The pressure to speak becomes almost intolerable when disclosure to the police of information about another's activities is required not merely for actual subjective knowledge or foresight, but merely upon inferred reasonable foreseeability of criminality, that is, where criminal liability results from a failure to disclose information in circumstances where a reasonable person would have suspected that some illegal activity had occurred, or might occur, even though the accused did not actually foresee or suspect it.

What is the public-policy justification for imposing positive duties on an ordinary person to disclose a mere suspicion that someone else is engaged in possible criminal conduct? Surely the state, by imposing such a duty and enforcing it by criminal sanctions is pressurising future persons to disclose this information under threat that, if they don't they will be prosecuted, convicted and sentenced for such failure? The possible benefit to the state of this course of action is that it will ultimately obtain the cooperation of the public in the detection of serious crime by means of the threat. This benefit, often ephemeral in nature, depends on the assumption that loyalty to one's fellows is less important to the ordinary person than fear of criminal conviction. As far as the individual who is prosecuted for failure to 'rat' on his or her fellow citizens is concerned, the state might hope to impel this person by means of the threat of imminent conviction and sentence to 'spill the beans' while under arrest or under prolonged awaiting trial detention. Any elusive future benefit of this nature must be weighed against the reality that, if the state does obtain the benefit of disclosure from this accused, there is no guarantee that the information obtained by the police will lead to the successful conviction of others.¹⁶

Furthermore, disclosure under threat of criminal sanction might result in a challenge to the legality or admissibility of the information so obtained, based on an infringement of the accused's fundamental rights to privacy or

¹⁶See n 5 above. See also Laura ML Maroldy 'Recordkeeping and reporting in an attempt to stop the money laundering cycle; why blanket recording and reporting of wire and electronic fund transfers is not the answer' (1991) 66 *The Notre-Dame LR* 863 at 872 where the author cites an instance where money launderers complied with all the reporting requirements and still carried on their business unimpeded.

to remain silent and might even bring, in its wake, a challenge to the admissibility of the information gained in a subsequent trial of another person. On a cost-benefit analysis, it would be advisable for the state to spend its time and resources honing its own investigative skills, educating the public in vigilance and, at most, endeavouring to obtain the voluntary collaboration of private entities and individuals in the fight against crime. A strategy based on identifying appropriate incentives for cooperation in supplying information might be more effective than simply resorting to criminal conviction and punishment for failure to do so.¹⁷

Statutory duties under section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004

In terms of section 12 of the recently enacted anti-terrorism legislation in South Africa it is an offence, punishable by a maximum of five years' imprisonment, for a person who has reason to suspect that any other person intends to commit, or has committed, a 'terrorist activity' (as defined in the Act) or is aware of the presence at any place of a person who is suspected of intending to commit or having committed such an offence, to fail to report such suspicion or presence to the police as soon as reasonably possible. In terms of the 'definition' section of the Act, the phrase 'ought reasonably to have suspected' is defined as referring to a negligence criterion and the term 'reason to suspect', with its apparent meaning of 'facts giving rise to such belief',¹⁸ would, on a *literal* interpretation of the words used in the sections, probably be interpreted as implying an objective inquiry. This would mean that if I, as a reasonable person, ought to suspect that another person is linked to 'terrorist activities' and I do not report this to the police, I could be charged with a breach of the duty imposed by section 12 of the anti-terrorism legislation and spend up to five years in prison if convicted.

The damning feature of the apartheid versions of terrorism laws was that, amongst other obnoxious features, they provided for detention of persons without trial if a government official had reason to believe that these persons were withholding information relating to terrorists. The period of detention for interrogation depended on whether a member of the executive was satisfied that the detainee had satisfactorily replied to all questions.¹⁹

¹⁷It is argued that the existence of corporate compliance programmes should operate as a defence to crimes requiring a culpable mental state: Charles J Walsh & Alissa Pyrich 'Corporate compliance programs as a defense to criminal liability: can a corporation save its soul?' (1994/5) 47 *Rutgers LR* 605ff. On the possibility of self-reporting as a possible defence to criminal liability and the existence of corporate compliance programmes as a possible factor mitigating sentence: see Matthew R Hall 'An emerging duty to report criminal conduct: banks, money laundering, and the Suspicious Activity Report' (1995/6) *Kentucky LJ* 643 at 647-8 esp n35.

¹⁸*London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D) at 592E-F.

¹⁹Section 6(1) of the Terrorism Act 83 of 1967.

Any reference to detention without trial contained in the early drafts of the new South African anti-terrorism legislation²⁰ was wisely dropped from the final version which is now on the post-apartheid statute book in South Africa. However, under section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, a person who merely ought to suspect that another person is a 'terrorist' and fails to report this suspicion to the police can be incarcerated for up to five years. Of course, the conviction under section 12 involves a trial with all its due process protections whereas the apartheid equivalent involved detention without trial. Thus the accused under section 12 is given the benefit of the exercise of his or her right to silence or freedom from self-incrimination.

However, a recent Working Group on Arbitrary Detention of the United Nations Commission on Human Rights investigation into pretrial detention and police custody conditions in South Africa has revealed that, although arbitrary detention is not institutionalised, for the large number of pre-trial detainees in the country, the excessive length of pretrial detention and the conditions under which pre-trial detainees are held could lead to de facto arbitrary detention.²¹ Persons suspected of having knowledge that might prove useful to the state in its fight against terrorism could well fall into this pre-trial vortex. One can only imagine how vague definitions of 'terrorism' and stereotyping of offenders could serve to exacerbate the potential infringement of the fundamental rights of the individual accused.

Furthermore in a prosecution under section 12 the state has merely to prove a failure to comply with the positive duty imposed by the section, accompanied possibly by mere negligence on the part of the accused regarding suspected terrorist activities, in order to achieve a conviction, even if subsequently the suspicion turns out to be groundless. The breach of the obligation to disclose the suspicion under section 12 in fact forms the essence of the offence and, at the outset, places practical limits on the accused's right to remain silent – at least on issues covered by the suspicion. In essence, a duty-to-report offence requires the person to speak out, not voluntarily, but under pain of criminal conviction and penalty. Duty-to-report offences not only pose due process obstacles but also evoke the obvious issues attendant on breaches of confidentiality and invasions or privacy. Such offences, if they are to exist within a just and fair system of criminal law, must at least be subject to restrictive interpretation.

Protection for whistleblowers is provided by section 17(7) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, which states that no 'action, whether criminal or civil, lies against a person

²⁰See Esther Steyn 'The Draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system' (2001) 14 *SACJ* 179 at 182.

²¹<http://www0.un.org/apps/news/story.asp?NewsID=15917&Cr=south&Cr1=africa> (press release of 19 Sept 2005) accessed 21 October 2005.

complying in good faith' with the reporting duty under section 12(1) of the Act.

Statutory duties under section 28 and 29 of the Financial Intelligence Centre Act 38 of 2001

Reporting duties imposed on 'accountable' and 'reporting' institutions in terms of the Financial Intelligence Centre Act (FICA)²² to report cash transactions over a certain prescribed limit²³ or reporting duties imposed on any person who 'carries on a business' or who 'is employed by a business' to report suspicious or unusual transactions regarding the proceeds of unlawful activities,²⁴ are all enforced by severe criminal penalties. European legal systems tend to opt for administrative remedies²⁵ rather than the criminal law to obtain information from corporations about suspicious transactions and these systems try to foster a partnership relationship between corporations and law enforcers. The United States, England and South Africa prefer to rely on the heavy-handed, and potentially counterproductive, use of criminal sanctions to enforce duties of disclosure on corporations and persons carrying on businesses. In South Africa, the FICA imposes particularly severe punishments for breaches of statutory duties.²⁶

²²38 of 2001.

²³Under s 28. The duty is to report to the Financial Intelligence Centre.

²⁴Under s 29. The duty is to report to the Financial Intelligence Centre.

²⁵For instance, the German Money Laundering Act of 8 August 2002 not yet in force on 1 December 2006 (*Federal Law Gazette* 1 of 14 August 2002) s 17 refers to an 'administrative offence' leading to a fine of up to €50 000 for failing to report; the Belgium Law of 11 Jan 1993 on Preventing Use of the Financial System for Purposes of Laundering Money and Terrorism Financing art 22 refers to a 'supervisory or regulatory authority or the competent disciplinary authority' publishing its decisions and the measures that the institution or individual shall adopt and concludes that 'an administrative fine of not less than €250 and not more than €1 250 shall be imposed. Of course, the imposition of a fine will have the same practical effect whether it is imposed by a criminal court or a supervisory, regulatory or competent disciplinary authority but the stigma of a criminal conviction must not be neglected. On the matter of the enforcement of the duty to inform it is perhaps not without significance that the overarching European Union Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purposes of money laundering art 8 refers to furnishing information to the authorities responsible for combating money laundering by credit and financial institutions and their directors and employees 'co-operating' and informing 'on their own initiative'. An administrative remedy would, of course, be more attractive in jurisdictions that do not have a well-developed form of corporate criminal liability (Stessens n 30 above at 205). The debate on whether the appropriate approach is 'criminal trial, conviction and penalty (with of course, the advantage of attendant due process protections for the accused)' or 'administrative body, administrative offence and fine (possibly without due process protection)' has not yet been exhausted. A possible middle course would be to have a combination of administrative fines (imposed by supervisory bodies that are required to comply with due process norms because the proceedings are seen as analogous to a criminal trial) and selective criminal penalties only for the most serious offences.

²⁶Penalties for failing to report suspicious or unusual transactions under s 29 are: imprisonment not exceeding 15 years or a fine not exceeding R10 million. The penalties for failing to report cash transactions over a certain prescribed limit are not yet in force.

Not only is the use of the criminal sanction for failures to report certain information to the authorities dubious, the criminal definition incorporated in section 29 of the FICA is too vague and, therefore, arguably infringes the fundamental principle of legality. Who is a person who 'carries on a business'? The term is not defined in the legislation and, in its ordinary meaning, would cover an almost limitless class of persons.²⁷ Furthermore, what constitutes 'unusual' conduct depends on the knowledge of what is 'usual' for that person or entity. The unusual quality of a transaction becomes a highly personal issue that will vary not only with each type of business transaction but also with the type that precedes or succeeds it.²⁸

One might argue that the concept of what constitutes 'suspicion'²⁹ or what is 'suspicious' would imply some subjective state of mind. However, section 52(2) of the FICA clearly states that a *negligent* failure to report under section 29 will, in itself, be an offence. The same criticism of a negligence-based liability voiced in the preceding and succeeding sections of this article apply equally here.

As Stessens³⁰ notes, the Financial Action Task Force on money laundering in 1990 'urged countries to apply appropriate administrative, civil or criminal sanctions to financial institutions, but only in respect of one feature of the preventive anti-money laundering system, namely for those institutions which fail to maintain records for the required retention period'. Furthermore, Stessens observes that article 14 of the Inter-American CICAD³¹ Model Regulations on money laundering designates the *wilful* failure of financial institutions to comply with the prevention of anti-money laundering measure as a criminal offence.³²

In terms of section 37 of the FICA, an obligation of secrecy or confidentiality or any other restriction on the disclosure of information under common law or statute does not override the obligation of an accountable institution, supervisory body, reporting institution, SARS or any other person of complying with the reporting duty under the Act. As wide as the consequent infringement of confidentiality and privacy may be, it is at least encouraging that the scope of legal professional privilege (in respect of communications made in confidence between attorney and client for the purposes of legal advice or litigation which is pending, contemplated or commenced or between third party and attorney for purposes of litigation

²⁷See Burchell & Milton n 1 above at 997.

²⁸Opportunities for innovative commerce activities compound the problem of deciding what is, in fact, unusual. Legislation directed at traditional banking and other institutions might become obsolete as new economic opportunities of hiding the origin of money emerge.

²⁹See *Powell NO v Van der Merwe NO* 2005 1 SACR 317 (SCA) at 333 where Cameron JA endorsed Lord Devlin's formulation of 'suspicion' as a 'state of conjecture or surmise'. If the suspicion has to be *reasonable* then it has to be *objectively* assessed (*ibid*).

³⁰Guy Stessens *Money laundering – a new international enforcement model* (2000 CUP) 202.

³¹The Inter-American Drug Abuse Control Commission.

³²*Loc cit*.

which is pending, contemplated or commenced) does, in terms of section 37(2), specifically override the duties of disclosure under the Act. Furthermore, in terms of section 38 of the FICA, no civil action or criminal prosecution will lie against the discloser of information for complying in good faith with duties under the Act.

It is quite likely that heavy criminal sanctions placed on financial institutions to ferret out money launderers, even if successful in identifying culprits, will simply stretch the ingenuity of the criminal mind into other ways of hiding the nefarious origins of money, possibly using the potential hiding places provided by the ever-expanding opportunities of an electronic age.

In terms of section 38 of the FICA, no civil action or criminal prosecution will lie against an accountable or reporting institution, supervisory body, SARS or any other person who complies in good faith with the reporting duties under the Act. Whistleblowers therefore receive some protection under this legislation.

Of course, responsibilities placed on financial institutions to establish and verify the identity of their clients and to keep records of business relationships and transactions³³ reflect sensible business practices and fall into a category different from statutory duties of disclosure placed on financial institutions and enforced by criminal sanctions.

Statutory duty under section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004

In terms of section 34 of the recently enacted anti-corruption legislation in South Africa, 'any person who holds a position of authority and who knows *or ought reasonably to have known or suspected* that any other person has committed' an offence of corruption as defined in the Act '*or the offence of theft, fraud, extortion, forgery or uttering a forged document*' involving an amount of R100 000 or more, must report such knowledge or suspicion to any police official (italics added).

On the face of it, this duty to report, based as it is on a 'person who holds a position of authority' (defined in the Act as essentially someone who occupies a public or quasi public office)³⁴ would seem to comply with the common-law exceptional obligation to act, in so far as this common-law duty to act could extend to public or quasi-public officials. But the italicised words reveal a major departure from common-law principles: negligence is the fault criterion for liability for failing to report in terms of the section and,

³³Under ss 21 and 22 of FICA

³⁴Inexplicably, the definition of 'persons who hold a position of authority' in s 34(4) does not include auditors: see Oliver Pragal 'An evaluation of the Prevention and Combating of Corrupt Activities Act No 12 of 2004' mini-dissertation in part fulfilment of the requirements of the LL.M degree (UCT, 2005).

what is more, the section extends the negligence basis for liability for failing to report to failing to report common-law offences such as a theft, fraud, extortion, forgery and uttering.

It is arguable that the fault element for the new offences of corruption should be interpreted as intention (and possibly even *dolus directus*).³⁵ It is beyond doubt that the common-law offences listed in section 34 and any liability for accomplices or accessories after the fact to these offences are founded on intention. The legislature, in its fervour to suppress corruption, has interfered with centuries of precedent and authority that have established the pre-eminence of intention-based liability in the case of all common-law offences (apart from culpable homicide and contempt of court by the editor of a newspaper) and that has endorsed intention as the basis of the common-law liability of anyone charged with being an accomplice or accessory after the fact to any of these offences.

The South African anti-corruption legislation, unlike the FICA and the anti-terrorism legislation, does not provide protection from civil suit or criminal prosecution for persons who hold positions of authority and who are obliged to report suspected corruption in terms of the Act. However, in the *employment* context, the Protected Disclosures Act³⁶ provides protection from 'occupational detriment' for certain disclosures made under that Act.

A proposed statutory duty to inform a sexual partner of HIV-positive status
In the process of preparing draft legislation redefining the nature and scope of sexual offences in South Africa, it was argued by the erstwhile South African Law Commission that any new overarching sexual offences law should contain a specific provision punishing the non-disclosure of HIV-positive status to a sexual partner. In the tabled version of the Bill the Law Commission opted for the inclusion of the intentional failure to disclose infection with a life-threatening, sexually transmissible disease in circumstances where there is a significant risk of infection to a sexual partner as a false or fraudulent means sufficient to lead to a prima facie case of unlawful conduct for rape. The 2004 working draft of the Criminal Law (Sexual Offences) Amendment Bill contained options for legislative reform in this area which would punish 'criminal exposure of another to HIV or

³⁵See below. In the Prevention and Combating of Corrupt Activities Act 12 of 2004 the mental element of the general offence of corruption in s 3 is expressed in the following words: 'in order to act ... or by influencing another so to act' and 'designed to achieve an unjustified result' and these words reappear in the specific offences of corruption contained in ss 4, 5, 6, 7, 8 and 9. These words carry a strong indication that *dolus directus* is required for liability in terms of these sections. The wording of some of the other specific types of corruption mentioned in the Act clearly imply a fault element of *dolus* and probably *dolus directus* (eg 'intent to influence' (s 11); 'in order to improperly influence' (s 12); 'aim' and 'intent to obtain' (s 13); 'in order to conduct' and 'in order to influence' (s 14); 'intent to influence ... cause or induce' (s 18).

³⁶26 of 2000.

another sexually transmissible infection' as a separate statutory offence rather than defining the conduct as rape.

A commendable feature of both of these suggestions for reform was that the punishment of any omission or failure to disclose HIV-positive status was linked to intentional rather than negligent conduct.³⁷ However, the enactment of a statutory provision based on either the original tabled version of the Draft Sexual Offences Bill or the 2004 working draft options would still be unwise for two main reasons: first, the existing criminal law in its common-law principles in fact adequately punishes the non-disclosure envisaged and, secondly, the enactment of a statutory provision specifically criminalising the non-disclosure of HIV-positive status would, in practice, be both counter-productive in the fight against HIV/AIDS and could well result in further discrimination against groups at risk of contracting the virus.

The common-law of rape,³⁸ assault,³⁹ *crimen injuria*, fraud and attempted murder⁴⁰ would be potentially broad enough to cover instances of intentional non-disclosure of HIV-positive status to a sexual partner – whether the virus was actually communicated to the complainant or not. In those special circumstances where it could be proved beyond reasonable doubt that the virus had been communicated by the accused to the victim and had caused (both in fact and in law) the death of the victim, a conviction of murder could result if the non-disclosure was intentional; if the non-disclosure was not intentional, but only negligent, a conviction of culpable homicide might result. If the common law is capable of encouraging the disclosure of HIV-positive status to a sexual partner, the legislature would be well advised not to enter the arena by criminalising yet another failure of an individual to speak.⁴¹ It seems that the wisdom of non-intervention has been acknowledged

³⁷Section 229 of the German Penal Code (which reads: 'whoever causes bodily harm to another through negligence should be punished by up to 3 years imprisonment or fine') would be broad enough in principle to cover the negligent non-disclosure of HIV-positive status but this section has seldom, if ever, been used to cover such conduct.

³⁸Assuming the courts adopt the approach that a non-disclosure of HIV-positive status to a sexual partner negates true consent to engage in sexual intercourse (the approach advanced in Burchell & Milton *Principles of criminal law* 342 and now encouraged by the English Court of Appeal's over-ruling in *R v Dica* [2004] 3 All ER 593 of the antiquated and unduly restrictive attitude of the 19th century English decision in *R v Clarence* (1888) 22 QBD 23). Although the *Dica* decision opens up the possibility of a conviction of assault, similar reasoning could apply to a conviction of rape. A recent South African High Court decision (*S v Nyalungu* 2005 JOL 13254 (T)) has affirmed that a conviction of rape could result from a non-disclosure of HIV-positive status to a sexual partner (although in this case the accused's conduct exceeded mere non-disclosure of sero-positive status and amounted to sexual intercourse by threats).

³⁹See, for instance, the Canadian Supreme Court decision in *R v Cuerrier* (1998) 127 CCC (3d) 1 (SCC) and the English Court of Appeal in *R v Dica* n 38 above.

⁴⁰*S v Nyalungu* n 38 above.

⁴¹It is not without significance that in New Zealand, where there is legislation requiring persons to disclose their HIV-positive status, a Wellington court has acquitted an accused of this offence (criminal nuisance) where he failed to disclose his HIV-positive status to his sexual partner but had *protected* sexual intercourse with her. See:

http://www.news24.com/News24/World/News/0,,2-10-1462_1811533,00.html accessed 21

by the legislature in the 2006 version of the Criminal Law (Sexual and Related Matters) Amendment Bill.

Minimum fault requirements

Kent Roach, in comparing South African anti-terrorist legislation with post-September 11 anti-terrorism legislation in Canada, has concluded that the equivalent Canadian offences 'explicitly require subjective fault in the form of knowing participation or facilitation of terrorist activity and participation for the subjective purpose of enhancing the ability of the group to carry out terrorism'.⁴² Roach argues convincingly: (i) that it is unfair to punish *negligent* conduct linked to 'terrorism'⁴³ as harshly as equivalent conduct of an *intentional* nature (because principles of fundamental justice in the Canadian Charter require fault in the form of intention to be proved regarding certain serious crimes⁴⁴ as a result of their stigma and punishment); and (ii) that principles of 'fair labelling' and 'proportionality' in sentencing require different degrees of punishment for intentional as opposed to negligent facilitation of terrorism.⁴⁵ According to Roach, it is not sufficient to leave the imposition of the appropriate sentence to judicial discretion. These criticisms would apply with even greater vigour to offences where negligent *non-disclosure of suspicion* of terrorist activities is involved (as opposed to positive conduct amounting to assistance).

There is compelling argument that terrorist-related offences should be based on proof of intentional, not simply negligent, conduct. In fact, there is even a convincing argument that the fault requirement for such serious offences, carrying such severe punishments, should be based on proof of *dolus directus* that is, that the accused's aim and objective was to bring about the particular unlawful consequence or circumstance. Even the Appellate Division in apartheid South Africa was aware of the need to interpret draconian security legislation that punished no more than legitimate 'opposition politics', such as organising an unlawful strike, causing dislocation to industries or services to society, or even destroying a building out of a personal grudge against an employer, as requiring a fault element of

October 2005.

⁴²Kent Roach 'A comparison of South African and Canadian anti-terrorism legislation' (2005) 18 *SACJ* 127 at 141.

⁴³Section 3(1) of the South African anti-terrorism legislation punishes a person 'who does anything which will, or is likely to, enhance the ability of any entity engaging in a terrorist activity, and who knows or ought reasonably to have known or suspected, that such act was done for the purpose of enhancing the ability of such entity to engage in a terrorist activity is guilty of an offence ...'. Section 3(2) punishes 'any person who...collects or makes a document; or possesses a thing, connected with the engagement in a terrorist activity, and who knows or ought reasonably to have known or suspected that such ... document or thing is so connected, is guilty of an offence ...'. Both of these subsections of section 3 specifically punish *negligent* conduct.

⁴⁴Which he argues should include offences of 'terrorism'.

⁴⁵Note 42 above at 142-3.

dolus directus rather than *dolus eventualis*.⁴⁶ If a person's conduct was not accompanied by the specific statutorily defined aim and object then, under the statutory relics of apartheid, he or she could not be convicted.

The wording of section 3 of the anti-corruption legislation in South Africa⁴⁷ is amenable to the interpretation that not merely *dolus eventualis*, but in fact *dolus directus* is required for liability, implying that the prosecution would have to establish that it was the accused's aim and object to influence another to act in an unlawful or unethical manner as defined in the Act, rather than merely foresight of the possibility that another will be influenced to act in such an unlawful or unethical manner.

Organised crime, manifesting itself in varying degrees of criminality ranging from 'intentional murder and maiming of innocent civilians in order to intimidate a population or to compel a government or an international organisation to act'⁴⁸ to economic crimes such as money laundering and corruption, carries heavy penalties imposed by statute. The severity of penalty and the indelible quality of the stigma attached to conviction arguably demand a higher intention threshold than for other serious offences. Similarly, new statutory offences based solely on a breach of a duty to speak or act, introduced often with precipitous haste in the desperate desire of states to be perceived as being 'tough on crime', should *at least* be interpreted to be based on *dolus eventualis* – the lowest form of intention rather than objectively assessed negligence – and preferably *dolus directus*.

Deference to the United Nations

The supposed justification for the statutory extension of duties to act or speak, as well as the expansion of negligence-based liability, is often given as the imperative of complying with United Nations' directives or guidelines. The preambles to the terrorist, organised crime and corruption laws in South Africa all refer to international or United Nations obligations to combat these forms of criminality and to enact legislation in furtherance of this objective. Commentators have, however, rightly questioned the implications of this genuflecting of the guidelines and instructions issued by the United Nations

⁴⁶See *Minister of Law and Order v Pavlicevic* 1989 3 SA 679 (A) and *S v Nel* 1989 4 SA 845 (A), discussed in Jonathan Burchell & John Milton *Principles of criminal law* (2ed 1997) 333–4 (and briefly in (3ed 2005) 501). A contemporary analogy lies in the international sphere of criminal law. The commission of the crime of genocide under art 6 of the Statute of the International Criminal Court clearly requires *dolus directus* – a special form of intent *ie* 'an intent to destroy, in whole or in part, a national, ethnical, racial or religious group ...'.

⁴⁷Section 3 of the Act uses the words 'in order to act...or by influencing another so to act ...'. These words at least import some 'intention' element and, strictly speaking, could imply *dolus directus* in terms of the normal meaning of the words 'in order to' which mean 'with a view to' or 'for the purpose of' (*Concise Oxford dictionary*).

⁴⁸Kent Roach's definition of terrorism n 42 above at 133.

Security Council for the separation of powers, human rights and the rule of law in South Africa.⁴⁹

In fact, the definition of the *mens rea* element of money laundering demonstrates that the South African legislature has even exceeded the parameters of article 6 of the United Nations Convention Against Transnational Organised Crime 2000 by extending liability for this offence beyond intentional conduct to cover negligent conduct also.⁵⁰ Following United Nations', or even United States',⁵¹ models of criminalisation of organised crime might well result in the ultimate rejection of the transplanted matter by its host. Exceeding the crime control objectives of the United Nations (which are often based, in any event, on premises of co-operative expediency in prosecuting transnational crime) is even more difficult to justify than slavishly following the United Nations' blueprint for minimum intervention.

Some features of recent legislative attempts to impose duties on ordinary citizens to act or speak on pain of criminal penalty

Under the common law, the rule at the moment is that there is no general duty to act or speak except in those circumstances where the common law imposes such a duty. One of the categories where a duty to act for the benefit of another, or even the state, exists is when the legislature itself imposes such a duty. But obviously the legislature should not simply overturn the emphasis of the common law on individual autonomy by imposing legal duties to act in a wholesale or piecemeal way so that the common-law rule of no liability

⁴⁹See especially CH Powell 'Terrorism and the separation of powers in national and international spheres' (2005) 18 *SACJ* 151 (who focuses essentially on the adoption of the Security Council list of 'terrorist' organisations in the South African legislation). See also Kent Roach n 42 above at 148–9.

⁵⁰See Burchell & Milton n 1 above at 990. The Convention which entered into force on 29 September 2003, and which has been ratified by South Africa, does not extend liability for money laundering beyond a person who *knows* that the property constitutes the proceeds of crime or *knows* (at the time of receipt) that the acquisition, possession or use is of property which is the proceeds of crime. Furthermore, it has been pointed out (see Powell, below) that Security Council Resolutions, issued under Ch VII of the United Nations Charter, require states to prevent terrorist acts, to refrain from supporting terrorist groups and to prosecute terrorist offences and that certain obligations also rest on state parties to the Convention for the Suppression of the Financing of Terrorism of 1999 (which South Africa has ratified). Despite the parameters set out in these international documents, Powell, in a comparative study of anti-terrorism regimes in South Africa, Uganda, Tanzania and Kenya, has concluded that, although the above Convention does not mandate civil forfeiture of assets (as opposed to criminal confiscation after conviction), all four states under review exceeded the provisions of the Treaty by requiring civil forfeiture and South Africa and Uganda have express provisions for permanent forfeiture of terrorist property: C H Powell 'Terrorism and Governance in South Africa and Eastern Africa' in Victor V Ramraj, Michael Hor & Kent Roach (eds) *Global anti-terrorism law and policy* (2005) CUP 577.

⁵¹Neil Boister has highlighted some of the potential problems in simply transferring penal norms from a developed to a developing country: 'Transnational penal norm transfer: The Transfer of civil forfeiture from the United States to South Africa as a case in point' (2003) 16 *SACJ* 271. See also Burchell & Milton n 1 above at 976ff, where some of the pitfalls in the South African importation of the criminalisation of 'racketeering' from the United States are raised.

is completely undermined. The only way in which this could be done by the legislature would be after a thorough examination of the inadequacy of the common-law rule and its replacement with one that is more akin to the Continental rule of intervention. Of course, even here the final word on whether the rule of no liability, subject to limited exceptions or general liability for failures to act subject to limited exceptions, would comply with Constitutional norms is for the Constitutional Court, not the legislature, to decide.

Similarly, the general rule of the current criminal law is that *mens rea*, preferably in the form of intention⁵² and exceptionally in the form of negligence, is required for criminal liability. Furthermore, a criminal trial inevitably brings in its train all the due process requirements, including the presumption of innocence and right to remain silent. There does not have to be any specific invocation of these requirements – they apply by virtue of the criminal nature of the proceedings. The legislature might wish to dilute or even circumvent the *mens rea* requirement of liability, or even avoid the due process limitations on liability (as apparently was the intention of the legislature in enacting the civil forfeiture provisions of the Prevention of Organised Crime Act (POCA)),⁵³ but the Constitutional Court will, fortunately, always have the final say.

Furthermore, common-law principles of criminal liability relating to degrees of participation in crime or inchoate offences can be read into statutory offences by legitimate process of inference. The inferring of common-law rules in the interpretation of a statutory instrument is not always sufficiently acknowledged by legislative drafters – hence the recent omnibus statutes that try to cover every single manifestation of criminal conduct. For instance, the corruption legislation attempts to identify every conceivable aspect of corrupt practices and by doing so leads to both an overlap between general and specific offences of corruption and potential confusion between the common-law offence of bribery and legislative forms of corruption.

The legislature has in section 21 of the Prevention and Combating of Corrupt Activities Act stated that any person who ‘attempts, conspires with any other person; or aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit an offence in terms of this Act, is guilty of an offence’. By statute⁵⁴ and in terms of common-law principles, attempts, liability for incitement or conspiracy are already defined

⁵²Jansen JA in *S v Ngwenya* 1979 2 SA 96 (A) at 100A.

⁵³By stating that the proceedings are civil in nature rather than criminal and by using civil terminology like ‘proof on a balance of probabilities’ or referring to the ‘defendant’ rather than the ‘accused’ but the use of this tendentious terminology does not preclude a court piercing the veil to find that the proceedings are in fact criminal in nature and all the principles of criminal justice apply: see Burchell & Milton n 1 above at 1011–7.

⁵⁴Section 18(1) and (2) of the Riotous Assemblies Act 17 of 1956 and see Burchell & Milton n 1 above at 622,3.

and further legislative restatement of the principles is superfluous and misleading.⁵⁵ The common law of accomplice liability would also apply to statutory offence by inference and so one could even adopt the above reasoning in the context of the duty to report. Why is it necessary to have a legislative duty to report when a common-law failure to report amounting to complicity in the crime, provided the complicity is intentional and the common-law rules relating to liability for omissions are satisfied, could lead to liability?⁵⁶

A thorough study in order to identify possible gaps in the common law of crime must take place before legislation that overlaps with common law is drafted. Such legislation also does not always grant sufficient respect to due process and Rule of Law prerequisites of the common law and the Constitution. The civil forfeiture provisions of POCA are prime instances of this phenomenon.⁵⁷

Is codification of the criminal law the answer?

This volume of essays is in honour of a distinguished exponent of South African criminal law who, apart from his extremely significant contribution to the elucidation of the general principles of criminal liability in this country (especially in the light of German jurisprudence) in his impressive four editions of *Criminal law* and five editions of *Strafreg*, is an ardent supporter of the codification of the criminal law. Kallie Snyman's *Draft criminal code for South Africa*⁵⁸ is one that, in the tradition of the Model Penal Code of the American Law Institute, provides an influential restatement of the general principles and some of the more common specific crimes in South Africa. Its objectives are to identify these principles, place them in an accessible form and further the principle of legality by striving towards reasonable certainty in legal definition.

Perhaps a new argument for codification has now arisen: codify the common-law principles of criminal liability in order to prevent the legislature from further abridging or attempting to override the fundamental principles of criminal justice that have evolved over the centuries.

For instance, in the domain of liability for omissions, the civil and criminal law has, over the centuries, developed a *modus vivendi* which seeks to find

⁵⁵For instance, s 2(3)(a)(i) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 states that to accept, agree or offer to accept any gratification includes 'to demand, ask for, seek, request, solicit, receive or obtain ...'. Thus the legislation penalises as a completed crime (*ie* not merely an attempt) mere offers of or demands for bribes. The scope for attempt liability under the Act is clearly narrower than under the common law.

⁵⁶See Pamela H Bucy n 6 above at 850. An example of the pitfalls of duplication of definition arises in the context of a statutory definition such as that contained in s 21 of the South African anti-corruption legislation which uses the words 'aids and abets'. Does this mean that the English concept of 'aiding and abetting' applies in South African law?

⁵⁷Burchell & Milton n 1 above at 1001ff.

⁵⁸CR Snyman *A draft criminal code for South Africa* (1995).

a balance between conflicting interests. Over the years the courts have identified factors that point towards the imposition of legal duties in the civil and the criminal law: viz prior conduct creating a potentially dangerous situation; where a person has control of a potentially dangerous thing or animal; where a protective or special relationship exists between the parties; where a person occupies a public or quasi-public office or calling which imposes on him or her a duty to act; and where contract or statute imposes such a duty.⁵⁹ Courts have emphasised that the list of exceptional common-law duties to act is not closed but will depend for its delineation on the legal convictions of the community or legal policy makers. In other words, the courts, the legislature and the framers of the Constitution provide the ultimate criterion for imposition of legal duties.

It is true that the role of the legislature in developing the list of legal duties to act or speak is specifically acknowledged in the common law, but the legislature should only intervene when the common law is proven clearly to be unable to deal with the imposition of a legal duty. In particular, the legislature should not compound the problem by creating a proliferation of legal duties to act or speak in such a way that the common-law general rule of immunity for a failure to act is *incrementally* turned on its head⁶⁰ and the general rules relating to intention-based liability rejected.

In the common-law jurisprudence, failure to inform the police of the commission or suspected commission of an offence is not in general criminal in itself.⁶¹ A duty to disclose the identity of a detainee being questioned by the police is, however, imposed on a public official such as a police officer (in keeping with the common-law duty to act resting on a person occupying a public office or calling). Furthermore, certain offences are defined in such a way that an omission to act may be criminal.⁶² Imposing a general criminal liability for such failure to inform the police would overturn the fundamental emphasis on individual autonomy in the common law, and would result in certain fundamental rights being infringed and established fault criteria being compromised.

In the civil law, extensive duties imposed on the state to protect persons from violence and human rights abuses have recently been founded on a theory of

⁵⁹See Burchell & Milton n 1 above chap 10.

⁶⁰If the South African approach, based on the maximising individual liberty is to be replaced with the continental approach which maximises altruism and beneficence then this can only be done after a thorough examination of the weaknesses of the current position and the benefits of change.

⁶¹This is also the position in the United States: Matthew R Hall n 17 above at 743ff. The offence of misprision of felony, which is hardly ever used, is confined to active concealment *loc cit*.

⁶²See the crime of defeating or obstructing the administration of justice (*S v Binta* 1993 2 SACR 553 (C)) and treason where the failure to report an act of treason constitutes treason itself (*S v Banda* 1990 3 SA 446 (B)). For a general criticism of the scope of the offence of treason, see Burchell & Milton 924–5 and Snyman *Criminal law* 323–4.

governmental accountability⁶³ and such duties could also be justifiable under common-law categories of exceptional duties to act.⁶⁴ This last-mentioned expansion of legal duties portrays a more protective and caring face of government – a caring spirit that is also reflected in the growing jurisprudence on the protection of socio-economic rights.

The shift from the initial cynicism of the amputee in Coetzee's novel *Slow man*⁶⁵ to a more optimistic perception of his predicament, based on recognition of a spirit of caring of which he is the recipient, reflects a recent *literary* recognition of this beneficial development in the context of individual relationships.

However, there is a vast difference between imposing responsibilities on the state (and even individuals) to protect persons, particularly the weak and vulnerable, from violence and exploitation (or even to foster the protection of socio-economic rights) and imposing duties on the citizens of the state to assume the role of the state by reporting on suspected and sometimes nebulously defined criminal activities of their fellow citizens on pain of criminal sanction. A community of coerced informers will only serve to turn citizens against each other and impose additional strains on already overcrowded prisons by a process of over-criminalisation, without solving the underlying problem of poor detection of criminal activity.

A final word of caution may not be out of place: any drafting of a Criminal Code in order to prevent the further erosion of common-law principles of criminal liability by the legislature⁶⁶ must be achieved by a body that not only carries general credibility in the field of law reform, but that is also acknowledged as respecting the heritage of the general principles of criminal liability. In the process of such drafting, areas of duplication and uncertainty

⁶³See above 1 and the most recent judgment of the Constitutional Court in the *Metrorail* case, 2005 2 SA 359 (CC).

⁶⁴Burchell & Milton 192–4 and 196–205. See especially Marais JA in *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at 451.

⁶⁵J M Coetzee *Slow man* (2005) – a novel set in Australia, in which Paul Rayment utters the following cynical words in the initial stages of confronting his injury: 'In the brave new world into which both he and Mrs Putts have been reborn, whose watchword is *laissez faire!*, perhaps Mrs Putts regards herself as neither his keeper nor his brother's keeper or anyone else's. If in this new world the crippled or the infirm or the indigent or the homeless wish to eat from rubbish bins and spread their bedroll in the nearest entranceway, let them do so: let them huddle tight, and if they wake up alive next morning, good on them' (23). As a dedicated Croatian nurse ministers to Rayment he can 'feel the ice within him begin to thaw' (208). Coetzee's novel underscores the distinction between care ('good nursing') and loving care ('loving hands') (261). Law and society can at least *compel* 'good nursing' or protective care of others by the state, even if it could never *compel* one individual's affection or love for another.

⁶⁶The recent erosion of common-law principles of criminal liability by the legislature is not necessarily deliberate although, in the context of the adoption of civil forfeiture, in addition to criminal confiscation, in the prevention of organised crime legislation in South Africa (see n 50 and n 57 above and Burchell & Milton *Principles of criminal law* 1011ff) the potential adverse consequences for due process protection of individuals would seem to have been deliberately intended. At other times the intervention of the legislature might have been as a result of ignorance of the common-law parameters.

in the criminal law should also be minimised, while casting the common-law principles in a more permanent and accessible form.

The accused's right to cross-examination vs the admission of hearsay evidence: a balancing of interests?

Fawzia Cassim*

TRIBUTE

I first met Professor Snyman in 1996 when I joined the Department of Criminal and Procedural Law at Unisa as a junior lecturer. Professor Snyman was, of course, the subject head for the discipline, Criminal Law.

His textbook entitled Criminal Law was the prescribed textbook in criminal law at the University of Natal, where I had studied for my LLB degree a few years previously. Naturally, I was quite chuffed and overwhelmed to make his acquaintance. Over the years I have found

Professor Snyman to be very pleasant and helpful to the younger colleagues in the department. He is a noted researcher who has published extensively in his field. Indeed, his research output is an inspiration to us all. He will be sorely missed by all in the department and the College of Law.

Abstract

This contribution considers the impact of hearsay evidence on the accused's right to cross-examination. The article examines the right to cross-examination and the limitations to the right to cross-examination, such as hearsay evidence. The article explores whether a balancing of interests can be achieved between the accused's right to cross-examine evidence and the admission of hearsay evidence. Foreign jurisdictions such as the United States of America and the United Kingdom, and certain decisions of the United Nations Human Rights Committee and the European Court of Human Rights are examined for guidance. The article concludes that the state should not have *carte blanche* to admit hearsay evidence against the accused to his prejudice, but should only admit such evidence where there are compelling reasons. The European Court's approach of evaluating the impact of hearsay evidence on the trial as a whole should be followed. One should endeavour to look for alternative safeguards or 'counter-balancing' procedures to ensure an equitable balance.

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INTRODUCTION

It is a fundamental principle that the accused should be allowed to present his case in court in an effective manner. This will enable him to establish the truth about his guilt or innocence.¹ The right to present one's case applies to all aspects of court proceedings where the court makes a factual finding.² This right is an expression of the *audi alteram partem* principle and is part and parcel of the right to a fair trial.³ The notion of a fair and adversarial hearing requires that the accused be given an adequate opportunity not only to challenge and question witnesses against him, but also to present his own witnesses in order to establish an effective defence.

Cross-examination is a marked characteristic of the common law adversarial trial system.⁴ According to Wigmore, it is 'the greatest legal engine ever invented for the discovery of truth'.⁵ It has strong historical and symbolic roots.⁶ The object of cross-examination is firstly, to obtain information that is favourable to the party on whose behalf the cross-examination is conducted and secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such party.⁷

¹It is noteworthy that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. *As per* Watermeyer AJ (as he then was) in *Rex v Difford* 1937 AD 370 at 373. It should be stated at the outset that the accused will be referred to in the masculine form for purposes of convenience.

²The right to present one's case contains a number of sub-rights, which appear in the trial phase of the criminal process. They comprise the following rights such as the right to cross-examine witnesses, the right to address the court on evidence to be adduced, the right to give and adduce evidence, the right to address the court at the conclusion of evidence and the right to address the court on sentence.

³The *audi alteram partem* principle literally means 'hear the other side'. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. See *S v Suliman* 1969 (2)SA 385 (A). The rules of natural justice come into play here. The *audi alteram partem* principle is followed in judicial proceedings in a number of countries throughout the world, along with the rights such as legal representation, the right to argument and cross-examination, and the leading of evidence.

⁴The adversary system's real genius, the heart of the concept, lies in the use and perfection of cross-examination. The central philosophy is that by testing the statements of one against the questions of an adversary, the fact finder may determine the truth. See Singer 'Forensic misconduct by federal prosecutions and how it grew' (1968) 20 *Alabama Law Review* 227 at 268.

⁵See Wigmore *Evidence in trials at common law* (1979) s 1367.

⁶See Van der Merwe 'Regerlike inkorting van kruisondervraging: 'n gemeenregtelike, statutêre en grondwetlike perspektief' (1997) 3 *Stellenbosch Law Review* 348. Also see Underwood 'The limits of cross-examination' (1997) 21/1 *American Journal of Trial Advocacy* 113 at 113-118, regarding the history and mythology of cross-examination.

⁷See Cross and Tapper *Cross on Evidence* (7ed 1990) 303. Also note that usually a party may not cross-examine his own witness. However, the advantage of having a witness declared hostile is that the party calling him may thereafter cross-examine the hostile witness. See *S v Dolo* 1975

This article will examine the right to cross-examination and the limitations of this right, such as hearsay evidence.⁸ The aim of the article is to ascertain whether a balancing of interests can be achieved between the accused's right to cross-examination and the admission of hearsay evidence. Foreign jurisdictions such as the United States of America and the United Kingdom, and decisions of the United Nations Human Rights Committee and the European Court of Human Rights are examined for guidance.

THE RIGHT TO CROSS-EXAMINATION

South African law

The right to cross-examine state witnesses

Section 166 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the 'Act') provides that the accused has the right to cross-examine state witnesses and any witness called by the court, before he presents his case for the defence.⁹ This gives him the opportunity to elicit favourable evidence from witnesses (known as adducing evidence) and to undermine the value of incriminating evidence (known as challenging evidence). The defence is entitled to cross-examine each and every state witness.¹⁰ The accused's right to cross-examine also has a constitutional basis, and is derived from section 35(3)(i) of the Constitution.¹¹

The right of cross-examination also exists in respect of a co-accused who has elected to testify.¹² Where the defence proposes to submit another version of any fact or event testified to by a state witness, there usually rests a duty upon the defence to put its version to the state witness whose evidence the defence will contradict in the course of its own case. It is only as a result of proper cross-examination along these lines, that the court will be placed in a position to

1 SA 641 (T).

⁸It should be noted that the other limitations to the right to cross-examination are face-to-face cross-examination and documentary evidence, which are beyond the scope of this article.

⁹Section 166(1) of the Act provides that the accused may cross-examine any co-accused who testifies at a criminal proceeding. This section also provides that after every witness has been cross-examined by the other party, the party who called the witness may re-examine the witness on any matter raised during the cross-examination of that witness. Also see *S v Ramalope* 1995 1 SACR 616 (A), regarding the meaning of the right to re-examination in terms of s 166(1) of the Act. Also see *S v Mashaba* 2004 11 SACR 214 (T), where the court emphasised the need to fully explain the right to cross-examine and the purpose of cross-examination to an unrepresented accused. This ensures that the accused has had a fair trial.

¹⁰See Joubert *et al Criminal procedure handbook* (5ed 2001) 222. Also see *S v Langa* 1963 4 SA 941 (N) and *S v Lesias* 1974 1 SA 135 (SWA).

¹¹Section 35(3)(i) of the Constitution of the Republic of South Africa, 1996 provides that the accused has the right 'to adduce and challenge evidence'. The right to 'challenge evidence' includes the right to cross-examine evidence. This is part of the accused's right to a fair trial.

¹²It is accepted practice that co-accused persons exercise their right to cross-examine their co-accused or his witness in numerical order before the state is given the opportunity to cross-examine.

ascertain the relative acceptability of the two versions. However, if this rule is not followed, it may require the recalling of state witnesses and lead to an unnecessary waste of time.¹³ Assertions made on behalf of the accused during his cross-examination of state witnesses and which are intended to reflect the defence case may, in exceptional circumstances, have the effect of curing the deficiency in the state case where the evidence adduced by the state is insufficient to establish a *prima facie* case.¹⁴ However, the decision not to cross-examine may often be a risky one and should be taken only after careful consideration.¹⁵

The right to cross-examine witnesses for the defence

The prosecution may cross-examine each defence witness and the accused if he elects to give evidence.¹⁶ Cross-examination of the accused by the state should be conducted with courtesy and without prejudice to the accused. It should not be conducted in an intimidating, offensive or mocking fashion. The accused should obtain a full opportunity to answer questions. Improper cross-examination by the prosecutor may lead to the accused's conviction being set aside on appeal and review.¹⁷ There may be occasions when a prosecutor may decide not to cross-examine an accused person or a defence witness. Such a decision is a risky one because courts will be reluctant to reject a defence version which went untested and unchallenged by cross-examination.¹⁸

The right to recall witnesses for cross-examination

Presiding officers have the power to refuse a request to recall a witness for cross-examination or even for further cross-examination. However, they should exercise this power sparingly, and only when it is clear that the request is made frivolously or as part of delaying tactics.¹⁹ The position is that where an accused has already cross-examined the state witnesses and put his defence to them, he suffers no prejudice if the court refuses the request to recall a witness for further cross-examination made by his legal representative who was appointed

¹³See *S v M* 1970 3 SA 20 (RA). However, see *S v Motlhabane* 1995 (8) BCLR 951 (B), where it was held that the death of a state witness during cross-examination threatens the right of an accused to a fair trial to the extent that the evidence remains untested and the court should consider disregarding such evidence *in toto*.

¹⁴See *S v Offerman* 1976 2 PH H215 (E).

¹⁵See *S v Gobozi* 1975 3 SA 88 (E).

¹⁶Section 166(1) of the Act also provides that the prosecutor may cross-examine any witness including an accused called on behalf of the defence at criminal proceedings. Regarding the question of whether cross-examination is an appropriate tool for testing expert evidence, see Meintjies-Van der Walt 'Expert evidence and the right to a fair trial: a comparative perspective' (2001) 17 *South African Journal of Human Rights* 301.

¹⁷See *S v Nkibane* 1989 2 SA 421 (NC). Also see *S v Gidi* 1984 4 SA 537 (C), regarding guidelines for proper cross-examination.

¹⁸See *S v Gobozi supra*.

¹⁹See *S v Kondile* 1974 3 SA 774 (Tk) and *S v G* 1992 1 SACR 568 (B).

subsequently.²⁰ Where a witness is to be recalled, the nature of the proceedings should be explained to such witness.²¹ It should be explained that the proceedings are not a new trial but that further questions will be put in order to clarify certain issues.

The position in foreign jurisdictions and international law

The position in other countries and international law is similar to our law. In the United States, the right to confrontation and cross-examination is seen as an essential and fundamental requirement of a fair trial.²² The primary object of the Confrontation Clause is to prevent depositions of *ex parte* affidavits being used against the prisoner in place of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only to test the recollection and sifting of the conscience of the witness, but also to compel him to stand face to face with the jury so that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he can be believed.²³ Thus, the primary interest secured by the Confrontation Clause is said to be the right of cross-examination.²⁴ The Sixth Amendment Confrontation Clause also guarantees defendants (accused) the right to meaningfully cross-examine witnesses who appear at the trial, but who cannot or will not respond to questions. The defendant's inability to cross-examine a witness on important matters because that witness has invoked a testimonial privilege or witness 'shield' law violates the Sixth Amendment.²⁵ However, granting the accused an opportunity to cross-examine witnesses can

²⁰See *S v M* 1976 4 SA 8 (T).

²¹See *S v Msiwa* 2001 1 SACR 413 (Tk).

²²See *Pointer v Texas* 380 US 400 (1965), where the accused had objected against the use of a transcript of the witness's statement at the trial, which denied him any opportunity to have his counsel cross-examine the principal witness against him. The court found that the Sixth Amendment guarantee of confrontation and cross-examination was denied to the accused. Also see *Chambers v Mississippi* 410 US 284 (1973) at 294, where the court remarked that the rights 'to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognised as essential to due process'.

²³*Mattox v United States* 156 US 237 (1895). The court held that the trial court could admit into evidence the transcribed testimony of a witness who has testified at trial but had since died prior to the second trial, and the witness had been fully cross-examined. The testimony was found to be admissible because the defendant's lawyer had the opportunity to fully cross-examine the witness at the first trial, thereby preserving the defendant's constitutional guarantees. It should be noted that the accused is referred to as the defendant in Anglo-American law.

²⁴See, *inter alia*, *Davis v Alaska* 415 US 308, 315 (1974), *Ohio v Roberts* 448 US 56 (1980) at 63, *California v Green* 399 US 149 (1970) at 149 and *Douglas v Alabama* 380 US 415 (1965). Also see *Delaware v Fensterer* 474 US 15, 21-22 (1985), where the court held that the Confrontation Clause is usually satisfied when the defence is given a full and fair opportunity to probe and expose infirmities of testimony such as forgetfulness, confusion and evasion through cross-examination.

²⁵See *Olden v Kentucky* 488 US 227 (1988).

be meaningless if the accused does not have skilled counsel to conduct the questioning.²⁶

The United Nations Human Rights Committee has extended the right to examine witnesses to include the right to confront directly and to cross-examine witnesses. The Committee has found that a failure to make a witness statement available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial.²⁷ The Human Rights Committee has also remarked that article 14(3)(e) of the International Covenant on Civil and Political Rights (hereinafter referred to as the 'ICCPR') protects the 'equality of arms' between the prosecution and the defence in the examination of witnesses, but does not prevent the defence from waiving or not exercising its right to cross-examine a prosecution witness during the trial hearing.²⁸ In *Compass v Jamaica*²⁹ the accused alleged that he had not been given the opportunity to cross-examine one of the main prosecution witnesses, who was unable to give evidence during the trial because he had left the country. However, the Committee found no violation because the witness had been examined by the defence under the same conditions as by the prosecution.

The European Court is not willing to accept written statements from absent witnesses as a substitute. In the case of *Kostovski v Netherlands*³⁰ the conviction for armed robbery was based on reports of statements by two anonymous witnesses, who were interviewed in the absence of the accused and his counsel by the police. The court found that the fact that the prosecution witnesses' identities had been withheld, meant that the accused was not only denied the right to cross-examine but also that he was unable to demonstrate prejudice,

²⁶See *Powell v Alabama* 287 US 45 (1932), where it was held that 'the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel'.

²⁷It transpired that in the following cases *Garfield and Andrew Peart v Jamaica* Comm Nos at 464/1991 and 482/1991 UN Doc CCPR/C/54/D/464/1991 (1995), a statement made to the police by the main prosecution witness regarding the murder for which the complainants were charged, was not made available to the defence. It appeared that the statement differed materially from the statement at the preliminary hearing and at the trial. Also see De Zayas 'UN human rights treaties' in Weissbrodt & Wolfrum *The right to a fair trial* (1998) 687.

²⁸Weissbrodt *The right to a fair trial* (2001) 138. Article 14(3)(e) provides that everyone charged with a crime has the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

²⁹No 375/1989 UN Doc CCPR/C/49/D/375/1989 (1993). There was no violation because on the one hand, the accused was present during the preliminary hearing when the witness gave his statement under oath and was cross-examined by the accused's lawyer, and on the other hand, no objection was voiced either at the trial or on appeal, regarding the submission of the witness statement, and his answers in cross-examination as evidence.

³⁰See *Kostovski v Netherlands* (1989) 12 EHRR 434. It was emphasised by the European Court that its duty was not to express a view on whether the statements were correctly admitted and assessed by the trial court, but to ascertain whether the whole proceedings, including the way in which the evidence was taken and the defence rights were honoured, was fair.

hostility or unreliability. Although the possibility existed that, in serious cases, witnesses could be intimidated, there was a need to balance the use of anonymous statements with the interests of the accused, and the conviction was found to be irreconcilable with the guarantee in article 6.³¹ The court has also made it clear that the right to examine prosecution witnesses has to be balanced against the interests of the witnesses.³² The *Kostovski* judgment was followed in *Windisch v Austria*,³³ where the defence was given no opportunity to question the two anonymous witnesses. Because the trial court had relied heavily on their written statements, the court held that the restrictions on the defence rights deprived the applicant of a fair trial. Although the court has accepted that some jurisdictions exempt certain witnesses from testifying, it has reiterated that the rights of the defence must be protected.³⁴

In England, the accused has the general right to cross-examine prosecution witnesses.³⁵ However, questions must be relevant and answers on collateral

³¹Article 6(3)(d) of the European Convention for the Protection of Human Rights (hereinafter referred to as the 'ECHR') provides that the accused has the right to examine or have examined witnesses against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. According to Cheney, art 6 seems to echo the due process requirements of Anglo-American law. To illustrate this, when paragraph (3)(d) guarantees the right to cross-examine witnesses, this represents the right of confrontation which underlies the adversarial process. As long as the cumulative effect of the proceedings, notwithstanding the existence of some specified defect is not a denial of a fair hearing, the European Court will not find that the trial infringes art 6. See Cheney *et al Criminal Justice and Human Rights Act 1998* (1999) 76.

³²See *Doorson v The Netherlands* (1996) 22 EHRR 330, where the conviction was based on the evidence of anonymous witnesses. No violation was found in the circumstances.

³³(1991) 13 EHRR 281. Similarly, in *Ludi v Switzerland* (1993) 15 EHRR 173, the written statement of an undercover agent had played a role in the conviction. The court found that the anonymity of the undercover agent should have been preserved without denying the applicant his rights of defence.

³⁴To illustrate this, the non-compellability of members of the accused's family was found to be acceptable in *Unterpertinger v Austria* (1991) 13 EHRR 175. However, the European Court added that the use of the statements made by the family members must comply with the rights of the defence which Article 6 aims to protect. *Ibid* at para 31.

³⁵The tradition of cross-examining a witness is said to be a recent development in England. The procedure involved the judge examining the witnesses who were allowed to relate their stories in their own words. It was only during the 18th century that the practice developed of having barristers prosecute and defend. See Müller K and Tait M 'The child witness and the accused's right to cross-examination' (1997) 3 *Tydskrif van die Suid-Afrikaanse Reg* 519 at 521. The position at common law is that all witnesses are subject to cross-examination. See *R v Hilton* [1971] 3 All ER 541. According to the English common law, defendants are granted the right to confront witnesses according to the concept of trial as combat. The right to confront assumes the right to cross-examine, which is performed by the respective parties. This is also the position under the European Convention. Also see *Allen v Allen* [1894] P 248, where it was held that the evidence of one party cannot be received as evidence against another party in the same litigation unless the latter has had an opportunity of testing it by cross-examination.

issues are usually accepted as final.³⁶ The judge has a discretion to prevent any questions which in his opinion, are unnecessary, improper or oppressive.³⁷ The judge's consent is also required if the accused in a rape case wishes to adduce evidence or cross-examine about any sexual experience of the complainant with another person. Consent may only be granted if the judge is satisfied that it would be unfair to the accused to refuse it.³⁸ Similarly, it has been held that where one prisoner gives evidence on oath inculcating another charged on a joint indictment, he is liable to be cross-examined by or on behalf of that other.³⁹ English law also prefers live testimony to statements from absent witnesses. However, a statement may be admitted if a credible witness testifies under oath that the deponent is dead, ill, or prevented from attending by the defendant or his agent.⁴⁰ The deposition must take place in the defendant's presence, and the defendant or his lawyer must be given the opportunity to cross-examine the witness.⁴¹

LIMITATIONS ON THE RIGHT TO CROSS-EXAMINATION

South African law

However, the right to cross-examination is not absolute. The possibility exists that the right to cross-examination can be abused in a system which requires the judicial officer to play a passive role. The legislature has tried to remedy this situation with the introduction of section 166(3) to the Criminal Procedure Act.⁴² Section 166(3)(a) of the Act provides that the court may if it appears that cross-examination is being 'protracted unreasonably and thereby causes the proceedings to be delayed unreasonably', request the cross-examiner to disclose

³⁶Harris & Joseph *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 229.

³⁷*Id.* For a discussion about improper cross-examination of the accused by prosecutors, see Taylor & Byrne 'Reflections on crown attorneys and cross-examination' (2001) 45/3 *Criminal Law Quarterly* 303–330. The writers suggest that crown attorneys should begin canvassing with trial judges whether the probative value of a proposed line of questioning will be outweighed by its prejudicial effect before they embark on improper cross-examination. Nevertheless, just as the judiciary must become more active in stopping inappropriate cross-examination and correcting improprieties after they occur, similarly, the defence must become more vigilant in objecting to improper cross-examination.

³⁸In practice however, leave is refused if the evidence or cross-examination relates only to credit, and granted if it is relevant to an issue. Nevertheless, the distinction can be difficult to draw. *Id.*

³⁹See *R v Hadwen* [1902] 1 KB 882; *R v Stannard* (1962) [1964] 1 All ER 34. Also see *Murdoch v Taylor* [1965] AC 574 at 592, where it was stated that a trial judge has no discretion whether to allow an accused to be cross-examined regarding his past criminal offences once he has given evidence against his co-accused.

⁴⁰See Sherman 'Sympathy for the devil: examining a defendant's right to confront before the International War Crimes Tribunal' (1996) 10 *Emory International Law Review* 833 at 857.

⁴¹*Id.*

⁴²It has been inserted by s 8 of the Criminal Procedure Amendment Act 86 of 1996. The position at common law and statutory law is that an accused does not have an absolutely free hand to cross-examine at will. These restrictions are inherent to the right itself, or require justification in terms of the limitation clause under the Bill of Rights.

the relevancy of any particular line of examination.⁴³ The court may also impose reasonable limits regarding the length and line of the cross-examination in terms of section 166(3).⁴⁴ The court may also order that any submission regarding the relevance of cross-examination be heard in the absence of the witness.⁴⁵ It should be noted that section 166(3)(a) does not limit the right to challenge evidence. However, it gives the court the power to control unreasonable questioning.

A judicial officer has both a discretion and a duty to control undue or improper cross-examination.⁴⁶ The court also has a discretion to restrain and control the ambit of cross-examination in terms of section 197(b) of the Act.⁴⁷ This discretion must be exercised in the light of the principles governing relevance.⁴⁸ The court remarked that the right to cross-examination is not absolute in *Klink v Regional Court Magistrate NO*⁴⁹ the court remarked that the right to cross-

⁴³De Waal *et al* suggest that s 158 may also impose a limitation on the right to challenge evidence. Section 158 provides that a court may order that evidence be given by means of closed-circuit television or similar form of electronic media, provided that the prosecutor and the accused retain the right to question the witness and to observe the reaction of that witness. See De Waal *et al* *The bill of rights handbook* (4ed 2000) 555.

⁴⁴According to De Waal *et al*, this provision is not unconstitutional. Instead, it confers a discretion and it is therefore possible to apply it in a manner which does not violate the accused's right to a fair trial. *Id.*

⁴⁵In terms of s 166(3)(b). Both ss 166(3)(a) and 166(3)(b) raise constitutional issues which concern the right of the accused to a fair trial, and more specifically, the right to challenge evidence and the right to be present during the trial. Van der Merwe argues that whilst both sections are constitutional, they ought to be applied with caution in order to secure a fair trial as guaranteed by s 35(3) of the Constitution. See Van der Merwe *op cit* 359.

⁴⁶*S v Cele* 1965 (1) AD 82. The court noted that latitude in the cross-examination of witnesses, where credibility is the issue, should be allowed until the court is satisfied, either that the right to cross-examine is being misused or abused, or that the particular line of cross-examination could never produce anything which could assist the court in its eventual decision on credibility. Also see *S v Pitout* 2005 1 SACR 571 (BD) at 576, where the court stated that a judicial officer should realise that whenever questioning has to start on a previous inconsistent statement, he or she has a duty to see to it that the cross-examiner first lays the basis of such questioning. Failure to observe this rule may adversely affect the probative value of such evidence.

⁴⁷In terms of s 197(b), the accused giving evidence is protected from questions showing that he has been charged with any offence other than that which he is charged, or that he is of bad character, unless he testifies against another accused charged with the same offence.

⁴⁸See *S v Pietersen* 2002 1 SACR 330 (C), where it was held that the cross-examination has to be relevant to the issue of credibility and it cannot prejudice the accused being cross-examined in the conduct of his defence to the extent that his right to a fair trial is undermined.

⁴⁹See *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE). Also see *S v Mayiya* 1997 (3) BCLR 386 (C), where the court held that although an accused should be allowed to cross-examine unhampered, the court may disallow questions that are irrelevant, misleading, vexatious, abusive, oppressive and discourteous. The court on appeal considered the duty of disclosure, and held that it also places the accused in a better position to test the reliability and credibility of state witnesses by means of cross-examination in the interests of a fair trial. The prosecutor's failure to disclose the medical report to the accused rendered the trial unfair.

examination is not absolute in that the trial court retains a discretion to disallow questioning that is irrelevant, unduly repetitive, oppressive or improper. The court also remarked that it may also prevent a lawyer from conducting a bullying or intimidating form of cross-examination, or if it appears that his line of questioning is calculated to confuse the witness.⁵⁰ To this end, cross-examination should always be conducted with restraint and dignity.⁵¹

An accused cannot therefore state that his right to a fair trial has been infringed if the court intervenes to prevent his lawyer from conducting a bullying or intimidating form of cross-examination, or if it appears that his line of questioning is directed at confusing the witness. Thus, the circumstances of each case will dictate whether or not the curtailment or limitation of cross-examination has resulted in the violation of a right to a fair trial. However, where an accused has been deprived of the opportunity to cross-examine a witness due, for example, to the latter's death, the use of such untested evidence will result in the infringement of his constitutional right to challenge evidence sufficiently.⁵² It may also happen that accused who are physically disruptive in the courtroom may forfeit their right to be present. Similarly, section 159(1) of the Act provides that if an accused conducts himself in a manner which makes the continuation of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence. This will impact on his right to cross-examine state witnesses. However, he is later given the opportunity to question or to confront witnesses who testified in his absence.⁵³

The position in foreign jurisdictions and international law

Similarly, in the United States, the court may limit cross-examination if the questions are prejudicial, irrelevant, cumulative or collateral.⁵⁴ The court may also restrict cross-examination if it contains no sufficient factual basis or will jeopardise an ongoing government investigation.⁵⁵ Indeed, it has been held in *Davis v Alaska*⁵⁶ that an accused's right to cross-examine is subject only 'to the

⁵⁰See *Klink v Regional Court Magistrate supra* at 410 D-E.

⁵¹See *S v Gidi* 1984 4 SA 537(C).

⁵²See *S v Motlhabane supra* at 951.

⁵³See s 160 of the Act.

⁵⁴See, *inter alia*, *US v Diaz* 26 F 3d 1533, 1539-40 (11th Cir 1994), *US v Gonzalez-Vazquez* 219 F 3d 37, 45 (1st Cir 2000).

⁵⁵See, *inter alia* *US v Alvarez* 987 F 2d 77, 82 (1st Cir 1993), *US v Balliviero* 708 F 2d 934, 943 (5th Cir 1983).

⁵⁶See *Davis v Alaska* 415 US 308 (1974) at 316. Also see *R v Rewnjar* [1949] 1 WWR 177; 93 CCC 142; 7 CR 127 (CAN), where it was held that judge may check cross-examination if it becomes irrelevant, prolix or insulting, but so long as it may be fairly applied to the issue or touches the credibility of the witness it should not be excluded. Also see *R v Ignat* (1965) 53 WWR 248 (CAN), where it was stated that counsel for an accused in a criminal case must be allowed the widest latitude in the examination and cross-examination of witnesses subject to the limitations imposed by the rules of evidence and of fair advocacy. Serious curtailment of this

broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation'. To disallow such questions is not regarded as a limitation on an accused's right to challenge evidence, because they do not achieve the legitimate purpose of cross-examination. Accused persons may be found to have forfeited their constitutional and evidence-law rights to confront and cross-examine a prosecution witness. This occurs if that witness is unavailable for trial owing to threats or other misconduct of the accused, or owing to the misconduct of others to which the accused has agreed to.⁵⁷ Certain decisions of the European Court of Human Rights also demonstrate that the accused's right to cross-examine every prosecution witness is important but not absolute.⁵⁸ Thus, reliance on pre-trial witness statements is not contrary to the Convention as long as the rights of the defence are respected.⁵⁹

HEARSAY EVIDENCE

The position in South Africa

The common-law position

Hearsay evidence is regarded as being untrustworthy because it cannot be tested by cross-examination.⁶⁰ It is not only the maker of the statement who might have been deliberately lying. He may simply have been mistaken owing to deficiencies in his powers of observation or memory, or he may have narrated the facts in a garbled or misleading manner. The purpose of cross-examination is to expose these deficiencies. If the maker of the statement is not present before the court, then this safeguard is lost.⁶¹

According to Zeffertt *et al*, the common-law rule was rigid.⁶² All hearsay evidence which does not come within some established exception was excluded, no matter how reliable it may have been. This could lead to a grave injustice. The common-law rule prevented the court from discovering the truth

right by the court, and any suggestion of partiality on the court's part, may result in the conviction being squashed.

⁵⁷See *People v Geraci* 649 NE 2d 817 (NY Ct App 1995) at 817. The accused is also said to have waived the right to cross-examination if he prevents a witness from testifying or fails to make a timely objection to a violation. See *inter alia*, *US v Houlihan* 92 F 3d 1271, 1278 (1st Cir 1996), *US v Burton* 937 F 2d 324, 329 (7th Cir 1991).

⁵⁸See *inter alia*, *Unterpertinger v Austria supra*.

⁵⁹See *inter alia*, *Windisch v Austria supra* at para 26.

⁶⁰Hearsay is defined as any oral or written statement, or conduct, reported on the witness stand by someone other than the person who stated, wrote or engaged in the questionable conduct. Such evidence is usually excluded unless it falls within one of the common law or statutory exceptions. See Zeffertt *et al* *The South African law of evidence* (2003) 381 regarding the status of the common law and statutory exceptions.

⁶¹See *Teper v R* [1952] AC 480 at 486; [1952] 2 ALL ER 447 at 449.

⁶²Zeffertt *et al op cit* 366.

in cases where no policy could have justified its application. This led to a new approach in South Africa, namely, the statutory position.⁶³

The statutory position

The statutory position is regulated by section 3 of the Law of Evidence Amendment Act 45 of 1988.⁶⁴ Section 3(1)(a) states, *inter alia*, that hearsay shall not be admitted as evidence at criminal or civil proceedings unless each party against whom the evidence is to be adduced agrees to the admission of such evidence at such proceedings.⁶⁵ The person upon whose credibility the probative value of such evidence depends, must himself testify at such proceedings in terms of section 3(1)(b). Section 3(4) defines hearsay evidence as evidence (whether oral or in writing) as evidence, the probative value of which depends upon the credibility of any person other than the person giving such evidence. It is evident from the above that section 3(4) no longer requires a statement, that it is to be hearsay, to be tendered for the purpose of asserting the truth of its content.⁶⁶

It has been held that the implied assertion of verbal conduct will be hearsay in terms of subsection (4) if its probative force depends on the credibility of anyone other than the witness.⁶⁷ Hearsay may be provisionally admitted in terms

⁶³It should be noted that the common law exceptions to the hearsay rule are now regarded as being obsolete but not irrelevant. They are factors which the court may consider in exercising its discretion to admit the evidence in the interests of justice. Also see Schwikkard 'The challenge of hearsay' (2003) 120/1 *The South African Law Journal* 63–71 at 63.

⁶⁴It should be noted that the legislation was hugely influenced by a PhD thesis completed by Professor Andrew Paizes, entitled 'The concept of hearsay with particular emphasis on implied hearsay assertions' (1984). See Zeffert *et al op cit* 365. Also see Rall 'The new hearsay rules' (1990) 3/1 *Consultus* 53–55 for a critical look at section 3 of the Law of Evidence Amendment Act 45 of 1988.

⁶⁵However, where the agreement is express, courts should act with caution where accused persons are unrepresented, and instead consider the contents of s 3(1)(c).

⁶⁶The case of *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd* 1953 3 SA 343 (W), illustrates this. The plaintiff brought an action for defamation and injurious falsehood, alleging that the defendants had spread rumours that cigarettes manufactured by the plaintiff company had caused tuberculosis. A commercial traveller's testimony that statements to this effect had been repeated to him by customers was found not to constitute hearsay since the evidence was tendered not to prove that the statements were true, but to show that rumours were circulating. The question arises whether the probative value of the evidence depends on the credibility of any person other than the witness? Thus the statements which were held not to be hearsay at common law, in the *International Tobacco* case, would be hearsay under the statute because of their probative force. An inference could be drawn from them that a rumour which was circulating would be governed or controlled by the credibility of both the witness and the non-witness. See Zeffert *et al op cit* 368.

⁶⁷See the case of *S v Van Niekerk* 1964 1 SA 729 (C), where it was held that the implied assertion fell within the ambit of the rule against hearsay. The facts were that a magistrate was charged with the theft of a gun, which he had confiscated from a drunk who died shortly afterwards. The magistrate admitted having sold the gun and having kept the proceeds, but said that the deceased had asked him to sell the gun and had later told him to keep the money. The prosecution tried to

of section 3(3) if the court is informed that the declarant will testify subsequently. If he does not, it will be excluded unless it can be admitted by agreement or if the court is of the opinion in terms of section 3(1)(c), that it would be in the interests of justice to do so. Thus, section 3(1)(c) of the Evidence Amendment Act 45 of 1988 gives courts the discretion to admit hearsay evidence if they are of the opinion that such evidence 'should be admitted in the interests of justice'.⁶⁸ The phrase 'interests of justice' must be interpreted in the context of the Bill of Rights and an accused's right to a fair trial.

Hearsay evidence is said to deny an accused the right to cross-examine the witness. This is because the declarant of a statement is not in court, and thus cannot be challenged. A judge should therefore hesitate when admitting or relying on hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act, where such evidence plays a decisive or even important role in convicting an accused unless there are compelling reasons for doing so.⁶⁹ The case law illustrates that the courts have been reluctant, even before the Constitution, to use the exception lightly in criminal cases against the accused. However, hearsay evidence has been admitted more readily where it is tendered by the accused. In the case of *S v Cekiso*,⁷⁰ it was held that section 3(1)(c)

rebut this defence by producing letters written by the deceased to his brother before and after the sale, asking him to collect the gun from the magistrate. The letters were tendered as conduct by the deceased tending to show that he did not think that he had authorised the magistrate to dispose of his gun and in order to show that his view was correct. The court held that the letters should have been excluded as hearsay evidence. Also see *Zeffertt et al op cit* 364.

⁶⁸The court may consider the following factors: (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whom the credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the court's opinion be taken into account. Also see *Mnyama v Gxalaba* 1990 1 SA 650 (C), where the issue concerned a dispute amongst the next of kin as to where an intestate deceased should be buried and who should attend to the burial. Evidence of a verbal wish of the deceased expressed to his widow regarding his place of burial was tendered. The court found that it was empowered by s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 to admit hearsay evidence in the interests of justice. However, the court analysed the hearsay evidence and rejected it as not having sufficient cogency to warrant acceptance.

⁶⁹See *S v Ramavhale* 1996 1 SACR 639 (A) at 649. When the court convicted the appellant of murder, it had relied on a piece of hearsay evidence by a state witness as to what the deceased had said. The prosecutor did not lead the evidence in question, but slipped it inadvertently. The court found clear prejudice to the appellant in admitting the hearsay at the stage of judgment. It held further that the irregularities were so gross that the trial could be vitiated.

⁷⁰1990 4 SA 20 (E) at 21 E. The state had applied for the admission of certain hearsay evidence. In a criminal trial, the court had refused to allow the evidence of what the deceased had told a witness about the accused having entered the deceased's house. The accused had denied that they had entered the deceased's house at all. The court considered s 3(1)(c) and found that it would not be in the interests of justice to allow such evidence, which cannot be tested in the normal way. The application to lead such evidence was therefore refused.

should not be exercised in favour of allowing hearsay evidence on controversial issues about which conflicting evidence has been given. To allow such evidence would result in severe prejudice to the person against whom the evidence is given. The discretion in terms of section 3(1)(c) will seldom be exercised in favour of the admission of hearsay in criminal cases owing to the presumption of innocence and the court's reluctance to allow untested evidence to be used against an accused in a criminal case.⁷¹ However, this does not affect the position in civil matters where the section will be constructively applied to search for the truth.

However, in *S v Dyimbane*⁷² the court admitted certain evidence which had not been challenged and which was highly relevant material in the prosecution case. Thus the court found that it was not 'hearsay' evidence. It was held in *S v Mpofo*⁷³ that if the probative value of what has been adduced is so diminished as a result of unreliability, then the resultant prejudice caused by its reception may persuade the court to exercise its discretion against admitting it. The case of the undefended accused was considered in *S v Ngwani*⁷⁴ where it was held that the court should explain the provision to such accused, and give them the opportunity to address the court on the question of whether the admission of the hearsay evidence would be prejudicial to them.

Hearsay evidence is more readily admitted in a bail hearing because it is not regarded as 'criminal proceedings'. This includes the introduction of affidavits by the accused.⁷⁵ The court is more likely to admit hearsay evidence where

⁷¹See *Metadad v National Employers' General Insurance Co Ltd* 1992 1 SA 494 (W) at 499 H. The court found that it is bound to apply Act 45 of 1988 when so required by the interests of justice. Also see *S v Saat* 2004 1 SA 593 (W), where the issue arose regarding the admissibility of the record of evidence in previous proceedings in terms of s 3(4) of Act 45 of 1988. After weighing up all the factors and particularly that the witnesses had already been extensively cross-examined and that the usual objection to the reception of hearsay evidence did not exist, the court held that it was in the interests of justice to admit such evidence in terms of s 3(1) of Act 45 of 1988.

⁷²1990 2 SACR 502 (SE) at 504. The court remarked that when hearsay evidence is prejudicial to the accused, the court must consider this factor. However, it need not be decisive. Hearsay evidence is very prejudicial where it concerns proof of guilt. In this case, it should only be admitted if there are compelling reasons. Steytler suggests that this view is correct in the light of the constitutional right to challenge and adduce evidence. See Steytler NC *Constitutional criminal procedure: a commentary on the Constitution of the Republic of South Africa, 1996* (1998) 351. The court also remarked that in deciding whether or not to admit hearsay evidence in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, it must consider all the factors set out in s 3(1)(c) and take an overall view at the end of the case.

⁷³1993 2 SACR 109 (N).

⁷⁴1990 1 SACR 449 (N). The magistrate had invoked s 3(1)(c) of Act 45 of 1988, but he had not explained the effect of the subsection to the accused. He had also not informed the accused on the question whether the subsection should be invoked or not. The court set aside the conviction.

⁷⁵*S v Pienaar* 1992 1 SACR 181 (W). The court held that there is nothing in the Criminal Procedure Act that renders the use of affidavits in bail applications inadmissible. However, an affidavit will have less probative value than oral evidence which is subject to the test of cross-

evidence is tendered regarding the imposition of a proper sentence. This is because the nature of the sentencing enquiry which requires a complete picture of a convicted person in the interest of society, requires evidence which often will include hearsay evidence.

The constitutional position

The question arises whether the admission of hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988, is constitutional. It has been held in *S v Ramavhale*⁷⁶ that hearsay evidence may be accepted 'subject to the broad, almost limitless criteria set out in section 3(1)'. However, the courts have approached the two statutory exceptions in section 3 with caution. An accused is entitled to legitimately waive the right to challenge evidence by consenting to the admission of such evidence in terms of section 3(1)(a). It is also preferable to insist on his express consent, and not to construe a failure to object to its reception as implied or tacit consent.⁷⁷ It has been suggested that in view of the constitutional right to challenge evidence, this practice should be given constitutional force, and that any consent should meet the requirements of a valid waiver and be explicitly noted on the record.⁷⁸ Common law hearsay exceptions should also be subjected to the requirements of section 36(1) of the Constitution. However, they will probably survive because they are based on trustworthiness and necessity.⁷⁹

The constitutionality of section 3 was challenged before the Supreme Court of Appeal in *S v Ndhlovu and Others*,⁸⁰ where it was held that the use of hearsay

examination. On the other hand, an affidavit will also carry more weight than a mere statement from the bar. Also see *S v Maki en Andere* (1)1994 2 SACR 630 (EK), where the court had to consider an opposed bail application where one of the accused did not give oral evidence but relied on an affidavit he had made, which was handed in on his behalf. The state contended that the affidavit was not admissible. The court held that bail applications are not 'criminal proceedings' because they are not 'proceedings directed by the state against the accused in order to secure his conviction and punishment'. The court noted that a bail application is couched in the form of an application with some characteristics of civil proceedings. Therefore, it is regarded as 'civil proceedings' for the purposes of s 3 of the Law of Evidence Amendment Act, and hearsay evidence is admissible. Accordingly, the court applied the above principles and held that the affidavit was admissible.

⁷⁶See *S v Ramavhale supra* at 650b.

⁷⁷Steytler *Constitutional criminal procedure op cit* 351.

⁷⁸*Id.*

⁷⁹*Ibid* at 353.

⁸⁰2002 2 SACR 325 (SCA) at para 24. The court also found that since the Constitution did not guarantee an entitlement to subject all evidence to cross-examination; it contained the right (subject to limitation) to 'challenge evidence'. According to Zeffertt *et al*, a more realistic approach would be to regard the provisions of s 3 which constituted a limitation of the accused's right to challenge evidence as a reasonable and justifiable limitation in terms of s 36 of the Constitution. See Zeffertt *et al op cit* 381. Also see Schwikkard *SALJ op cit* 63-71 for a detailed discussion about the case. Although she welcomes the judgment, she maintains that it left many questions unanswered such as the ambit of the right to challenge evidence or that the depth of

evidence by the state does not violate the accused's right to challenge evidence by cross-examination at all, since 'where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant'. The Supreme Court of Appeal therefore confirmed that the Law of Evidence Amendment Act 45 of 1988 provides a constitutionally sound framework for the admission of hearsay evidence.⁸¹

The position in foreign jurisdictions and international law

In the United States, the general position is that all hearsay statements are inadmissible, but there are many exclusions and exceptions to this rule.⁸² However, the following types of hearsay are sometimes admissible, provided that the declarant is not available to testify at the trial owing to a testimonial privilege or refusal to testify, lack of memory, death or infirmity in a re-trial, testimony from a prior trial, and in a homicide trial, statements of the circumstances of what the declarant believed was his impending death. The prohibition against hearsay is based on the rationale that statements made out of court are not subject to cross-examination, and therefore do not give a defendant a chance to challenge their veracity and truthfulness.⁸³

In a number of decisions since 1965, the US Supreme Court seemed to equate the Confrontation Clause with the hearsay rule. It held that a major purpose of the clause was 'to give the defendant an opportunity to cross-examine the witnesses against him'.⁸⁴ The right to confront prosecution witnesses entrenched in the Sixth Amendment also prevents the use of hearsay statements against the accused, unless the statement has sufficient 'indicia of reliability', and the declarant is not available to testify at the trial.⁸⁵ A witness is said to be

the role of cross-examination was not explored (at 71).

⁸¹See *S v Ndhlovu supra* at 341c.

⁸²The following types of statements are generally excluded from the definition of hearsay, and are therefore admissible at trial (see Minn Rule Evid 801(d)): they include prior consistent or inconsistent statements of a trial witness, prior statements identifying a suspect, or describing an event or condition while it is observed, or immediately afterwards, and prior admissions of an opposing party (including criminal defendant) or that party's agent or co-conspirator. See Frase 'USA' in Weissbrodt and Wolfrum (1998) *op cit* 55.

⁸³See *Pointer v Texas supra* at 400, where a conviction was reversed. This was because the trial court had admitted transcript testimony from the previous hearing in which the defendant's counsel was not present, and the witness was not cross-examined.

⁸⁴*Ibid* at 406–407, where the use of preliminary hearing testimony was found to violate the defendant's right of confrontation. Also see *Douglas v Alabama supra* at 418 and *Bruton v US* 391 US 123 (1968).

⁸⁵See *Ohio v Roberts supra* at 56, which raised the issue concerning the testimony of an unavailable witness. The court allowed the admission of the out of court statement where actual cross-examination during the preliminary hearing did not occur, and where the declarant was unavailable for cross-examination at trial. The rule in *Roberts* was narrowed in *United States v Inadi* 475 US 387 (1986), where the court held that the rule of 'necessity' is confined to the use of testimony from a prior judicial proceeding, and does not apply to co-conspirators' out-of-court

unavailable if the government is unable, despite good-faith efforts to procure that witness' attendance at trial.⁸⁶ However, a trend has developed in some of the modern state evidence codes and Federal Rules of Evidence towards a more open admissibility of all types of evidence, including hearsay.⁸⁷ The US Supreme Court has also dispensed with the unavailability requirement for statements admitted under certain admitted exceptions to the hearsay rule (*eg* statements made to obtain medical diagnosis or treatment).⁸⁸

Recently, the US Supreme Court's decision in *Crawford v Washington*⁸⁹ overruled *Ohio v Roberts*, thus marking a fundamental shift in the Supreme Court's interpretation of the Sixth Amendment Confrontation Clause. Whilst the *Ohio v Roberts* case allowed the admission of hearsay statements provided they were reliable, even though the accused had no opportunity to cross-examine the hearsay declarant, *Crawford* requires that the accused be given an opportunity to cross-examine the declarant as to hearsay statements in which the clause applies. *Crawford* therefore, takes the position that the purpose of the clause is

statements. See Smith 'When to hear the hearsay: a proposal for a new rule of evidence designed to protect the constitutional right of the criminally accused to confront the witnesses against her' 32(4)(1999) *The John Marshall Law Review* 1287–1309, where Smith argues that a standard should be developed that will allow uncross-examined and inculpatory hearsay statements to be admitted against the defendant only when these statements are truly reliable. The Confrontation Clause will satisfy once such a standard is implemented. Also see Lathi 'Sex abuse, accusations of lies, and videotaped testimony: a proposal for a federal hearsay exception in child sexual abuse cases'(1997) 68 *University of Colorado Law review* 507, where the writer also proposes a hearsay exception to the Federal Rules of Evidence for the out-of-court statements of children who allege sexual abuse. Also see Imwinkelried 'The constitutionalization of hearsay: the extent to which the Fifth and Sixth Amendments permit or require the liberalization of the hearsay rules' 76 (1992) *Minnesota Law Review* 521.

⁸⁶See *Mancusi v Stubbs* 408 US 204, 212 (1972).

⁸⁷Watkins 'The double victim: the sexually abused child and the judicial system' 7 (1990) *Child and Adolescent Social Work* 29 at 37. Also see Douglass 'Beyond admissibility: real confrontation, virtual cross-examination, and the right to confront hearsay'(1999) 67/2 *The George Washington Law Review* 191, where the writer discusses a new approach to the confrontation-hearsay dilemma. He believes that the answer lies in the tool of confrontation.

⁸⁸See *White v Illinois* 502 US 346 (1992). The US Supreme Court has also held that out-of-court statements of co-conspirators, spontaneous statements and those made in the course of procuring medical services are examples of firmly rooted hearsay exceptions which make proof of unavailability and reliability unnecessary. See *Bourjaily v United States* 483 US 171, 183 (1987). Also see Layton 'Hearsay, reliability and prior inconsistent statements made by co-accused, Part 11' (1999) 41 *Criminal Law Quarterly* 501–516. Also see Gray 'The medical treatment hearsay exception in Maryland: a low point in clarity for practitioners and protection for litigants' (2000) 29 *University of Baltimore Law Review* 237.

⁸⁹124 S Ct 1354 (2004). The facts were that the defendant stabbed a man he claimed tried to rape his wife. He claimed that it was done in self-defence. At the trial, the prosecution offered a tape-recorded statement that the defendant's wife gave to the police which cast doubt on the self-defence theory. The court admitted the evidence and the defendant was convicted of assault. The Supreme Court found that the admission of the tape-recorded statement violated the defendant's rights under the Confrontation Clause.

to ensure that reliability be tested by confrontation through cross-examination.⁹⁰ The effect of *Crawford* is that when the Confrontation Clause applies, it requires that the accused be given an opportunity to cross-examine the declarant of the hearsay statement, regardless of the statement's reliability.⁹¹

In England, accused persons have the right to call witnesses on their own behalf and to cross-examine witnesses called by the prosecution. However, witnesses cannot testify about statements made by persons who are not subject to questioning in court.⁹² Article 6 of the ECHR prohibits the use of statements by absent witnesses.⁹³ The common law position is that such statements cannot be adduced as evidence in terms of the hearsay rule. Thus, such statements are inadmissible as evidence of any fact asserted. The reason for the exclusion of hearsay is that it is unreliable and because the witness is not subject to cross-examination. The use of hearsay also means that the trial can be stigmatised as being unfair and an abuse of due process.

However, written witness statements may be admissible under sections 23 or 24 of the Criminal Justice Act 1988. The presence of the witness is not required. The witness must be dead, physically or mentally unfit, out of the jurisdiction, unable to be traced, or have been intimidated. However, the trial judge has an exclusionary discretion under section 25 not to admit the evidence if, in the interests of justice, it ought not to be admitted.⁹⁴ However, the burden of persuading the court that the document should be excluded rests on the party objecting to admission. If the statement is one prepared for the purposes of criminal investigation, a positive duty rests on the trial judge in terms of section 26 to ensure that the party tendering the statement bears the burden of persuading the court that the admission of the statement is in the interests of

⁹⁰*Ibid* at 1374.

⁹¹For a detailed discussion of the *Crawford* case and its impact on the interpretation of the Sixth Amendment Confrontation Clause, see Counsellor and Rickett 'The Confrontation Clause after *Crawford v Washington*: smaller mouth, bigger teeth' (2005) 57/1 *Baylor Law Review* 1–22.

⁹²This rule against hearsay evidence has been reviewed by the Law Commission. See Dickson 'England and Wales' in Weissbrodt and Wolfrum (1998) *op cit* 508. Also see Tapper 'Hearsay in criminal cases: an overview of Law Commission report no 245' (1997) *The Criminal Law Review* 771, for a discussion about the Law Commission's report. Also see *R v Kearley* (1992) 2 WLR 657 (HL), where requests for drugs were made by callers on the telephone but not in the defendant's presence or hearing. On appeal, the House of Lords held that the implied assertion involved in the request for drugs should be excluded as hearsay.

⁹³The relevant article provides for a witness to be called, to give oral evidence and to be cross-examined. The Human Rights Act 1988 incorporates the European Convention on Human Rights into UK law.

⁹⁴Section 25(2) directs the court to look at the following elements: the nature and source of the document; the extent to which other evidence on the issue is available; the relevance of the evidence; or the risk of unfairness. See *Cheney et al op cit* 101. Section 25 is similar to s 3(1)(c) of the Law of Evidence Amendment Act.

justice.⁹⁵ The weight to be attached to the inability to cross-examine and the magnitude of any risk that the admission of the statement will result in unfairness to the accused will depend partly on the court's assessment of the quality of the evidence shown by the contents of the statement.⁹⁶ Any potential unfairness which arises from an inability to cross-examine on the particular statement, may be effectively counterbalanced by a warning and an explanation in the summing up to the jury. The court also has to consider whether the interests of justice will be properly served by excluding the statement if one considers other evidence available to the prosecution.⁹⁷

The effect of the Criminal Justice Act 1988 and the statutory duty to consider any unfairness to the defendant before admitting documentary hearsay ensures that there is a 'fair hearing' and that these provisions do not infringe article 6.⁹⁸ It has been suggested that article (6)(3)(d) prohibits the prosecution from adducing hearsay evidence, but the court has not adopted such a strict interpretation. In the case of *Unterpertinger v Austria*⁹⁹ the court concluded that the conviction had been substantially based on written statements of absent witnesses, and therefore there was a breach of article 6. A similar view was taken in *Kostovski v Netherlands*.¹⁰⁰ These cases demonstrate that where hearsay evidence is the main or decisive evidence against the defendant, reliance on it

⁹⁵The case of *R v Cole* [1990] 2 All ER 108, illustrates the different functions of ss 25 and 26. It involved a case of assault in which the prosecution tried to introduce the statement of an eyewitness who had subsequently died. Leave was required in terms of s 26 and the appellant argued that this should have been refused because the only way of denying the statement under s 26(ii) would have been for the defendant to testify or to call witnesses. This would have led to improper pressure on the defendant. The court of appeal rejected this submission. However, it accepted that a balance had to be struck between the widening of power to admit documentary hearsay and ensuring that the accused received a fair trial.

⁹⁶*Cheney et al op cit* 102.

⁹⁷See *R v Cole supra*.

⁹⁸Article 6(3)(d) embodies the accused's right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. Article 6(3)(d) is phrased in such a way as to ensure the presence of witnesses, and thereby prohibit hearsay introduced on behalf of the prosecution. Similar material may be introduced on behalf of the defence, although there is no obligation as a result of art 6 for a domestic court to admit such evidence. See *Cheney et al op cit* 105.

⁹⁹See *Unterpertinger v Austria supra* at 175. The accused was charged with assault on his stepdaughter and wife. The police took witness statements from the two victims. The witnesses were not compellable under Austrian law. At the trial, both victims refused to testify and the interviews with the investigating judge were read out. *Unterpertinger* applied to the Commission on the grounds that the acceptance of written evidence of interviews with the judge and the police infringed art 1 and art (6)(3)(d), because he was unable to cross-examine the victims.

¹⁰⁰See *Kostovski v The Netherlands supra* at 434. Here, the conviction was based on accounts by two witnesses, who were allowed to remain anonymous and not to testify because of the fear of reprisals. Also see *Saidi v France* (1993) 17 EHRR 251.

in court will lead to a breach of the Convention.¹⁰¹ Other decisions stress that the hearsay evidence must not be the only item of evidence.¹⁰² However, the cases are not wholly consistent on this point.¹⁰³ According to Andrew Ashworth, the *Trivedi* ruling demonstrates that in certain cases it will be possible to hold that the trial was fair, largely because of the strength of other evidence.¹⁰⁴

The impact of article 6 may require amendment to the rigid application of the rule regarding defendants. The case of *R v Blastland*¹⁰⁵ involved a murder case in which a third party made a statement which strongly suggested that person's involvement in the killing. However, the House of Lords found the statement to be inadmissible. In *Blastland*, therefore, the result of the exclusion of the items of evidence involved (the third party's confession and his knowledge of the crime), was to deprive the jury of information which might have left it with a reasonable doubt about the defendant's guilt. The argument has been advanced that the concept of a fair hearing requires an inclusionary discretion to admit hearsay statements on behalf of the accused.¹⁰⁶ According to Emerson and Ashworth, the presumption against hearsay embodied in Article 6(3)(d) is

¹⁰¹See *Van Mechelen v The Netherlands* (1997) 25 EHRR 647 at 657, where the court held that the trial was unfair when eleven police officers gave evidence for the prosecution, remained anonymous, and were questioned by the judge whilst prosecuting and defence counsel were kept in another room, with only a sound link to the judge's chambers.

¹⁰²See *Doorson v The Netherlands supra* at 330, where the court held that the trial was not unfair when two prosecution witnesses remained anonymous and were questioned by the judge in the presence of counsel but not the accused. The court found that there were certain 'counter-balancing' procedures and sufficient other evidence to justify the conclusion that there was no violation. In *Asch v Austria*, 12 HRLJ 203 (1991), the court held that where a victim of an assault declined to testify at the trial, then the statements relied on were not the only evidence.

¹⁰³The European Commission has also considered the relationship between the provisions of the Act and art 6 in *Trivedi v UK* [1997] EHRLR 520. Here, a doctor was charged with false accounting by claiming for more night visits to a patient than had actually occurred. The prosecution had relied on written statements by the patient who was elderly and infirm. The Commission declared that the application was inadmissible because the statements were not the only evidence. The judge had conducted an enquiry into the patient's condition, and evidence on the patient's reliability had been admitted. The jury had been warned against attaching undue weight to the patient's evidence. Thus, in this case, the admission in evidence of pre-trial statements made by an elderly witness unfit to give oral evidence at the trial did not render the proceedings unfair as a whole. However, the Commission came to a different conclusion in *Quim v UK* 23 EHRR CD 41 (1996). Here, the statements were regarded as important evidence where the applicant had not been allowed to cross-examine the witnesses in person.

¹⁰⁴However, this does not alter the fact that the provisions of the Criminal Justice Act 1988 do not, at face value, comply with art 6(3)(d), and that judicial discretion cannot be relied upon to ensure compliance unless judges take account of such matters as the need to keep departures from art 6(3)(d) to an essential minimum, the need to devise other 'counter-balancing' procedures to compensate for any incursion on defence rights, and the importance of not basing a conviction solely or mainly on evidence admitted by these means. See Ashworth 'Article 6 and the fairness of trials' (1999) *The Criminal Law Review* 261 at 270.

¹⁰⁵[1985] 2 All ER 1095.

¹⁰⁶However, it is a principle of common law that any evidence admissible for the defence must also be admissible for the prosecution. *Cheney et al op cit* 104.

worded so as to apply only to witnesses who give evidence against the accused, and there is no equivalent rule against the introduction of hearsay evidence by the defence.¹⁰⁷ Where national law allows the admission of such evidence, there is nothing in Article 6 to prevent this. However, no obligation rests on a court to admit hearsay evidence which purports to exonerate the accused in terms of Article 6.¹⁰⁸

The Criminal Justice Act 2003 (hereinafter referred to as the 'CJA 2003') has rationalised and modernised the existing system on hearsay evidence in England.¹⁰⁹ Under the CJA 2003, hearsay evidence will be the subject of a statutory definition for the first time in criminal cases.¹¹⁰ However, CJA 2003 does not specifically cater for a confession made by a third party which remains inadmissible unless one of the exceptions applies.¹¹¹ If the maker of the confession is an available witness, then the accused can use the safety valve.¹¹² Section 116 includes a number of refinements on s 23 of the 1988 Act.¹¹³ Although the new scheme has been welcomed as a definite improvement on the existing system, it does not have all the answers to the hearsay dilemma.¹¹⁴

CONCLUSION

The accused's right to present an effective defence includes the right to cross-examine evidence in terms of s 166 of the Act.¹¹⁵ This enables him not only to elicit favourable evidence, but also to test the truthfulness of the evidence presented by the opposing party. Cross-examination is regarded as the principal method of testing the veracity and reliability of evidence. A judicial officer is

¹⁰⁷See Emerson and Ashworth *Human rights and criminal justice* (2001) at 471.

¹⁰⁸See *Blastland v UK* (1988) 10 EHRR 528.

¹⁰⁹See Birch 'Criminal Justice Act 2003 (4) Hearsay, same old story, same old song?' (2004) *Criminal Law Review* 556–573 for a detailed discussion about the impact of the CJA 2003 on hearsay evidence.

¹¹⁰*Ibid* at 561.

¹¹¹Also see *R v Blastland supra*. It should be noted that the four hearsay exceptions comprise the following: (a) statutory exceptions including those in the 2003 Act (s 114(1)(a)); (b) common-law exceptions preserved by s 118 (s 114(1)(b)); (c) hearsay admitted by agreement of all parties to the proceedings (s 114(1)(c)); (d) the 'safety valve' or limited inclusionary discretion which allows the use of what otherwise would be inadmissible hearsay (s 114(1)(d)). *Ibid* at 562; 559–560.

¹¹²*Id.*

¹¹³Section 116 deals with proof by absent witnesses. The new provision applies to all first-hand hearsay, unlike s 23 of the 1988 Act which was confined to documentary evidence. It is important that the maker of the statement is 'identified to the court's satisfaction'. The discretion and leave provisions of ss 25 and 26 of the 1988 Act have been shorn away so that a statement which fulfils the conditions of admissibility under s 116 is automatically admissible. The reasons advanced for such removal is that it has led to inconsistent and arbitrary decision-making. *Ibid* at 566–567.

¹¹⁴*Ibid* at 572.

¹¹⁵Also see s 35(3)(i) of the Constitution which provides that the accused has the right to 'adduce and challenge evidence'. The right to 'challenge evidence' includes the right to cross-examine evidence. The right to cross-examination is seen as a fundamental requirement of a fair trial.

obliged to assist an unrepresented and illiterate accused in presenting his defence by way of cross-examination.¹¹⁶ However, the right to cross-examination is not absolute.¹¹⁷ A judicial officer has a discretion to control improper cross-examination,¹¹⁸ and may disallow questions that are irrelevant, vexatious, abusive, oppressive and discourteous.¹¹⁹

Hearsay evidence is said to deny to the accused the right to cross-examination. Hearsay evidence is generally excluded because of its possible fabrication and the danger of innocent misreporting, unless it falls under the common law or statutory exceptions.¹²⁰ However, the exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. The fact that the statement is untested in cross-examination, therefore, is a factor to be considered in assessing its probative value.¹²¹ Statutory hearsay is presently regulated by the Law of Evidence Amendment Act 45 of 1988. The case law demonstrates the court's reluctance to use the exceptions lightly in criminal cases against the accused.¹²² However, it is more readily admitted when it is tendered by the accused in a bail hearing because bail applications are not regarded as criminal proceedings.¹²³ The Supreme Court of Appeal held in *S v Ndhlovu and Others* that admission of hearsay evidence by the state does not violate the accused's right to challenge evidence by cross-examination.¹²⁴ This decision confirmed that admission of hearsay evidence in terms of s 3 of Act 45 of 1988 is constitutional. However, the case is not without criticism.¹²⁵

In international law, hearsay evidence is generally excluded because of its unreliability, unless it falls under one of the recognised exceptions. A denial of the right to cross-examination may lead to the trial being rendered unfair. A balance has to be struck, therefore, between the admission of hearsay evidence and the accused's right to a fair trial. To illustrate this, the Confrontation Clause entrenched in the Sixth Amendment also prevents the use of hearsay statements against the accused, unless the statement is sufficiently reliable and the

¹¹⁶See *S v Mashaba supra*.

¹¹⁷See *S v Klink supra*.

¹¹⁸See *S v Cele supra*.

¹¹⁹See *S v Mayiya supra* and *S v Klink supra*.

¹²⁰As stated by Judge Conradie: "Talk is cheap" is an old adage which, I think, is apt to hearsay evidence as it is to unkept promises. Fabrication of hearsay evidence is always a danger. So is the danger of innocent misreporting.' See *Mnyama v Gxalaba supra* at 654.

¹²¹See *Metadad v National Employers' General Insurance Co Ltd supra* at 499.

¹²²See *inter alia*, *S v Cekiso* and *S v Ramavhale supra*.

¹²³See *S v Pienaar* and *S v Maki en Andere (1) supra*.

¹²⁴See *S v Ndhlovu and Others supra*.

¹²⁵See Zeffert *et al op cit* 381 and Schwikkard *op cit* 71.

declarant cannot testify at trial.¹²⁶ However, the interpretation of the Sixth Amendment Confrontation Clause has fundamentally changed as a result of the decision in *Crawford v Washington*.¹²⁷ The British criminal justice system also demonstrates that an accused has the right to cross-examine witnesses and to be present in the court-room.¹²⁸ The Criminal Justice Act 1988 has regulated hearsay evidence subject to Article 6 of the ECHR. However, the CJA 2003 has now rationalised and modernised the existing system.¹²⁹

The article 6 decisions of the European Court demonstrate that the overall fairness of the trial was not undermined by the reception of evidence from anonymous witnesses¹³⁰ nor by the admission of a statement of an absent witness.¹³¹ This is because in all cases there was sufficient other evidence available, and the conviction was not based mainly on the evidence admitted in breach of article 6. On the other hand, where the court has come to the conclusion that such evidence was the sole or main basis for a conviction, it has found little hesitation in finding the trial unfair and in violation of article 6.¹³² The Convention appears to require that the trial as a whole must be fair.¹³³

The innovative decision in *Crawford v Washington* favours the accused's right to cross-examination over the admission of hearsay evidence, whilst *S v Ndhlovu and Others* clearly favours hearsay evidence over the accused's right to cross-examination. The European Courts require the whole trial to be fair. If the hearsay evidence is the sole or main evidence against the accused, then the trial is unfair. Similarly, our courts should not have *carte blanche* to admit hearsay evidence against the accused to his prejudice, unless there are compelling reasons.¹³⁴ Instead, our courts should consider whether the admission of hearsay evidence is a justifiable and reasonable limitation in terms

¹²⁶See *Ohio v Roberts supra*. In reviewing the hearsay exception, the court emphasised that the primary purpose of the Confrontation Clause is to ensure the right of cross-examination.

¹²⁷*Crawford* has overruled *Ohio v Roberts*. *Crawford* requires that the accused be given an opportunity to cross-examine the declarant of the hearsay statement regardless of the statement's reliability. See *Crawford v Washington supra*.

¹²⁸See *R v Hilton supra*.

¹²⁹See *Birch op cit 557*.

¹³⁰See *Doorson v The Netherlands supra*.

¹³¹See *Trivedi v UK supra*.

¹³²See, *inter alia*, *Unterpertinger v Austria supra*, where the conviction was mainly based on evidence untested by cross-examination; *Kostovski v Netherlands supra*, where the conviction was based 'to a decisive extent' on evidence from anonymous witnesses whom the defence was unable to see; and *Saidi v France supra* at 251, where written witness statements were the 'sole basis for applicant's conviction'.

¹³³*Ashworth op cit 272*.

¹³⁴See *S v Dyimbane supra*, where the court held that if hearsay evidence is prejudicial, it will only be admitted if there are compelling reasons.

of s 36 of the Constitution, 1996.¹³⁵ In so doing, the courts will like their European counterparts, evaluate whether the trial as a whole is fair.

Every party must be given a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.¹³⁶ The ideal is to ensure that the accused will be able to present his case effectively by way of cross-examination, and thereby exercise his right to a fair trial. A balance has to be struck between the admission of hearsay evidence and the accused's right to a fair trial. It is accepted that some diminution of the procedural rights of the accused is necessary to ensure protection of considerations of public policy and the necessities of the case. After all, 'the balancing process accepts that justice is not perfect, or even as perfect as human rules can make it. A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused.'¹³⁷ Nevertheless, any measure restricting the defence must be strictly necessary, and if a less restrictive measure can be found, then that measure must be applied.¹³⁸ Thus, a concerted effort is needed to reform the justice system to find a better balance between the rights of the accused and the interests of society. Indeed, one should always look for alternative safeguards or 'counterbalancing procedures' to ensure an equitable balance. The approach of the European Courts and the *Crawford* decision are steps in the right direction.

¹³⁵See *Zeffert et al op cit* 381.

¹³⁶Thus, the parties must have the opportunity to have knowledge of and comment on all evidence adduced or observations filed. See *inter alia*, *Dombo Deheer BV v Netherlands*, October 27, 1993, Series A, No 274 A; 18 EHRR 213.

¹³⁷See Momeni 'Balancing the procedural rights of the accused against a mandate to protect victims and witnesses: an examination of the anonymity rules of the International Criminal Tribunal for the former Yugoslavia' (1997) 41/1 *Howard Law Journal* 155 at 178.

¹³⁸See *Van Mechelen v Netherlands supra* at para 59.

The seriously ill or dying patient's right to know

LC Coetzee*

INTRODUCTION

Doctors are often confronted with the decision whether or not to inform a patient that he or she is seriously or terminally ill. In fact, '[i]nformed consent and telling the truth to terminally ill patients are two of the major recurrent ethical issues in contemporary health care'.¹ In many societies a patient's right to know is considered to include, as a general rule, the right to be informed of a diagnosis. But does the patient have a right to know that he or she is dying? Most Western legal systems admit of a so-called 'therapeutic privilege' which entails that a doctor may withhold information from the patient if the disclosure of such information may cause the patient harm. Although therapeutic privilege usually concerns the withholding of information relating to risks associated with a proffered medical intervention, it is also mentioned in the context of the seriously, or terminally, ill patient.² It has been argued, for example, that the deliberate omission to convey the diagnosis of a terminal disease to a patient may be considered a legally justifiable act of paternalism where the doctor believes that disclosure of such information will advance the patient's condition and will seriously affect his or her mental state.³ Some even believe that it is a doctor's *duty* to treat terminally ill patients, especially children, with the 'drug named illusion', to withhold the truth from them, and even to lie to them.⁴

In German legal literature one often comes across references to the case of the well-known German literary figure, Theodor Storm. Laufs and Uhlenbruck⁵ use Storm's case to indicate that there is no shortage of 'impressive evidence' for the view that doctors must often deceive seriously ill patients. At a rather advanced age, Storm was taken ill with cancer of the stomach and demanded the truth about his illness from his doctor. Apparently, the disclosure of the incurable, terminal nature of his disease caused him to break down. The concerned family arranged for an expert opinion declaring the diagnosis to be wrong and the illness to be harmless. Storm immediately believed this and

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¹D Welz 'The boundaries of medical-therapeutic privilege' (1999) 116 *SALJ* 299 at 307.

²See, eg, DA Dickerson 'A doctor's duty to disclose life expectancy information to terminally ill patients' (1995) 43 *Cleveland State LR* 320; HW Smith 'Therapeutic privilege to withhold specific diagnosis from patient sick with serious or fatal illness' (1946) 19 *Tennessee LR* 352.

³G Laurie *Genetic privacy: a challenge to medico-legal norms* (2002) 196.

⁴J Türköl 'Remarks on telling the truth or lying' (1985) 4 *Medicine and Law* 92-93. Cf Welz n 1 above at 308-309.

⁵A Laufs & W Uhlenbruck (eds) *Handbuch des Arztrechts* (3ed 2002) 498. Cf Welz n 1 above at 319-320.

enjoyed a great summer, in the course of which he celebrated his seventieth birthday in good spirits and victoriously completed his '*Schimmelreiter*'.⁶

BRIEF HISTORICAL OVERVIEW OF TRUTH-TELLING

Ever since the time of Hippocrates, there has been a divergence of opinion regarding the issue of truth-telling in cases of terminal illness. Whereas Hippocrates himself cautioned doctors to reveal 'nothing of the patient's future or present condition' to him, since this may lead to the patient's taking a turn for the worse,⁷ some of his contemporaries thought that patients needed to know the truth in order to prepare themselves and their loved-ones for their demise.⁸ Hippocrates' advice should be read against the background of his ethics. According to the Hippocratic Oath, the purpose of medicine is to benefit the sick and to keep them from harm and injustice.

One of the pre-eminent figures in the history of medical ethics at the end of the eighteenth century, was Thomas Percival.⁹ Like many before him, Percival followed beneficence as a guiding principle in his ethics. His advice to doctors was not to make 'gloomy prognostications' but to give timely notice of danger to the friends of the patient and even to the patient himself, 'if absolutely necessary'.¹⁰ Percival called for honest disclosure to be the norm but saw terminal cases as an exception to this norm.¹¹ Percival's work formed the basis of numerous codes of ethics, notably the American Medical Association's first Code of Medical Ethics of 1847, and continued to influence the views of medical students and doctors for almost a hundred years.¹² Percival's ambivalent stance in respect of the issue of truth-telling made him a forerunner of many modern advocates of therapeutic privilege.

In the 19th century, doctors showed a clear reluctance to disclose the diagnosis of life-threatening disease (typically, cancer) and an even greater unwillingness to share information on prognosis.¹³ It appears, though, that the motivation for withholding a diagnosis was often the fear that the patient will interpret the diagnosis to be an indication of fatal prognosis.¹⁴

⁶Cf G Brenner *Arzt und Recht: Leitfaden und Nachschlagewerk des medizinischen Rechts für die ärztliche Praxis* (1983) 37; HD Laum 'Wahrheit und schweigen am Krankenbett: die rechtliche Bewertung' (2000) 125 *Zentralblatt für Chirurgie* 921. Ironically, this implies that the impact of bad news can be reversed by subsequent deception.

⁷See SJ Reiser, AJ Dyck & WJ Curran *Ethics in medicine: historical perspectives and contemporary concerns* (1977) 8. Cf J Katz *The silent world of doctor and patient* (1984) 4; R Faden & TL Beauchamp *A history and theory of informed consent* (1986) 61.

⁸MA Krisman-Scott 'An historical analysis of disclosure of terminal status' (2000) 32 *J of Nursing Scholarship* 48.

⁹1740–1803.

¹⁰CD Leake (ed) *Percival's medical ethics* (1975) 91; Faden & Beauchamp n 7 above at 68; Katz n 7 above at 17–18.

¹¹See, eg, Leake n 10 above at 194–195.

¹²Faden & Beauchamp n 7 above at 69, 70, 73; Katz n 7 above at 20–21.

¹³See EJ Gordon & CK Daugherty "'Hitting you over the head": oncologists' disclosure of prognosis to advanced cancer patients' (2003) 17 *Bioethics* 146 and the authorities cited there.

¹⁴*Ibid.*

The trend to conceal the truth – especially that of terminal illness – prevailed through the early 20th century.¹⁵ The fifties saw the first surveys in the United States to determine patients' informational needs and the extent to which doctors met those needs. These revealed that patients overwhelmingly wanted to be informed, but that doctors very often did not inform cancer patients of their diagnosis.¹⁶ In the sixties the work of Glaser and Strauss, as well as Kubler-Ross, started to question the idea that the truth inevitably hurts. However, the practice of non-disclosure was still very common and it was only in the seventies that doctors' attitude to truth-telling started to change significantly.¹⁷ Currently, it would appear from the limited empirical data available that doctors do not usually disclose the prognosis (of advanced cancer) to the patient unless there is a significant clinical reason to do so.¹⁸ One recent study found that doctors said they would withhold information about survival estimates from patients in 23% of cases, would give survival estimates different from the ones they actually estimated in 40% of cases and would give the survival estimates they actually estimated in 37% of cases.¹⁹

THE POSITION IN SOUTH AFRICAN LAW

Case law

There is some vague authority in our case law for the viewpoint that a doctor's duty to disclose may be restricted in circumstances where disclosure may scare or frighten the patient into refusing treatment which would be in his or her best interest to undergo.²⁰ In *Castell v De Greef*,²¹ Ackermann J (as he then was) ruled that the obligation to warn a patient of a material risk inherent in a proposed treatment 'is subject to the therapeutic privilege, whatever the ambit of the so-called "privilege" may today still be'. Ackermann J pointed to the fact that a number of authors have commented on the dangers inherent in the so-called therapeutic privilege, and in particular the inroads that it might make on patient autonomy. He found it unnecessary to pursue this issue further in the case at hand because therapeutic privilege had not been invoked.²² He expressed the view that it 'does, however, form part of the wider debate concerning consent to medical treatment and whether emphasis should be placed on the autonomy and right of self-determination of the patient in the light of all the

¹⁵ Krisman-Scott n 8 above at 49.

¹⁶ *Id* at 49–50.

¹⁷ *Id* at 51; Gordon & Daugherty n 13 above at 147; DH Novack, R Plumer, RL Smith, H Ochtill, GR Morrow & JM Bennet 'Changes in physicians' attitudes toward telling the cancer patient' (1979) 241 *J of the American Medical Association* 897.

¹⁸ See Gordon & Daugherty n 13 above at 148 and the authorities cited there.

¹⁹ EB Lamont & NA Christakis 'Prognostic disclosure to patients with cancer near the end of life' (2001) 134 *Annals of Internal Medicine* 1096. There are, however, considerable cultural differences in disclosure preferences – see eg JL Mitchell 'Cross-cultural issues in the disclosure of cancer' (1998) 6 *Cancer Practice* 153.

²⁰ See *SA Medical and Dental Council v McLoughlin* 1948 2 SA 355 (A) 366; *Richter v Estate Hammann* 1976 3 SA 266 (C) 232. See also SA Strauss *Doctor, Patient and the Law* (3ed 1991) 19; P van den Heever 'Therapeutic privilege in the South African medical law' 1993 *De Rebus* 624; Welz n 1 above at 299.

²¹ 1994 4 SA 408 (C) 426H.

²² At 418F–G. *Cf* Welz n 1 above at 300.

facts or on the right of the medical profession to determine the meaning of reasonable disclosure'.²³ Later on in the judgment,²⁴ Ackermann J took a firm stance in this 'wider debate' and acknowledged that our law is moving away from paternalism and recognises the patient's right to autonomy and self-determination.²⁵

The question whether therapeutic privilege can justify the withholding of information from a terminally or seriously ill patient has not yet received pertinent attention in our case law, although an interesting case is recorded by Margo.²⁶ In this case, the patient-plaintiff, herself a general medical practitioner, asked an orthopaedic surgeon for his opinion on a lump on the calf of her left leg. The pathologist's report returned the result of a malignant melanoma, but this information was not conveyed to the patient-plaintiff. In fact, the plaintiff alleged that the orthopaedic surgeon had deceived her by stating in writing that the lump was benign. The plaintiff claimed that her life would have been prolonged by two to three years if the appropriate steps had been taken in response to the pathologist's report, and that the orthopaedic surgeon's negligent failure to apprise her of the malignant nature of the lump had denied her that extra life span. She claimed substantial damages for loss of life span and loss of enjoyment and other advantages sustained as a result of this failure on the part of the orthopaedic surgeon. Because of her poor prognosis the plaintiff was granted permission to take her evidence on commission. The plaintiff died before this task could be completed and her executors withdrew the action.

Most recently, the question of therapeutic privilege within the context of the withholding of the diagnosis of a life-threatening illness arose indirectly in *VRM v Health Professions Council of South Africa and Others*.²⁷ A doctor examined a woman pregnant with her first child one month before its birth and established that she was HIV positive. The doctor did not inform the woman because he considered it 'heartless and cruel' to do so. He was of the opinion that the disclosure of such information could not change anything at that stage. The baby was eventually still-born. A committee of preliminary inquiry of the Health Professions Council resolved not to refer the matter to a disciplinary

²³At 418G–H.

²⁴At 426D–E.

²⁵Welz n 1 above at 299–300 states that Ackermann J appears to hold the view that the therapeutic privilege does not accord fully with the present-day developments of our law which clearly promote patient autonomy and self-determination. FFW van Oosten 'Patient rights: a status report on the Republic of South Africa' in Roger Blanplain (ed) *Law in motion: recent developments in civil procedure, constitutional, contract, criminal, environmental, family & succession, intellectual property, labour, medical, social security, transport law* (1997) 987 at 999 remarks that the court adopted a rather ambivalent approach to the therapeutic privilege since, on the one hand, it appears to accept that the defence sets a limit to the doctor's duty of disclosure, but on the other hand it seems to associate the defence with medical paternalism. See also L Dreyer 'Redelike dokter versus redelike pasiënt *Castell v De Greef* 1994 SA 408 (K)' (1995) 58 *THRHR* 532 at 538.

²⁶CS Margo *Final postponement: reminiscences of a crowded life* (1998) 119–121.

²⁷2003 TPD, unreported.

committee. The court ruled that in the circumstances of the case there was a duty on the Council to refer the mother's complaint.

Legal opinion

Generally speaking, before the coming into operation of the National Health Act 61 of 2003,²⁸ the doctor's duty to disclose did not include an obligation to disclose the diagnosis.²⁹ Scant authority existed for the viewpoint that the doctor should avoid causing the patient anxiety or distress by disclosing an adverse diagnosis.³⁰ It was suggested in the legal literature that the doctor may invoke the therapeutic privilege and deliberately refrain from informing a patient who is anxious to be cured of the nature of the serious disease diagnosed, because such information may have the effect that the patient would become depressed and desperate to such an extent that he or she refuses further medical treatment. The cancer patient was mentioned specifically.³¹ The use of therapeutic privilege in such circumstances is justified by the arguments that truth-telling may be contrary to the patient's own best interests and that disclosure of an unfavourable or adverse diagnosis or prognosis may have a harmful effect on the patient and therapy.³²

Legislation

National Health Act 61 of 2003

The new National Health Act 61 of 2003 now stipulates that it is the doctor's duty to inform patients of their health status. However, the Act also recognises that under certain circumstances disclosure of a patient's health status may be withheld.

In terms of section 2 of the Act, its objects are to regulate national health and to provide uniformity in respect of health services across the nation by, *inter alia*, setting out the rights and duties of health care providers, health workers, health establishments and users,³³ and protecting, respecting, promoting and fulfilling the rights of, *inter alia*, vulnerable groups.³⁴ It is hard to imagine a more vulnerable group than those afflicted by life-threatening illness. It is also hard to imagine a vulnerable group that would be more unwilling or unable to pursue

²⁸The provisions relevant in the present context came into operation on 2 May 2005.

²⁹FFW van Oosten *The doctrine of informed consent in medical law* (1991) 59, 67 and the authorities cited there. However, the doctor had to disclose the diagnosis where the patient made his or her consent to a proposed intervention conditional upon such disclosure. It remained very difficult for the patient to prove that he or she had suffered harm as a result of the doctor's breach of a contractual duty to inform him or her of the diagnosis.

³⁰Van Oosten n 25 above at 999.

³¹Strauss n 20 above at 92; MA Dada and DJ McQuoid-Mason *Introduction to medico-legal practice* (2001) 14; Welz n 1 above at 308. Cf J Wawersik 'Die Auswirkungen juristischer Aufklärungserfordernisse auf das Arzt-Patient-Verhältnis' in H Jung & HW Schreiber (eds) *Arzt und Patient zwischen Therapie und Recht* (1981) 90 at 92.

³²FFW van Oosten 'The so-called "therapeutic privilege" or "contra-indication": its nature and role in non-disclosure cases' (1991) 10 *Medicine and Law* 31 at 33; Welz n 1 above at 309.

³³S 2(b). See ss 5–20.

³⁴S 2(c)(iv).

their rights by going to court. The Act contains certain provisions specifically dealing with a patient's right to information and informed consent.

Subsection (1) of section 6 provides as follows:

Every health care provider must inform a user of —

- (a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
- (b) the range of diagnostic procedures and treatment options generally available to the user;
- (c) the benefits, risks, costs and consequences generally associated with each option; and
- (d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.

Whatever the position may have been in our common law, it is now clear that section 6(1)(a) places a duty on every health care provider³⁵ to inform a user³⁶ in an appropriate manner of the user's health status but simultaneously recognises a therapeutic privilege to withhold such information where there is substantial evidence that the disclosure thereof would be contrary to the best interests of the user.³⁷ The term 'health status' is not defined in the Act, but would probably include diagnosis, and could possibly include prognosis.

Section 6 does not expressly relieve the doctor of the duty to inform the patient of the risks or consequences associated with diagnostic procedures and treatment options where such disclosure would be contrary to the best interests of the user. Whether the doctor could still raise the defence of therapeutic privilege under such circumstances, is uncertain.

Importantly, the exception provided for in section 6(1)(a) is not created in the best *medical* interest of the user, but simply in the best interests of the user. Presumably, a determination that disclosure would be contrary to the best

³⁵'Health care provider' is defined in s 1 as a person providing health services in terms of any law, including in terms of the Allied Health Professions Act 63 of 1982, the Health Professions Act 56 of 1974, the Nursing Act 50 of 1978, the Pharmacy Act 53 of 1974, and the Dental Technicians Act 19 of 1979.

³⁶According to s 1, 'user' means 'the person receiving treatment in a health establishment ... or using a health service, and if the person receiving treatment or using a health service is (a) below the age contemplated in s 39(4) of the Child Care Act, 1983 ... "user" includes the person's parent or guardian or another person authorised by law to act on the firstmentioned person's behalf; or (b) incapable of taking decisions, "user" includes the person's spouse or partner, or, in the absence of such spouse or partner, the person's parent, grandparent, adult child or brother or sister, or another person authorised by law to act on the firstmentioned person's behalf'.

³⁷It is not clear from whom information may be withheld in the case where it is feared that the disclosure of the health status of a minor below the age contemplated in s 39(4) of the Child Care Act 74 of 1983 would be harmful. Because the definition of 'user' includes such a minor's parent or guardian or another person authorised by law to act on the minor's behalf, a literal interpretation would allow the withholding of such information from the parent or guardian if disclosure would be contrary to the latter's, or the minor's, best interest.

interests of the user can only be made after weighing up the user's interest in knowing against his or her interest in not knowing. The wording of section 6(1)(a) suggests that the user's non-medical interests could also be taken into account when weighing up these interests.³⁸ Obviously, the better the doctor is acquainted with the patient's circumstances, the better he or she will be able to weigh up the interests at stake.

Promotion of Access to Information Act 2 of 2000

The Promotion of Access to Information Act 2 of 2000 also contains provisions aiming to protect patients from the harm that might result from the disclosure of information. These provisions specifically deal with the protection of patients against possible negative effects resulting from access to information held in medical records. The Act provides³⁹ that, if the information officer⁴⁰ or the head of a private body⁴¹ who grants⁴² a request for access to a record provided by a health practitioner in his or her capacity as such about the physical or mental health, or well-being, of the requester or person on whose behalf a request has been made, is of the opinion that the disclosure of the record to the relevant person⁴³ 'might cause serious harm to his or her physical or mental health, or well-being', the information officer or head of the private body may, before giving access,⁴⁴ consult with a health practitioner.⁴⁵ If, after being given access to the record concerned, the health practitioner consulted 'is of the opinion that the disclosure of the record to the relevant person would be likely to cause serious harm to his or her physical or mental health, or well-being' the information officer or head of the private body may only give access to the record if the requester proves to the satisfaction of the information officer or head of the private body that 'adequate provision is made for such arrangements as are reasonably practicable before, during or after the disclosure of the record

³⁸See, eg, *Arato v Avedon* 858 P 2d 598 (Cal 1993) at 602. In this case, doctors withheld statistical life expectancy data from a patient because the patient appeared anxious about his condition and they did not want to deprive him of any hope of cure. The plaintiffs argued that the doctors failed adequately to disclose the 'shortcomings' of chemotherapy and radiation therapy in treating the patient's cancer and thus failed to obtain an informed consent. They argued that the information on the statistical morbidity rate of pancreatic cancer was material to the patient's decision whether or not to undergo postoperative treatment; had he known the bleak truth concerning his life expectancy, he would not have undergone the rigours of an unproven therapy, but would have chosen to live out his last days at peace with his wife and children, and would have used the opportunity to arrange his business affairs. Instead, the plaintiffs asserted, in the false hope that radiation and chemotherapy could effect a cure, the patient failed to order his affairs in contemplation of his death. They claimed that this omission led to the failure of his contracting business and to substantial real estate and tax losses following his death.

³⁹In s 30(1) and s 61(1). The former section applies in the case of a public body and the latter applies in the case of a private body.

⁴⁰S 30(1).

⁴¹S 61(1).

⁴²In terms of s 11 (where a public body is concerned) or s 50 (where a private body is concerned).

⁴³I.e., the requester or, if the request has been made on behalf of the person to whom the record relates, that person.

⁴⁴In terms of s 29 and s 60, respectively.

⁴⁵Nominated by the relevant person or, in the case of a person under the age of 16 years, a person having parental responsibilities for the relevant person.

to limit, alleviate or avoid such harm to the relevant person'.⁴⁶ The Act provides that before access is so given to the requester, the person responsible for such counselling or arrangements must be given access to the record.⁴⁷

Discussion

In terms of the National Health Act, potentially harmful information regarding the patient's health status may simply be withheld. The Promotion of Access to Information Act, on the other hand, does not allow the (indefinite) withholding of access to information. Rather it makes provision for counselling and other arrangements aimed at limiting, alleviating or avoiding such harm. This difference of approach could possibly (and partially) be explained by reference to the fact that, as a general rule, the case in favour of truthful disclosure is much stronger where the patient solicits information.

In an attempt to limit the circumstances under which information may be withheld, the National Health Act requires *substantial evidence* that disclosure would run against the patient's best interests. The Promotion of Access to Information Act, on the other hand, restricts the circumstances under which provision must be made for measures to limit, alleviate or avoid harm. Only where the potential for harm resulting from disclosure is both *likely* and *serious*, should provision be made for such measures or arrangements.

Whereas in terms of the National Health Act, the harm guarded against is defined in terms of what would be in the patient's best interests, the Promotion of Access to Information Act restricts such harm to the patient's physical or mental health or well-being

FOREIGN CASE LAW

In the absence of any directly applicable and authoritative cases in South African law, it would seem advisable to look at the issues that arose and the approaches followed in such cases in foreign jurisdictions.

In the United States, the Supreme Court of Kansas hesitantly acknowledged the existence of a privilege to withhold the diagnosis of a 'dread disease' from a patient.⁴⁸ The court in an obiter dictum severely limited the discretion to withhold information on this ground. Only where the patient is unstable, temperamental or severely depressed does the possibility arise that the withholding be justified, and then only if the disclosure of the specific diagnosis of a dread disease like cancer may seriously jeopardise the patient's recovery.

⁴⁶S 30(3)(a) and s 61(3)(a).

⁴⁷S 30(3)(b) and s 61(3)(b).

⁴⁸*Natanson v Kline* 350 P 2d 1093 (1960) 1103.