

Seventh Annual Dave Ellis Memorial Lecture on *Access to Justice*:

Law as a Vehicle for Social Change

**Given by Martin O'Brien,
Senior Vice President for Programmes at The Atlantic Philanthropies**

Pillar Room, Rotunda Hospital, Dublin on 5 December 2013



It's a very great pleasure to have been asked to deliver the Dave Ellis Memorial Lecture. I met Dave on several occasions when I worked for the Committee on the Administration of Justice (CAJ) in Northern Ireland.

He was also one of the first people Atlantic worked with when we were considering how best to advance public law in Ireland. I was always struck by his dedication to making Ireland a fairer place.

From the moment he gained his legal qualification, he chose to put his very considerable skills at the service of the marginalised and disadvantaged who were denied access to the law because there was no properly state-funded legal aid system.

Dave was one of the chief pioneers of the establishment of community law centres to bring legal advice and representation to people who needed it. His legacy is clear today in the work of the Northside Community Law Centre. In that respect, he remains an inspiration to us all.

I'm very pleased that his partner Sarah Flynn is with us tonight as we pay tribute to him.

Of course, Dave's vision and ideas are also what FLAC (Free Legal Advice Centres) and the other community and public interest law centres are all about. Dave's same spirit and values are very visible when I look at people like Michael Farrell (senior solicitor at FLAC) and Noeline Blackwell (FLAC director general) and their colleagues in the other law centres.

Ireland is very lucky to have them and the many others who are working every day to make it a fairer more humane place. I believe that's also what the law is meant to do. It should deliver fairness or, at a minimum, mitigate the worst effects of its absence.

Sadly, it often falls badly short and not everyone has equal access. Those who need its protection most are often least able to avail of it. Organisations like FLAC and the other law centres work to make up for that deficit.

The mission of the Foundation, which I have the privilege to work for, is to make a lasting difference in the lives of marginalised and disadvantaged communities. Because Atlantic won't be around in perpetuity, we are concerned about what will be left behind as well as what we can do now.

We're also keen to lever our resources to secure the maximum change for the future. That has led us to invest significantly in efforts to change policy and practice in all of the geographies where we have been active. While the resources of philanthropy are significant, they are a drop in the bucket when compared to government.

If you can influence government policy and practice, then you can potentially bring about broader systemic and potentially far reaching change. In that context, law is a key element. It often determines how vast sums of money get spent, what benefits and services we receive. It also regulates our relationship with the state and with others and how we perceive ourselves and are perceived.

As a result, Atlantic has regularly looked to support campaigns to secure new laws or to repeal bad ones which undermine human rights. If you can change law you can change policy and practice. Hopefully the change will abide.

Examples of the campaigns we have supported include advocacy to secure the Affordable Care Act (affectionately known as "Obamacare"), immigration reform, or abolition of the death penalty in the United States.

In the Republic of Ireland, it includes things like our support for civil partnerships and same sex marriages, new and fairer immigration legislation, and mental capacity/supported decision-making legislation which will remove the last excuse for not ratifying the UN Convention on the Rights of People with Disabilities. In Northern Ireland, it includes enhanced measures to promote equality and reform the criminal justice and policing system.

We believe that success in these areas can yield concrete and significant improvements in the lives of individuals and communities. If you want to have a fair society, then you need to have fair law. That can and should mean laws clearly establishing fundamental rights like the right to housing, food and social security.

Sometimes, however, the need is not for new laws or to get rid of bad ones but rather to secure the full and fair implementation of existing ones. This is where public interest litigation frequently comes into play.

In Ireland, one thinks of FLAC's multi-decade and still ongoing effort through the Lydia Foy case to secure gender-recognition legislation or Michelle Gabriel's case which has helped people renegotiate their hire purchase agreements when they get into difficulties. Frequently these cases rely on the Constitution or on the European Convention.

Then, of course, there is the no less important work done by FLAC and the other law centres in places like social welfare appeals tribunals, the Refugee Appeals Tribunal or with the Legal Aid Board and other similarly perhaps less glamorous institutions. Interventions in these venues can transform the lived realities of individuals and particularly marginalised groups like migrants. The victories won can be every bit as meaningful as the more often discussed constitutional challenges.

In South Africa, with its inspirational and far-reaching Constitution, there are some particularly impressive examples of how using the law can make a difference. Litigation by Atlantic-supported groups has led to 2 million people getting antiretroviral treatment for HIV and to a very marked reduction in the perinatal

transmission of HIV/AIDS. This was in the context of a long battle with government and the pharmaceutical industry to secure access to cheaper generic drugs.

It has also led to the legalisation of same sex marriage, and to an additional \$1 billion spend on schools in the Eastern Cape. This is by no means an exhaustive list, but it demonstrates clearly the scale of what can be achieved through the vehicle of litigation.

In South Africa, too, there has been the daily grind work which has enabled thousands of poor people to access their social welfare entitlements or to improve the lot of migrants. As in Ireland, NGOs have used the data from these individuals to inform broader advocacy for change.

It's harder to argue that the system is working when you are confronted with the evidence of individuals who are being systematically failed. Some time ago in 2008, we commissioned an evaluation of the public interest litigation work which we had supported in South Africa. In the new year, we hope to publish an updated version of the material. We also hope to commission similar research on this work in Ireland, North and South. We hope that people working in the public interest law area in the future can learn the lessons of the work done over the last 15 years or so and can build on that work.

I want to say a bit about the findings from the South African work, and in particular what it has identified as the key ingredients or requirements for using public interest litigation to successfully advance social change. It argues that litigation on its own will often fail to deliver the desired change.

It suggests that there are three other important elements. These include:

- the need for greater public awareness and information about people's rights
- people need other advice and assistance in addition to litigation to claim their rights
- legal cases work best when accompanied by broader social mobilisation around the issue. In short, and perhaps most importantly, rights have to be asserted both inside and outside the courts.

The evaluators -- two seasoned lawyers -- also identified eight factors essential to successful litigation, including:

- Proper organisation of clients
- An overall long-term strategy
- Co-ordination and information sharing
- Amicus curiae interventions
- Right timing
- Good research
- Correct characterisation/framing of the legal issues involved
- Effective follow-up.

In order to make this work, of course, you also need dedicated and talented lawyers committed to working closely with the people who need the change. You also need a great deal of patience and tenacity.

Winning in court often fails to result in change on the ground or for the people who took the case. The shameful failure of the Irish government to as yet change the law as a result of the Lydia Foy case is one example. A case that CAJ was involved in at European Court of Human Rights also comes to mind. In 2001, the Court found that the UK government had failed to provide adequate independent investigations into a number of killings by the security forces. At the time, the families were delighted with the judgement. However, 12 years on arguably,

they have not had the adequate investigation they deserve. Undoubtedly, the judgement has led to significant changes, but others have been the beneficiaries and the full outworkings of the judgement have yet to materialise.

In other cases of course, the reverse can be true where forces work to limit the impact of the outcome to the person who took the case and to constrain its wider influence. The trend towards confidentiality provisions in settlements tends to reinforce that possibility.

These examples illustrate that litigation is not always a quick fix. You need to be in it for the long haul. We are fortunate in Ireland that FLAC has been and continues to be in it for the long haul. It's probably best known for its Trojan work to provide advice, representation and, where necessary, to litigate on behalf of individuals. However, it has also been doing important advocacy work based on what it sees every day is happening to people. Not just asserting rights in the court room and tribunals but in the back halls, on the airways and in the Dail.

I believe this witness and advocacy has been particularly important given the truly dreadful impact of the financial crisis. What immediately springs to mind is the very effective public advocacy done by Noeline and others on the issue of mortgage arrears. I believe FLAC deserves a lot of credit for its response to this devastating problem.

However, FLAC has not settled for what it can do by itself; it has also sought and succeeded in working closely with the other law centres, with members of the legal profession and with NGOs interested in changing the law. And through the Public Interest Law Alliance (PILA), many more lawyers and firms are getting involved in pro bono practice.

Atlantic supports similar efforts in Northern Ireland with the PILS (Public Interest Litigation Support) Project and an organisation called Pro Bono in South Africa.

We are encouraged by the good working relationship that has been built up by PILA in the Republic and the PILS Project. There is much that can be shared between the law centres, legal practitioners and NGOs in the two jurisdictions on this island. We have also been able to facilitate exchange and learning between those we support in South Africa, Ireland and the United States. In our final years, we hope to support more of this knowledge exchange and networking type work.

As Noeline said in a recent *Irish Times* article, PILA and these other initiatives act as a broker or matchmaker to ensure that those in need can access the expertise they require to advance their case. It's very encouraging indeed to see private sector law firms and lots of individual practitioners doing their bit. I would encourage more to step up to the plate. Those who have done so already should be congratulated for their far-sightedness.

Aside from being the right thing to do, it is a rewarding and valuable experience for all involved and also helps to rehabilitate the image of the lawyer in modern Ireland. This work offers not just the potential to be involved in individual cases, but to also deploy your expertise in the drafting of legislation. What better way to advance your agenda than to be able to produce specific and credible legislative proposals, which hard-pressed politicians can run with.

There are a number of impressive examples in Ireland where this kind of pro bono legislative drafting has been crucial to securing workable and significant change.

In my own work at CAJ to influence the contents of the Good Friday Agreement and the Northern Ireland Act, we quickly learnt that short, carefully crafted amendments and specific legislative proposals were sometimes more important than long, well-argued research reports.

FLAC and PILA have also worked in other ways to increase access and tackle the high fees and expense associated with litigation, which seems all the more unseemly in the context of the recession. Greater use of protective cost orders, as is now the case in the United Kingdom, would be a huge step forward and one which should be embraced in the Republic. Similarly, progress could be enhanced if it were easier to mount class actions in this jurisdiction.

The upcoming Legal Services legislation offers a good opportunity to advance these reforms. I would urge all of you to do what you can to influence the shape of that important legislation.

It will also be important to study the long-awaited legislation to merge the Human Rights Commission and the Equality Commission. I agree with the Minister's recent comment that it is of vital importance that the new body has the resources required to properly fulfil its wide-ranging functions. These functions are more important than ever in times of financial distress.

I also hope that the government moves quickly to appoint a Chief Commissioner and that it follows Emily O'Reilly's advice to make the appointment on a wholly independent and transparent manner.

I want to conclude by telling you a bit about a talk I had the good fortune to be able to listen to a few weeks ago. It was given by Bryan Stevenson, probably one of the brightest and most able civil liberties lawyers in the United States.

Bryan is a death row and racial justice litigator. He argues that the opposite of poverty is not wealth but rather justice. In his speech, Bryan also had a list of things that he believes are required if you want to secure justice inside an imperfect justice system.

At the top of Bryan's list is the need to be proximate or close to the people who need the change. To be effective, you must know and understand what people are going through. It's no use staying detached.

Secondly, he argued that we need to change the narrative and/or change the dominant view of issues or problems. People have to understand the human story rather than the stereotype. Unless we change the frame through which our issues are viewed, we will have limited impact.

Thirdly, he said we need to be hopeful that change is possible. We mustn't write people off. Everybody can have a change of heart or mind and can themselves become an agent of change.

Finally, we need to be willing to be uncomfortable or unpopular ourselves and to make others uncomfortable. This is maybe the hardest thing of all because we all crave being comfortable and accepted.

On reflection, I think Dave Ellis exemplified these four points. I think they are also at the heart of how FLAC and its colleagues in the community and public interest law groups do their business.