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CONSULTATION PAPER

ON

CONTEMPT OF COURT

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CONTENTS PAGES

CHAPTER 1: INTRODUCTION 1- 2

CHAPTER 2: CONTEMPT IN THE FACE OF THE COURT 3-35

Introduction 3

Types of Contempt in the Face of the Court 4
(1) Assaults and Insults 4
(2) Interruption of Court Proceedings 6
(3) Tape Recorders 8
(4) Photographs, Television and Video recordings 9
(5) Non-attendance at Court 10

Mens rea 11

Contempt by Particular Persons 11
(a) Lawyers 11
(b) Witnesses 14
(c) Parties 22
(d) Jurors 23

Jurisdiction 24
Opportunity for Defence 26
Unsatisfactory Answering in Bankruptcy Proceedings 32

CHAPTER 3: SCANDALISING 36-70

Introduction 36
Offence not Obsolete 37
Risk of Prejudice to Pending Proceedings not Essential 39

The *Actus Reus* 40
(1) Who can be scandalised? 40
(a) Courts 40
(b) Judges' conduct in their official capacity 42

CONTENTS PAGES

(2) The risk of prejudice to the administration of justice 43
(3) Mode of publication 44

Types of Scandalising 45
(i) Scurrilous Abuse 46
(ii) Imputation of Corruption, Bias or Impropriety 50

The Proper Limits of Criticism 57
(i) The notion of legitimate criticism 57
(ii) The *mens rea* element 60
(iii) Justification 63
(iv) Public benefit 66
(v) Fair comment 69

CHAPTER 4: THE SUB JUDICE RULE **71-116**

Introduction 71
The Prejudgment Test 73

CRIMINAL PROCEEDINGS 74
(a) Encouraging partiality 74
(b) Accused's criminal record or bad character 74
(c) Prejudicing jury in favour of accused 76
(d) Deterring witnesses from coming forward 81
(e) Premature publication of evidence 81
(f) Publication of pre-trial interviews 85
(g) Publication of photographs 85

(h) Temporal Limitations on the Scope of the *Sub Judice* Rule 86
    (1) When does the rule first apply? 86
    (2) The position between conviction and sentence 87
    (3) The position after a jury disagreement 87
    (4) The position pending appeal against conviction or sentence 93

(i) Defences 100
    (1) Public Interest 100
    (2) Discussion of Public Affairs 101

CIVIL PROCEEDINGS 101
(a) Introduction 101
(b) Disparaging one or more of the parties 104
(c) Prejudicing merits of the action 108
(d) Publication of information as to trial strategy 109
(e) Proximity of publication to time of trial of action 109
(f) Gagging writs 110
(g) Cases where there is no jury 115
(h) Pressures on witnesses and others 115
(i) Publications pending appeal 116

CHAPTER 5: ACTS, OTHER THAN PUBLICATION, WHICH INTERFERE WITH THE COURSE OF JUSTICE 117-147

1. Categories of Persons Interference with Whom Constitutes Contempt 117

(A) Witnesses 117
(1) Types of interference 117
(2) *Mens rea* 118
(3) Punishment of witnesses 119
(a) Mixed motives 119
(b) Publicity of punishment 120
(c) Compensation for punishment 121

(B) Jurors 126
(C) Judges 127
(D) Officers of the Court 128
(E) Parties to an Action 130

(F) Wards of Court 132
(1) Marrying a ward 132
(2) Wrongfully removing a ward from the jurisdiction 133

2. General Principles 134
The Scope of the *Actus Reus* 134
3. Abuse of the Court's Process 138
4. Other Examples 138

CHAPTER 6: CIVIL CONTEMPT **148-180**

Disobedience of Court Orders 148
(A) Disobedience of Orders requiring certain acts to be done 148
(B) Disobedience of Orders prohibiting certain conduct 150

(C) Scope of Order, Notice, Proof of Breach and Related Matters 151
(i) Strict compliance necessary 151
(ii) No distinction between interlocutory and final injunctions 151
(iii) Terms of injunction must be clear and unambiguous 152
(iv) Proper notice to defendant essential 152
(v) Proof of breach 153
(vi) What conduct amounts to a breach? 153

(D) *Mens Rea* 156
(i) In general 156
(ii) Of companies 157

(E) Apology 158
(F) Third parties 159
(G) Courts' discretion as to whether or not to order committal or attachment 161
(H) The Breach of an undertaking 162

(I) Execution: General Principles 162
(i) Sequestration 163
(ii) Attachment and committal 166
(iii) Disobeying order to pay money into court 168
(iv) Disobeying a judgment or order for possession of land or delivery of goods within specified time 169
(v) Disobedience of orders for interrogatories, or for discovery, or inspection of documents 170

CONTENTS PAGES

(vi) Disobeying orders of *habeas corpus* or related orders 171
(vii) Enforcement of the payment of a sum of money 171

The Distinction between Civil and Criminal Contempt 175

CHAPTER 7: JURISDICTION 181-189

CHAPTER 8: THE RESPECTIVE ROLES OF JUDGE AND JURY 190-209

Precursors to *Walsh* 190
The *Walsh* Decision 200

CHAPTER 9: CONTEMPT IN RELATION TO TRIBUNALS 210-224

CHAPTER 10: REFORM PROPOSALS IN RELATION TO CONTEMPT IN THE FACE OF THE COURT 225-255

Defence of the *Status Quo* 225
(1) The adequacy of the present operation of the law 222
(2) The need for flexibility of definition 226
(3) The inherent jurisdiction of Superior Courts 227

The Case for Abolition 229
(1) Lack of clarity 229
(2) Confusion of goals 230
(3) Breach of basic principles of consitutional and natural justice 232
(4) Adequacy of other legal responses 233
Our Tentative Conclusion 234

CONTENTS	PAGES

Possible Modifications if *In Facie* Contempt is Retained 236
(1) Excluding conduct which may be dealt with by other criminal proceedings 237
(2) Excluding insulting, non-disruptive conduct from the scope of *in facie* contempt 237

(3) Abolishing or modifying the summary procedure 238
(a) The Necessity Rationale 238
(b) The Overtness Rationale 240

Our Tentative Conclusions 242

(4) Limiting the physical scope of *in facie* contempt 242
(a) A geographical limit? 242
(b) A requirement that the judge or judges have actually witnessed the conduct in question? 244

(5) Making absence from court no longer constitute an *in facie* contempt 244

Journalistic Privilege 245
Sound Recorders 247

The case in Favour of a Wide-Ranging Entitlement to Make Sound Recordings 247
(1) Open justice 247
(2) The role of the media 248

The case Against a Wide-Ranging Entitlement to Make Sound Recordings 249
(1) Dangers relating to coaching of witnesses 249
(2) Disturbing witnesses 250
(3) The risk of distraction to court proceedings 250
(4) Privacy considerations 250

Eligibility to make a Sound Recording 251
(i) Persons having no connection with the proceedings 251
(ii) The media 252
(iii) Researchers 252

(iv) Authors 253
(v) The parties and their legal representatives 253
Our Tentative Conclusions 254
Television and video recordings 254

CHAPTER 11: REFORM PROPOSALS IN RELATION TO SCANDALISING 256-286

The Case in Favour of the *Status Quo* 256
(1) Protecting the administration of justice and the rule of law 256
(2) Preserving public confidence in the administration of justice 257
(3) Deterring future attacks by early preventive action 259

The Case against Contempt Proceedings for Scandalising 259
(1) Scandalising and Freedom of Speech 260
(a) The position under the Constitution 260
(b) The position under the European Convention 261

(2) Imprecision of Definition 264
(3) The *Mens Rea* Restrictions 266
(4) Discriminatory Application 270
(5) Civil and Criminal Alternatives to Scandalising 270

Our Tentative Conclusions as to Retention or Abolition of Scandalising 274

How the Law Should be Changed 274
(1) Introduction 274
(2) Comparative Aspects 274

(3) Policy Analysis 278
(a) Types of Conduct which should Constitute Scandalising 278
(i) Imputing corrupt conduct to a judge or court 278

CONTENTS PAGES

(ii) False or misleading accounts of legal proceedings 278
(iii) Scurrilous abuse 279

(b) The Necessary Degree of Danger to the Administration of Justice 279
(c) The Requisite *Mens Rea* 280
(d) The Necessary Mode of Communication 281
(e) Truth and the Public Interest as Defences 281
(f) Liability of Editors, Media Proprietors and Others 286

CHAPTER 12: REFORM PROPOSALS IN RELATION TO THE SUB JUDICE RULE 287-350

Arguments Against the Retention of the Sub Judice Rule 288
(1) The Constitutional Argument 288
(2) The Scientific Argument 292
(3) Alternative Remedies 295
(a) Change of venue 295
(b) Postponement and adjournment 295
(c) *Voir Dire* 296
(d) Discharge 298
Our Tentative Conclusion 303

The Extent of Publication 304
Prejudice 305
Our Tentative Conclusions 309
Risk to the Administration of Justice in general rather than in respect of a Specific Case 310
Our Tentative Conclusion 313

Temporal Limits 313
(1) Should there by any temporal limits? 314
(2) Should the test be that of the imminence of proceedings? 314
(3) Should the test be based on currency of proceedings? 317
Active Proceedings 317
Our Tentative Conclusions 320

CONTENTS PAGES

Mens Rea 321
(1) A test based on intention or recklessness 322
(2) A strict liability test 324
(3) A negligence-based test 325
Our Tentative Conclusions 329

Distributors 329
The Public Interest 330
Our Tentative Conclusions 335
Immunity for Reporting Parliamentary Proceedings? 335

Persons Legally Responsible for Publication 336
(1) Imposing liability on the company alone 336
(2) Making the editor liable in all cases 337
(3) Making the reporter liable 338
Our Tentative Conclusions 338

Authorship 339
Control 339
Proprietorship 339
Payments to Witnesses 340
(i) Leaving the present law of contempt unchanged 341
(ii) Clarifying, and perhaps strengthening the present law of contempt 341
(iii) Creating a new offence, in replacement of, or as an adjunct to, the law of contempt 342
Our Tentative Conclusion 342

Publicity of Judicial Proceedings 343
(1) Complete removal of the present restrictions 343
(a) Constitutional necessity 343
(b) Public information and public disquiet 344
(c) Stimulating further evidence 345

(2) A discretionary power to restrict publication of particular matters 346
(3) Restriction by legislation of publication of specific categories of evidence 346
(4) Leaving the present restrictions unchanged 347
Our Tentative Conclusion 347

CONTENTS PAGES

Suppression and Postponement of Reporting 347
Our Tentative Conclusions 350

CHAPTER 13: OTHER ACTS INTERFERING WITH THE ADMINISTRATION OF JUSTICE 351-374

Has contempt any useful role in this area? 351
Changes in Existing Law 356

(1) What level of interference with the administration of justice should be required? 357
(2) Should the contempt jurisdiction exclude cases of interference after legal proceedings have terminated? 357
(3) Should the contempt jurisdiction exclude cases of interference before legal proceedings have begun? 357
(4) The requisite mental component 359
(5) Reprisals against parties 360
(6) Monetary compensation 361

Pressures on Parties in Industrial Relations Context 363
Jury Secrecy 364

The case in favour of jury secrecy 364
(1) Jurors' need for security and privacy 364
(2) The desirability of finality 365
(3) Preserving public confidence in the jury system 365
(4) Preserving the jury's "dispensing power" 366

The case against jury secrecy 368
(1) Rectification of miscarriages of justice 368
(2) Lack of detrimental effect from disclosure 369
(3) Restricting valuable research on the operation of the jury 369
Our Tentative Conclusions 369

(1) No absolute rule of secrecy 370
(i) Offences committed in the jury-room 370

	(ii)	Miscarriages of justice	370
	(iii)	Jury research	371
(2)	Protection of jury secrecy by means other than contempt proceedings		371
(3)	Degrees of secrecy in specific contexts		372
(4)	Disclosure and publication		373
(5)	Temporal limits on disclosure		373

CHAPTER 14: REFORM PROPOSALS IN RELATION TO CIVIL CONTEMPT **375-412**

Rationales for Civil Contempt 375
(1) Coercion 375
(2) Punishment 378

Sanctions for civil contempt 380
A. Imprisonment 380
(1) Abolition 380
(2) Should Imprisonment Continue to be Open-Ended? 381
(a) How best to achieve the coercive goal? 382
(b) How can the court's standing be best protected? 382
(c) Justice for the contemnor 384
Our Tentative Conclusions 385

B. Fines 387

Mens rea 388
Defence of reasonable excuse 389
Waiver and discontinuance 389
The case for abolition 390
The case in favour of the *status quo* 390
Our Tentative Conclusions 392
Contempt in Relation to Family Litigation 392
Should Contempt Proceedings in Family Litigation be Abolished? 394
The Australian Compromise Proposal 396
Enforcement of Maintenance Obligations 399

The Case in Favour of Retaining Power to Imprison Deliberate Maintenance Defaulters 400
(1) The specially damaging effect of maintenance default 400
(2) The moral responsibility of marriage and parenthood 400
(3) Efficacy of imprisonment 400
(4) The social interest 403

The case against imprisonment 403
(1) Cost to the State 403
(2) Counter-productive solution 403
(3) Availability of other more effective remedies 403
(4) Casting the net toó widely 405
(5) The psychological dimension 405
(6) Incentive to flee the jurisdiction 406
Our Tentative Conclusions 408

"Trading-off" Rights Against Contempt 408
Our Tentative Conclusion 411

The Civil Law/Criminal Law Overlap 411

CHAPTER 15: PROPOSALS IN RELATION TO JURISDICTION **413-416**

(1) Conferring a full contempt jurisdiction on the Circuit Court and District Court 413
(2) Letting the High Court exercise a superintendence over the Circuit Court and District Court 414
(3) Restricting criminal contempt proceedings to indictments with a jury, save for minor offences 414
Our Tentative Conclusions 415

Civil Contempt 415
Appeals 416

CONTENTS PAGES

CHAPTER 16: REFORM PROPOSALS IN RELATION TO THE RESPECTIVE ROLES OF JUDGE AND JURY **417-419**

Our Tentative Conclusions 419

CHAPTER 17: REFORM PROPOSALS IN RESPECT OF CONTEMPT IN RELATION TO TRIBUNALS **420-431**

1. Should "Deemed Contempt" Provisions be Retained? 421
2. Scandalising 423
3. *In facie* contempt 424
4. A *sub judice* parallel? 427
5. Interferences (other than by publication) with the administration or effectiveness of a tribunal 430

CHAPTER 18: SUMMARY OF RECOMMENDATIONS **432-441**

BIBLIOGRAPHY **442-443**

LIST OF COMMISSION'S PUBLICATIONS **444-447**

CHAPTER 1: INTRODUCTION

In January 1989, the Attorney General referred to us the law of contempt of court for our examination with a view to making recommendations for reform. The subject is one of considerable complexity, which traces its origins back several centuries[1]; it is also of major contemporary significance, since it sets limits for the freedom of comment on the administration of justice, as well as controlling the information and commentary that may be made about current legal proceedings.

Contempt of court may be *criminal* or *civil*. Criminal contempt includes such matters as contempt in the face of the court (*in facie curiae*), scandalising, breaches of the *sub judice* rule and other interferences with the administration of justice, such as threatening a witness. Civil contempt consists of defiance of a court order, whether by positive conduct or by the neglect or refusal to obey an injunction. The Supreme Court has also recognised[2] the constitutionally inspired notion of "contempt of the Courts", which as yet awaits judicial development.

At the outset of our consideration of the subject, it is interesting to note that civil law systems have no concept of contempt of court akin to that prevailing in common law systems. Of course, certain modes of misconduct which are here punished as criminal contempt of court also amount to transgressions of the criminal law in civil law systems, but it remains true that "a broad-ranging principle to the effect that any significant interference with the administration of justice is punishable under a broad doctrine such as contempt is not to be found in the civil law".[3] In recent years the growth in civil law systems of civil fines, payable to the plaintiff or the State, reflects similar developments in

1 See *Fox, passim, Borrie & Lowe*, ch 1, *Miller*, ch1.

2 Cf *The State (Quinn) v Ryan* [1965] IR 70 (Sup Ct). See *Kelly*, 252-253.

3 Law Reform Commission of Australia's *Report on Contempt of Court*, para 22 (1987).

common law jurisdictions under the rubric of contempt.[4]

The law on contempt of court has been the subject of examination in several jurisdictions over the past couple of decades. In our examination and analysis of the issues we have greatly benefitted from these studies: our debt to their authors will be obvious from our repeated reference to their works and discussion of their proposals.

In this Consultation Paper, we examine the present law on contempt of court and make tentative recommendations for its reform. Chapters 1 to 9 inclusive set out the present law in detail and Chapters 10 to 16 inclusive set out our provisional proposals for reform. A summary of the recommendations will be found in Chapter 18.

We emphasise that the Paper does not embody the Commission's final proposals to the Attorney General for reform of the existing law. The object of the Paper is rather to stimulate reaction among interested sections of the public to the Commission's initial and tentative conclusions. When these reactions have been carefully assessed by the Commission, they will be in a position to present their final Report and proposals to the Attorney General. **So that the Commission's final Report may be available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission not later than the 4th September, 1991.**

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4 *Id.* Cf *NUM v Larkins*, unreported, High Ct, Barrington, J, 18 June 1985.

CHAPTER 2: CONTEMPT IN THE FACE OF THE COURT

Introduction
In *Re Rea (No. 2)*,[1] May, CJ said:

> "It is plain that no tribunal could be maintained with order and decency unless the presiding Judge had the power of dealing with the suppressing of contempts committed in open Court. It is for the sake of the administration of justice, and in order to maintain the decency and order of judicial proceedings, that this extensive and summary power is confided to a Judge."

Echoing these remarks, in *Morris v The Crown Office*,[2] Lord Denning, MR said:

> "The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power - a power instantly to imprison a person without trial - but it is a necessary power."

---

1 4 LR (Ir) 345, at 347 (QB Div, May, CJ, O'Brien and Fitzgerald JJ, 1879). See also *French v French*, 1 Hogan 138, at 139 (*per* McMahon, MR, 1824):

> ".... [A] tribunal administering laws, without authority to protect its proceedings from outrage or disturbance, presents to the mind the idea of an institution, which must be impotent, dependent and frequently useless."

2 [1970] 1 All ER 1079, at 1081 (CA).

The courts have stressed that the summary power of punishing for contempt *in facie curiae* should be used "sparingly and only in serious cases".[3] But this does not mean that the seriousness of the offending act should be judged by reference exclusively to the extent to which it disrupts the business of the court. An act in court which causes little or no disruption but which tends to interfere with the administration of justice in general may be penalised as *in facie* contempt.[4]

Types of Contempt in the Face of the Court

Contempt *in facie curiae* consists of conduct so direct and immediate as to be deemed to be "in the personal knowledge of the court".[5] The courts have dealt with a wide range of conduct amounting to contempt of this nature. Several different types of case may be considered in turn.

(1) *Assaults and Insults*

To assault a judge or other judicial officer while carrying out his or her official functions in court "is an obvious and serious contempt in the face of the court".[6] The courts have for centuries taken this view,[7] and even today penalties for such misconduct can be severe.[8]

Moreover, to assault or threaten any other person in court during court proceedings[9] or, it seems, when going to or from the proceedings,[10] is also a

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3 *Parashuram Detaram Shamsdani v King-Emperor*, [1945] AC 264, at 270 (PC).

4 See *Ex parte Tuckerman; Re Nash*, [1970] 3 NSWR 23, at 27:

> "The expression 'interfere with the course of justice' is not confined to a physical disturbance of particular proceedings in a court which prevents the court from attending to its business according to law; it comprehends as well an interference with the authority of the courts in the sense that there may be a detraction from the influence of judicial decisions and an impairment of confidence and respect in the courts and their judgments."

See further Chesterman, *Improper Behaviour in Court*, para 27 (1984).

5 *The State (DPP) v Walsh*, [1981] IR 412, at 432 (Sup Ct, *per* Henchy J).

6 *Halsbury, op cit*, para 6.

7 See the famous decision of *Anon*, 2 Dyer 1886n, 73 ER 416 (1631).

8 See *Miller*, 104-105.

9 *Mitchell v Smyth*, [1894] 2 IR 351 (QB Div, 1893) (threat made against constable instrumental in prosecution by person convicted of trivial offence).

contempt in the face of the court.[11]

Thus, where a party in litigation said to a counsel, in the public waiting area out of court, "Don't let me see you in the street", this was held to constitute contempt.[12] Similarly, in the New South Wales case of *In re Goldman*,[13] a disgruntled litigant, descending in a lift from the court with an opposing litigant, was guilty of contempt in saying "You know what's going to happen

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10 The matter was considered by Lord Esher, MR, in *Re Johnson*, 20 QBD 68 (1887), where abuse and threats by a solicitor to an opposing solicitor took place on the way along the passage the from judge's chambers, after an application had been made there. The Master of the Rolls stated (at 74):

> "The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of those duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice."

He also stated (at 73):

> "It may be that I have too much restricted the doctrine on the subject by suggesting that there would be a limit of time or space with regard to the question whether such conduct amounted to a contempt. It may be that there would be no such limit of time and space, provided the acts done or expressions used could be considered an interference with the course of justice. Distance in point of time or space, however, would, I think, at any rate be a matter to be taken into consideration in determining whether there had been an interference with the course of justice. It is not, however, necessary to consider whether there would be any such limitations here. I pass by altogether the question where and in what part of the building the appellant's misconduct took place; it is obvious that it took place immediately after proceedings before a judge in chambers, and in consequence of what had taken place upon those proceedings, and that the appellant intended in what he did to cast contumely and insult on such proceedings."

In *In re Goldman*, [1968] 3 NSWR 325, at 328 (Sup Ct, NSW, Ct App), Sugerman, A-P also left open the question whether there should be any limitation "in point of time or place".

In *Registrar, Court of Appeal v Collins*, [1982] 1 NSWLR 682, at 708 (CA), Moffitt, P said:

> "Once it is accepted that the power may extend to conduct outside the court room, there is no logic or basis in principle in prescribing a boundary within which the conduct must fall, such as within the limits of the precincts of the court, whatever that may mean in a modern complex of courts of different levels or in respect of courts located ... within various highrise buildings. There is no logic in limiting conduct the subject of the power to what is seen or heard by court officials. These factors when they exist may make it more appropriate to exercise the power.

See also *Moore v Clerk of Assize, Bristol*, [1972] 1 All ER 58, as explained by Lord Denning, MR, in *Balogh v St Albans Crown Court*, [1975] QB 73, at 84.

11 *Halsbury*, op cit, para 6, *Giscombe*, 79 Cr App Rep 79 (1984), *Craddock*, The Times, 18 March 1875, cited in *Oswald*, 45 and *Miller*, 105.

12 *Brown v Putnam*, 6 ALR 307 (Sup Ct, NSW, Ct App, 1975).

13 *In re Goldman*, [1968] 3 NSW', 325 (Sup Ct NSW, Ct App, 1968).

to you, you bastard".

Insulting behaviour in the presence of a court when it is actually sitting amounts to contempt in the face of the court.[14]

The most frequent example is insulting behaviour directed to the judge or to a judicial officer.[15] Thus, for example, to insult the Bench,[16] to strip,[17] or even to whisper or light a cigarette[18] in the public gallery may constitute contempt.

Insults directed to persons other than the trial judge may, moreover, also constitute a contempt in the face of the court.[19] These others may include a member or members of the jury, counsel or a solicitor.[20]

(2) *Interruption of Court Proceedings*

A person who wilfully interrupts court proceedings, whether by words or other conduct, is guilty of contempt.[21]

In *Morris v The Crown Court*[22] a group of students from the University of Aberystwyth, by prearrangement, "invaded"[23] the High Court in London, where Lawton, J was hearing an important libel case:[24]

> "They strode into the well of the court. They flocked into the public gallery. They shouted slogans. They scattered pamphlets. They sang songs. They broke up the hearing. The judge had to adjourn. They

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14 *Halsbury, op cit,* para 6. See also *Miller*, 106-110.

15 *Halsbury, op cit,* para 6.

16 Cf, e.g, *Ex parte Tanner, MP, Judgments of the Superior Courts (Ireland),* p343 (Exch Div, 1889).

17 *Gohoho v Lintas Export Advertising Services, The Times*, 21 January 1964, cited by *Miller*, 108.

18 See *Miller,* 108, citing unreported decisions.

19 *Halsbury, op cit,* para 6.

20 *Id.*

21 *Id.* See also *In re Rea*, 2 LR Ir 429 (QB Div, 1878). Cf *The People (AG) v Jasinski*, Frewen 283 (CCA 11 March 1963). The accused, a native of Poland, who had lived and worked in Ireland for the previous fourteen years, and who (*per* Haugh J for the Court of Criminal Appeal, at 285) "had a good knowledge of English", created "an uproar" in Court during the address by counsel for the prosecution to the jury, by demanding that it be translated into Polish as it was being delivered. An interpreter had been available for most of the evidence as it was given. The trial judge ordered that accused be removed from Court to the cells, and the proceedings continued in his absence. Haugn J, on the appeal against conviction for two offences, stated that the Court of Criminal Appeal was of opinion that "the trial Judge, who was in control of the entire proceedings, was, by reason of the open contempt persisted in by this applicant, entitled, in the interests of justice, to act as he did": *id.*

22 [1970] 1 All ER 1079 (CA).

23 *Id*, at 1080 (*per* Lord Denning, MR).

24 *Broome v Cassell & Co.* (which was later appealed to the House of Lords on the question of exemplary damages).

were removed. Order was restored."[25]

The purpose of this interruption was to demonstrate in support of the preservation of the Welsh language.

Lord Denning, MR observed:

> "Here was a deliberate interference with the course of justice in a case which was no concern of theirs. It was necessary for the judge to show - and to show to all students everywhere - that this kind of thing cannot be tolerated. Let students demonstrate, if they please, for the causes in which they believe. Let them make their protests as they will. But they must do it by lawful means and not by unlawful. If they strike at the course of justice in this land - and I speak both for England and Wales - they strike at the roots of society itself, and they bring down that which protects them. It is only by the maintenance of law and order that they are privileged to be students and to study and live in peace. So let them support the law and not strike it down."[26]

And Salmon, LJ said:

> "Everyone has the right publicly to protest against anything which displeases him and publicly to proclaim his views, whatever they may be. It does not matter whether there is any reasonable basis for his protest or whether his views are sensible or silly. He can say or write or indeed sing what he likes when he likes and where he likes, providing that in doing so he does not infringe the rights of others.
>
> Every member of the public has an inalienable right that our courts shall be left free to administer justice without obstruction or interference from whatever quarter it may come. Take away that right and freedom of speech together with all the other freedoms would wither and die, for in the long run it is the courts of justice which are the last bastion of individual liberty. The appellants, rightly or wrongly, think that they have a grievance. They are undoubtedly entitled to protest about it, but certainly not in the fashion they have chosen. In an attempt, and a fairly successful attempt, to gain publicity for their cause, they have chosen to disrupt the business of the courts and have scornfully trampled on the rights which everyone has in the due administration of justice; and for this they have been very properly punished, so that it may be made plain to all that such conduct will not be tolerated - even by students. The archaic description of these proceedings as 'contempt of court' is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insult. Nothing could be

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25 [1970] 1 All ER, at 1080.
26 *Id*, at 1083.

further from the truth. No such protection is needed. The sole purpose of proceedings for contempt is to give our the courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented .... This power to commit for what is inappropriately called 'contempt of court' is *sui generis* and has from time immemorial reposed in the judge for the protection of the public."[27]

(3) *Tape Recorders*

No statute regulates in express terms the use of tape recorders (or other sound recorders) in court.[28] The matter appears to fall within the inherent jurisdiction of the court to regulate its own procedure. The precise rationale for, and consequent scope of, this jurisdiction in general is a matter of uncertainty, which impinges on the specific question of the use of tape recorders.[29] On one view, the purpose of the jurisdiction is to prevent any obstruction of, or interference with, the administration of justice.[30] As an American commentator stated of the experience in the United States,

> "inherent powers may be used only when reasonably necessary for the court to be able to function .... Courts may not exercise inherent powers merely because their use would be convenient or desirable."[31]

On another view, the exercise of the court's inherent power should not be confined to cases of strict necessity and is permissible whenever its purpose is to secure or promote convenience and expedition in the administration of

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27 *Id*, at 1086-1087.

28 In the Alberta decision of *R v Basker*, [1980] 4 WWR 202 the Court of Appeal of that Province held it perfectly proper for a trial judge to have queried counsel about whether he had used a tape recorder without having first obtained the Judge's permission. Morrow JA said (at 209 - 210):

> "I would observe from my own experience both as counsel and as judge, an experience which dates back some forty years, that in the province of Alberta the use of private recorders in a courtroom, including the Appeal Court, was never attempted except and only when permission had first been sought and granted. Members of the Alberta Bar have, in my experience, always recognised that it was the prerogative of the presiding judge or judges as to whether apparatus such as recorders were to be permitted or not. It is also my experience that, upon such request being given, the presiding judge usually gives permission. Indeed, while there may be special occasions where consent might not be forthcoming, I would rather expect that permission would be rarely refused. In this respect, therefore, I have no hesitation in stating that the court in the present appeal was quite within its authority to question counsel as to whether, in fact, he was or had been making use of a recorder."

29 See the Report on the subject published by the New South Wales Law Reform Commission in March 1984, paras 2.28 ff.

30 Cf Jacob, *The Inherent Jurisdiction of the Court*, 23 Current L Problems 23, at 32, and the New South Wales Report, para 2.31.

31 Baskin, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 Yale L J 342, at 351 (1977).

justice.[32] The difference of approach - or perhaps mere tendency - may be important in relation to the use of recorders in court. Is a judge entitled to prohibit their use in *all circumstances* or only in *particular cases*? It is clear that recordings are capable of being put to improper use in certain circumstances: they may, for example, interrupt the flow of proceedings, or intimidate a witness, or they may be re-played to coach a person who has yet to give evidence.

Of course in cases where there is a specific risk of any misuse of this type, a judge would be perfectly free to prohibit the use of a recorder; but it is not entirely beyond argument that a judge may invoke such hypothetical risks, so as to prohibit the use of recordings in all circumstances. One suspects that, if the issue were tested, an appellate court might well uphold the propriety of even an absolute prohibition on the basis that it is never possible to exclude these risks, even if there is no question about the integrity of the would-be user of the recorder, since there may be an unauthorised use of the recording by someone else. Whether such an *a priori* resolution of the issue would commend itself to the court, however, is impossible to predict.

So far as general principles are concerned, it is relevant, though not conclusive, that the right of persons in Court to take notes has been recognised,[33] and it may be argued that this represents a general entitlement to record the evidence. More broadly, on constitutional grounds, it may be contended that open justice would not be fully guaranteed if it is limited to what those who attend court can recall or record by taking notes. The reply to these arguments, no doubt, is that sound recordings are not the same as notes. A note-taker may be less obtrusive than a sound recorder; sound recorders can, moreover, be used far more effectively to coach witnesses than a mere transcript, however full. Whether this is a fully effective refutation, however, may be debated.

(4) *Photographs, Television and Video Recordings*

As in the case of sound recordings, there are no statutory provisions dealing with the taking of photographs, television or video recordings. The matter appears to be one governed by the inherent jurisdiction of the court on the same general principles as those relating to sound recordings. It is, however, generally accepted that photographs may not be taken in court, nor may the proceedings be televised or video recorded without permission.

The application of these principles may not necessarily result in a uniform

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32 Cf *O'Toole v Scott*, [1965] AC 939, at 959, and see the New South Wales Law Reform Commission's Report, paras 2.31-2.32.

33 Cf *Home Office v Harman*, [1982] 1 All ER 532, at 537 (HL (Eng), *per* Lord Diplock), *Lambert v Home*, [1914] 3 KB 86, at 90, *Collier v Hicks*, 2 B & Ald 663, 109 ER 1290, at 1292 (*per* Lord Tenterden CJ, 1831), and the New South Wales Law Reform Commission's Report, paras 2.15-2.16.

acceptance or rejection of both sound and television or video recordings. A court might well come to the conclusion that, in view of its impact, television or a video recording should never be permitted or permitted in only exceptional circumstances, while sound recording should be widely permitted. Certainly in a case where there is a risk of a recording's being used to coach a future witness, the potential for misuse of a television or a video recording would seem to be greater than with a sound recording. Moreover, the intimidatory effect on witnesses of a television camera is likely to be worse than that of a sound recorder. Further, the degree of interference with court proceedings which television involves would in many (though not all) cases be greater than that of sound recorders.

(5) *Non-Attendance at Court*

The non-attendance at court of a participant in legal proceedings has been held in some cases[34] to be capable of constituting contempt *in facie curiae.* From one standpoint this can be criticised since the absentee can be considered to have "d[one] nothing in the face of the court".[35] From another standpoint, non-attendance is capable of amounting to an insult to the court: the locus of the injury is the court itself.[36]

In *In re Kelly and Deighan,*[37] Costello J held that attempting to induce a witness not to attend court constituted *in facie* contempt. Whether the principle goes so far may be debated, though, of course, conduct of such a kind would be capable of constituting constructive contempt of court. Another possible rationale for characterising it as *in facie* contempt is that it interrupts the proceedings no less effectively than conduct within the four walls of the courthouse.

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34 Principally in the United States: see Anderson, *Comment, A Pragmatic Look at Criminal Contempt and the Trial Attorney*, 12 Baltimore L Rev 100, at 108-109 (1982), Kilgarlin & Ozmun, *Contempt of Court in Texas - What You Shouldn't Say to the Judge*, 38 Baylor L Rev 291, at 323 (1986). Also Canada: see *McKeown v R*, 16 DLR (3d) 390 (Sup Ct Can, 1971). Lord Denning MR's judgment in *Weston v Central Criminal Courts' Administrator* [1977] QB 32 (CA) lends some support for this approach. The differing approaches in the cases towards characterisation, the degree of punctiliousness required of lawyers and the question of *mens rea* present little prospect for easy rationalisation: see *Borrie & Lowe* 32-35, *Miller*, 112-113. In a Circuit Court case in October 1989, an essential witness, Patrick Noone, was sent to prison for receiving stolen goods. The newspaper report (Evening Press, 7 March 1990) states that when Mr Noone failed to appear, the jury were discharged and the accused set free. Mr Noone claimed that he had been intimidated. The remainder of Mr Noone's sentence was suspended by Judge Buchanan on 7 March 1990.

35 *Behn v The President and Members of the Court of Arbitration*, 32 WALR 28, at 30 (1929). See also Chesterman, *Improper Behaviour in Court*, para 26 (1984): "... it would appear that ... absence from the court is logically not contempt in its face ...."

36 One is reminded here of the problem of determining the *locus delicti* in conflicts cases: see *Binchy, (Conflicts)* 147-153, Fridman, 24 U Toronto LJ 247 (1974), Webb & North, 14 Int & Comp LQ 1314 (1965), *Grehan v Medical Incorporated* [1986] IR 528.

37 [1984] ILRM 424 (High Ct, Costello J, 1983).

Mens Rea
The authorities dealing with the question of *mens rea* in respect of *in facie* contempt[38] are relatively few in number and unconvincing in their analysis. Most of the decisions deal with *mens rea* in the context of failure by counsel or a solicitor to attend court.[39] While of course the question is of central importance in that context, it is an exceptional one, far from characteristic of *in facie* contempts in general. It therefore should not be looked on as a certain guide. Modern principles of criminal law suggest that intention or recklessness should be required. However, some other aspects of the law of contempt (such as scandalising and breach of the *sub judice* rule) do not recognise either of these elements. At all events, where statutory provisions govern the court's jurisdiction in respect of *in facie* contempt, the *mens rea* position is usually clarified. Thus section 16(1) of the *Petty Sessions (Ireland) 1851* requires that the insult to the Justice be "wilful".

Contempt by Particular Persons

(a) *Lawyers*[40]
Lawyers have to tread warily when representing their clients. They must not be intimidated or browbeaten by the judge and must present their client's case as strongly as justice and fortitude may require. In doing so they must not forget another cardinal virtue - prudence. They must seek to temper their presentation to achieve the goal of advocacy, which is to convince the listener.[41] But, more urgently, they must ensure that they do not fall foul of the law of *in facie* contempt.

The difficulties facing lawyers are encapsulated in the following prudent advice given by an American writer:

> "An analysis of the case law reveals several patterns of which the trial attorney should be aware. First, an attorney with a history or reputation for abusing the court's courtesy and patience will have a much more difficult burden in establishing his lack of intent. Second, an attorney may reasonably dispute the trial judge's rulings provided he does not persist to the extent that he creates an obstruction to the

38 See *Borrie & Lowe*, 53-54, *Miller*, 133-135.

39 Many of these authorities are reviewed in *R v Barker*, [1980] 4 WWR 202 (Alta CA), which, it should be noted, was not concerned with such "absentee".

40 See generally Butt, *Contempt of Court and the Legal Profession*, [1978] Crim L Rev 463, PJ B[utt], *Contempt of Court -Exent of Liability of Members of Legal Profession*, 52 Austr L J 151 (1978).

41 In some cases, of course, counsel will have his or her eye on the appeal, knowing that the case before the trial judge is doomed. He or she may wish to make arguments, not because he or she expects to convince the trial judge, but in order to ensure that the appellate court will hear them and not decline to do so on the ground that they should have been made at trial. Cf *Hynes-O'Sullivan v O'Driscoll*, [1988] IR 436, at 450 (Sup Ct, *per* Henchy J), *Cook v Walsh*, [1984] ILRM 208, at 221 (Sup Ct, *per* McCarthy J).

court's business. When an attorney believes the judge to be in error and the judge refuses to be swayed by his initial argument, the wiser course is to forego further argument and to take an exception for appeal. Third, the trial attorney should not allow himself to be drawn into a heated controversy with the trial judge. In the event this does occur, the attorney should take care not to make personally derogatory statements to the judge nor statements demeaning the judicial system. Finally, failure to comply with a direct court order will always involve a high risk of contempt."[42]

Internationally the courts[43] have sought to reassure counsel that they will tolerate some degree of discourtesy and conflict. However, as *Borrie & Lowe*[44] observe, "[t]he dividing line between 'merely offensive conduct'[45] and conduct amounting to contempt is not easy to draw"; and it is of course the court, and not the counsel, who draws it.

Violent acts by counsel are clearly beyond the pale,[46] as are threats of violence[47] or provocative language likely to lead to a brawl.[48] Acts of defiance of the authority of the court, such as burning a document in disobedience to the order of the court,[49] can clearly constitute contempt. Insults by counsel to members of the jury will not easily be tolerated[50]; however, insults directed at opposing counsel are more indulgently regarded.[51]

In *In re Rea*,[52] an Irish solicitor fell foul of the contempt law. The warrant of committal recited that he had "insist[ed] upon interrupting and insulting the Court by shouting at the Court in the most violent and unseemly manner, and, although frequently called upon by the Court, continued to do so in such a way that no member of the Court was even able to speak ...."[53]

In determining whether counsel has gone beyond the permissible range in his

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42 Anderson, *Comment: A Pragmatic Look at Criminal Contempt and the Trial Attorney*, 12 Baltimore L Rev 100, at 117 (1982).

43 Cf, e.g., *Parashuram Detaram Shamdasani v King-Emperor*, [1945] AC 264, at 270, *Izuora v R*, [1953] AC 327, at 336.

44 *Borrie & Lowe*, 27.

45 *Parashuram Detaram Shamdasani v King-Emperor*, [1945] AC, at 270.

46 Cf *Bryans v Faber and Faber*, [1979] CA Transcript 316, cited by *Borrie & Lowe*, 29.

47 *Parashuram Detaram Shamdasani v King-Emperor*, [1945] AC, at 269.

48 *Id.*

49 *Linwood v Andrews and Moore*, 58 LT 612 (1888).

50 *Ex p Pater*, 5 B & S 299 (1864).

51 *Parashuram Detaram Shamdasani v King-Emperor*, [1945] AC, at 269.

52 2 LR Ir 429 (QB Div, 1878). Mr Rea was, however, discharged since it was not clear that he had been given an opportunity to show why the order should not be made: *id*, at 433. Cf *In re Rea (No. 2)*, 4 LR Ir (QB Div, 1878), where Mr Rea was again committed; in a case where three persons had been charged with taking part in a riotous mob, Mr Rea, having intimated that he appeared as solicitor for one of the accused only, "persisted in interfering as between the Court and the other parties charged": *id*, at 346. This time his committal (for seven day's imprisonment) was not disturbed.

53 *Id.* at 430.

or her exchanges with the Bench, courts have regard, expressly[54] or implicitly, to the fact that provocation from the Bench may excuse counsel's conduct or at all events mitigate its seriousness.

False Representation as Lawyer

It is a contempt *in facie curiae* to pretend to be a barrister. In *In the Marriage of Slender (Mr H and DM)*,[55] Watson SJ of the Family Court of Australia so held when sentencing a man to imprisonment for ninety days (on condition that he be released after fourteen days on entering certain specified recognizances) for appearing for a woman with whom he was having a sexual relationship, on the representation to the Court that he was a barrister instructed by a named solicitor.

Watson J said:

> "The Family Court of Australia is a superior court of record. Its status and dignity are exemplified not only by the provisions of the *Family Law Act* but by the table of precedence for the Commonwealth of Australia. Whereas its vitality is seen in its capacity to be a 'helping court',[56] neither the nature of its jurisdiction nor its deliberate informality should be seen as a temptation to any person, professional or lay, to treat it as other than what it is -a specialised superior court of record.
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> "[The contemnor]'s offence is grave. He has impersonated a legal practitioner. Such personation does not have to be in relation to an identified person.[57] His relationship with Mrs Slender infringes any objectivity he may possess as an advocate.[58] Counsel before this Court will constantly find it much safer to take their instructions in chambers of conference rooms rather than in bed-chambers."[59]

This judgement does not resolve the question whether it is contempt to pretend to be a barrister in a court of less elevated status - in which, for example, professional legal representation (or more narrowly, representation by a barrister) is not the norm. It may be argued that the element of conscious deceit at the expense of the court renders this conduct a contempt. It also seems clear that pretending to be a solicitor may constitute contempt, in view of solicitors' relationship to the court and their role in the

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54 Cf, e.g., *R v Barker*, [1980] 4 WWR 202, at 222 (Alta CA, *per* Morrow, JA).

55 29 FLR 267 (Fam Ct of Austr, Watson, SJ, 1977).

56 Cf the Law Reform Commission of Australia's *Report on Contempt of Court*, para 623 (1987).

57 Citing *R v Allison*, 83 WN (Pt 1) (NSW) 220 (1965).

58 The contemnor, after his misrepresentation had been discovered, claimed, *inter alia*, to be a law graduate from an Australian University. Watson SJ did not reject that claim, though, in another matter, he implicitly cast doubt on what the contemnor had alleged.

59 29 FLR, at 269, certain citations omitted.

administration of justice.

(b) Witnesses

Halsbury[60] states:

> "A witness who, without lawful excuse,[61] refuses to be sworn or, being sworn, refuses, or who prevaricates, or who remains in court after the witnesses have been ordered out of court, is guilty of contempt in the face of the court and may be fined and imprisoned. In civil proceedings a witness may decline to answer on the ground that he may incriminate himself or on the grounds of privilege. If a witness declines to answer on the former ground, the court must be satisfied that there are reasonable grounds for him to apprehend charges."

While it is clear that the refusal by a witness to answer a question can constitute *in facie* contempt,[62] it is necessary to show that the question was *relevant*.[63] As O Dalaigh, CJ observed in *Keegan v de Burca*,[64] "[i]t is, in my opinion, correct to say that it is no offence to refuse to answer an irrelevant question".

An example of a witness's refusal to answer a question is *Re O'Kelly*.[65] There Kevin O'Kelly, a journalist employed by Radio Telefis Eireann, was called as a prosecution witness in the trial before the Special Criminal Court of Sean Mac Stiofain for membership of an illegal organisation. Mr O'Kelly gave evidence that he had had an interview with a man and had made a tape-recording of the interview which he had given to another employee without interference. He and the other employee identified this tape-recording in Court. Mr O'Kelly stated in evidence "that he was satisfied the remarks on it by Mr Sean Mac Stiofain were authentic". But, when asked the direct

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60 *Halsbury*, *op cit*, para 6 (footnote references omitted).

61 A witness who is not compellable need not give evidence: see the Law Reform Commission's *Report on Competence and Compellability of Spouses as Witnesses* (LRC 13-1985), *The People (DPP) v T*, CCA, 27 July 1988, R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 151-153 (1989), Jackson, *Evidence - Competence and Compellability of Spouses as Prosecution Witnesses*, 11 DULJ 149 (1989). Nor can a person reported to have made a speech which, if in fact spoken, might be made the subject of an indictment against him, and would also be contempt of court, be required by the Court by whom he is charged with such contempt to state on affidavit what portion of the report he admits to be correct and what portion he believes inaccurate: *In re Youghal Election Petition (Barry's Case)*, IR 3 CL 537 (CP, 1869). But a denial of a report which lacks specificity may result in the Court's inferring the truth of the report: see *AG v O'Ryan and Bond*, [1946] IR 70 (High Ct, 1945).

62 *O'Brennan v Tully*, 69 ILTR 115 (1933), *Keegan v de Burca*, [1973] IR 223 (1973), *Re O'Kelly*, 108 ILTR 97 (1974). See also the procedure under the *Bankruptcy Act 1988*, sections 24-25, replacing the *Irish Bankrupt and Insolvent Act 1857*, discussed in the final section of this chapter.

63 *O'Brennan v Tully*, *supra*, *Keegan v de Burca*, *supra*.

64 [1973] IR, at 229.

65 108 ILTR 97 (CCA, November 1972 and June, July 1974).

question who was the man he interviewed, he refused to answer on the grounds that he had a problem of conscience as a journalist. Later in his evidence he said that a question:

> "seems to be asking me to say that I was present physically when the statements were made by the man on the tape were in fact made and my position is that to disclose the circumstances under which the statements on the tape were made available to me would be a breach of confidence between me and a client which I feel, were I to breach that confidence, I would be not only putting my own exercise as a journalist into jeopardy, I would make it very difficult adequately for any journalist all over Ireland to promote the public good by fostering the free exchange of public opinion."

The Court sentenced him to three months imprisonment and refused leave to appeal. Mr O'Kelly applied to the Court of Criminal Appeal, under section 44(1) of the *Offences Against the State Act 1939*, for leave to appeal against the severity of the sentence. The Court granted this application and admitted Mr O'Kelly on bail pending the determination of his appeal to the Court. The process took nearly two years to complete.

Walsh J delivered the judgment of the Court. The central passage merits quotation in full:

> "The Court is aware that in general journalists claim the right to refuse to reveal confidences or disclose sources of confidential information. The Constitution, in Article 40 section 6, states that the State shall endeavour to ensure that the organs of public opinion, such as the radio and the press, while preserving their right of liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. Subject to these restrictions, a journalist has the right to publish news and that right carries with it, of course, as a corollary the right to gather news. No official or governmental approval or consent is required for the gathering of news or the publishing of news. It is also understandable that newsmen may require informants to gather news. It is also obvious that not every news gathering relationship from the journalist's point of view requires confidentiality. But even where it does journalists or reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence. The fact that a communication was made under terms of expressed confidence or implied confidence does not create a privilege against disclosure. So far as the administration of justice is concerned the public has a right to every man's evidence except for those persons protected by a constitutional or other established and recognised privilege. As was pointed out by the Supreme Court in *Murphy v The*

Dublin Corporation and the Minister for Local Government,[66] it would be impossible for the judicial power under the Constitution in the proper exercise of its functions to permit any other body or power to decide for it whether or not certain evidence would be disclosed or produced. In the last resort the decision lies with the courts so long as they have seisin of the case. The exercise of the judicial power carries with it the power to compel the attendance of witnesses and the production of evidence and, *a fortiori*, the answering of questions by witnesses. This is the ultimate safeguard of justice in the State, whether it be in pursuit of the guilty or the vindication of the innocent.

As was pointed out in that case, there may be occasions when different aspects of the public interest may require a resolution of a conflict of interests which may be involved in the disclosure or non-disclosure of evidence but if there be such a conflict then the sole power of resolving it resides in the courts. The judgment or the wishes of the witness shall not prevail. This is the law which governs claims for privilege made by the executive organs of State or by their officials or servants and journalists cannot claim any greater privilege.

The obligation of all citizens, including journalists, to give relevant testimony with respect to criminal conduct does not constitute a harassment of journalists or other newsmen. If a journalist were to be invited to witness the commission of a crime in his capacity as a journalist and received the invitation only because of that capacity, the courts could not for a moment entertain a claim that he should be privileged from giving evidence of what he had witnessed simply because of the fact that he was there as a journalist. In the present state of the criminal law, in such a case a journalist concealing such knowledge, like any other person in a similar position, might well find himself guilty of misprision of felony where a felony was concerned. In the present case Mr O'Kelly was in effect being asked to identify the speaker of words which were claimed to constitute an admission of membership of an illegal organisation and therefore the commission of an offence, namely, the offence of being such a member. Even if the question of confidence arose here, which it clearly did not because ... the identity of the person being interviewed was an essential part of the publication, the claim of privilege to refuse to answer the question was unsustainable in law although made in good faith. However, Mr O'Kelly persisted in his attitude when the Court had very patiently explained the position to him. He was, in the opinion of this Court, rightly convicted of contempt of court and in fact has not appealed against that

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66 [1972] IR 215.

conviction."[67]

This analysis clearly recognises that the courts have a free rein in compelling journalists to reveal their sources where it appears that to do so will constitute relevant evidence. The thrust of the passage appears to be that such evidence should normally be forthcoming. Certainly Walsh J gives no indication that the courts should, on any constitutional principle or social or moral norm, defer to journalistic "privilege" in every case where the evidence is not deemed necessary in the interests of justice in the particular circumstances of the case. In the light of this passage it would seem an uphill task for counsel on behalf of a journalist to argue that such restraint is inherent in, or at all events not inconsistent with, the strong preference for hearing such evidence which is discernible in the passage.[68]

But it should also be noted that Walsh J, does not say in express terms that the court is *obliged* to require disclosure in a case where the evidence, although relevant, is not necessary in the interests of justice. It may well be that the courts, although declining to recognise the existence of a "journalist privilege" as such, may at their discretion decline to require such disclosure where it cannot be so justified.

It is useful in this context to note the approach in England prior to statutory reform.[69] In the English Court of Appeal decision of *AG v Mulholland and Foster*,[70] Lord Denning MR and Donovan LJ differed among themselves as to the circumstances in which disclosure of journalistic sources might be ordered. Lord Denning MR favoured a *necessity-based* test. He said:

> "The journalist puts forward as his justification [for non-disclosure] the pursuit of truth. It is in the public interest, he says, that he should obtain information in confidence and publish it to the world at large, for, by so doing, he brings to the public notice that which they should know. He can expose wrongdoing and neglect of duty which would otherwise go unremedied. He cannot get this information, he says, unless he keeps the source of it secret. The mouths of his informants will be closed to him, if it is known that their identity will be disclosed. So he claims to be entitled to publish all his information without ever being under any obligation, even when directed by the court or a judge,

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67 108 ILTR, at 101. The Court quashed the sentence of imprisonment and substituted a fine of £250. It had regard to the fact that Mr O'Kelly, save in regard to the privilege he claimed, had sought to be as helpful as he could; it also bore in mind that his refusal to answer the question in issue, "while perhaps adding some little extra difficulty to the case", had not effectively impeded the presentation of the prosecution's case.

68 It is useful in this context to consider Walsh J's remarks in *Murphy v Dublin Corporation* [1972] IR 215, at 233-234 (Sup Ct).

69 Brought about by the *Contempt of Court Act 1981*, section 10, most recently, and thoroughly, interpreted by the House of Lords in *X Ltd v Morgan-Grampion (Publishers) Ltd*, [1990] 2 All ER 1.

70 [1963] 1 All ER 767 (CA).

to disclose whence he got it. It seems to me that the journalists put the matter much too high. The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered. A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests - to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done or, in the case of a tribunal such as this, in a proper investigation being made into these serious allegations. If the judge determines that the journalist must answer, then no privilege will avail him to refuse."[71]

Donovan LJ preferred a *less closely defined* test. He said:

"While the journalist has no privilege entitling him as of right to refuse to disclose the source, so, I think, the interrogator has no absolute right to require such disclosure. In the first place the question has to be relevant to be admissible at all; in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand - I prefer that expression to the term 'necessary'. Both these matters are for the consideration and, if need be, the decision of the judge. And, over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.

For these reasons, I think that it would be wrong to hold that a judge is tied hand and foot in such a case as the present and must always order an answer or punish a refusal to give the answer once it is shown that the question is technically admissible. Indeed, I understood the learned Attorney-General to concur in this view, namely, that the judge should always keep an ultimate discretion. This would apply not only in the case of journalists, but in other cases where information is given and received under the seal of confidence, for example, information given by a patient to his doctor and arising out of that relationship. In the present case, where the ultimate matter at stake is the safety of the community, I agree that no such consideration as I have mentioned, calling for the exercise of a discretion in favour of the appellants, arises.

71 *Id.* at 771.

...."[72]

In the later Court of Appeal decision of *Senior v Holdsworth*,[73] which was concerned with the question of the production of a document - here, a cinematic film - Lord Denning MR reiterated his necessity-based test. Orr LJ commented that he could:

> "not see why, as respects confidentiality of sources, the camera team should be in any more privileged position than a journalist, though I respectfully agree with the view of Donovan LJ in *AG v Mulholland*, that in this field there should be some degree of residual discretion in the court of trial or the tribunal."[74]

Scarman LJ referred to the American cases of *Baker v F&F Investments*[75] and *Democratic National Committee v McCord*,[76] which had been decided against the background of the First Amendment, a constitutional provision having, "as yet",[77] no parallel in Britain. He went on:

> "I do not think that English law has gone beyond the limited discretion recognised in *Mulholland's* case as available to protect certain professional confidences. The difference in emphasis between the law of the United States with its constitutional background and English law is well illustrated by contrasting the language of the judges. Both legal systems stress the importance of the fair administration of justice, but in *Baker's* case it was said that a question must be answered if it goes 'to the heart of the party's case', whereas in *Mulholland's* case Donovan LJ said an answer was required if it would serve a useful purpose in the proceedings. *Mulholland's* case reveals how far the courts can go - no further, in my judgment, than Donovan LJ's gloss on the words of Lord Denning MR. The general issue of public advantage and private right - i.e. the balancing of the public interest in protecting the right and duty of the press to seek out and declare the truth, against the public interest in maintaining the right of the litigant to the production in court of the evidence, oral and documentary, he believes necessary to his case - is not yet one which the law entrusts to the courts, and I am totally unable to construe the Independent Broadcasting Act 1973 as conferring on the Independent Broadcasting Authority a position of privilege denied so far to the other media of public communication."[78]

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72 *Id*, at 772-773. See also *AG v Clough* [1963] 1 QB 773 (QBD, Lord Parker, CJ). In both *Mulholland* and *Clough*, reference was made to Hanna J's decision in *O'Brennan v Tully*, *supra*.

73 [1975] 1 All ER 1009, at 1015 (CA).

74 *Id*, at 1017.

75 470 F 2d 770 (1972).

76 356 F Supp 1394 (1973).

77 [1975] 2 All ER, at 1021.

78 *Id*, at 1021-1022.

In *British Steel Corporation Granada Television*,[79] the House of Lords endorsed Lord Denning MR's approach in *Mulholland*. Lord Salmon, dissenting, interpreted *Mulholland* and *Clough* as cases in which disclosure was ordered because the security of the State required it.[80] He concluded his judgment as follows:[81]

> "The immunity of the press to reveal its sources of information save in exceptional circumstances is in the public interest, and has been so accepted by the courts for so long that I consider it is wrong now to sweep this immunity away. The press has been deprived of this immunity only twice, namely in the *Clough* and *Mulholland* cases. And the exceptional circumstances in each of those cases were that the security of the nation required that the press's source of information must be revealed. Certainly no such circumstances appear in the present case. I do not say that national security will necessarily always be the only special circumstances but it is the only one which has been effective until now. Moreover, there are no circumstances in this case which have ever before deprived or ever should deprive the press of its immunity against revealing its sources of information. The freedom of the press depends on this immunity. Were it to disappear so would the sources from which its information is obtained; and the public would be deprived of much of the information to which the public of a free nation is entitled."

Subsequent to these decisions, section 10 of the *Contempt of Court Act 1981* was enacted, providing that:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

As regards the punishment for refusal to answer a question, the Supreme Court in *Keegan v de Burca*,[82] by a majority,[83] held that only a fixed sentence was proper. They took this view on the basis that it was of the nature of criminal contempt (in contrast to civil contempt) that it should be punitive rather than coercive.[84] McLoughlin, J, dissenting on this matter, argued first that refusal to answer a question amounted to civil rather than criminal contempt. The judge's analysis on this aspect is less than fully clear or

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79 [1981] 1 All ER 417.

80 *Id*, at 472.

81 *Id*, at 475.

82 [1973] IR 223.

83 O Dalaigh, CJ and Walsh J, McLoughlin J dissenting.

84 The majority also derived support from *Ex parte Fernandez*, 10 CBN 53 (1861) and *dicta* in other English decisions.

convincing. He went on, however, to make a cogent argument in favour of including coercive orders within the repertoire of a judge in cases where a witness refuses to answer a question:

> "A contempt in the face of the court may be an act complete in itself, e.g., disorderly conduct in court, intimidating the jury or hurling insults at the judge; in other words it is an act which, as expressed in one of the cases cited to us, is one which 'having been done cannot be undone'. Such a contempt is capable of being measured and an appropriate sentence fixed for it. Refusal by a party sworn to answer a question is not an act complete in itself, it is an offence which continues so long as the refusal continues and cannot be appropriately measured while the offence continues; if dealt with by a fixed sentence, the sentence might be oppressive on the offender whereas a sentence which ends when the offence ceases and the contempt is purged cannot be oppressive. It is not the declaration of refusal to answer the question but the failure to comply with the requirement which is the gist of the offence. Further, in a case such as this the purpose of the sentence is not primarily punitive but coercive and more strictly in the interests of justice and the effective administration of justice. By this means the wrong can best be remedied and the plaintiffs' right of action duly litigated.
>
> "The Constitution confers on the High Court established under the Constitution full original jurisdiction in all matters civil and criminal. Inherent in this jurisdiction is the jurisdiction to deal with contempt of court; it is a necessary ancillary power to enable that court to exercise its jurisdiction by suppressing any interference with its exercise. To my mind the way the contempt was dealt with by the [trial Judge] accords with good reason and sound commonsense; to set aside the order made by him would, I think, be a derogation of the jurisdiction conferred on the High Court by the Constitution."[85]

As regards privileges, it may be mentioned that, as well as legal privilege,[86] sacerdotal privilege[87] is recognised by the Irish courts, in contrast to their English counterparts. In *Cook v Carroll*,[88] Gavan Duffy J adverted to this difference, noting that Wigmore had attributed the English approach to antipathy for the Catholic Church. Gavan Duffy thought that:

> "the rule was first adopted in England at a period when religious bias was inevitable and when public opinion would have resented the

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85 [1973] IR, at 236.

86 See R Byrne & W Binchy, *Annual Review of Irish Law, 1988*, 331-334 (1989).

87 *Cook v Carroll* [1945] IR 515 (High Ct, Gavan Duffy J), *ER v JR*; [1981] IR 125 (High Ct, Carroll, J). Cf *Forristal v Forristal and O'Connor*, 100 ILTR 182 (Circuit Ct, Judge Deale, 1966). See Yellin, *The History and Current Status of the Clergy - Penitent Privilege*, 23 Santa Clara L Rev 95 (1983).

88 [1945] IR, at 521-522.

> privilege as being mainly a concession to Popish priests. It is sometimes forgotten that the Catholic Emancipation Act, with its provisions for suppression and banishment, proclaimed the dislike of the Jesuits and members of other religious orders as late actually as the year 1829; a spirit of that sort is very powerful and dies hard."

(c) *Parties*

Parties to litigation may, of course, be guilty of contempt *in facie curiae*.[89] This conduct may be of several varieties.

Disrupting the court is a clear case.[90] A defendant may refuse to recognise the court, or refuse to plead, or to give evidence; he or she may sit when told to stand and stand when told to sit. He or she may make noise or abuse the court. He or she may insist on making political or other irrelevant statements at any time.

The court has several other strategies available to deal with disruption: it may, for example, impanel a jury to determine whether a defendant is mute of malice or by visitation of God, and may enter a plea of not guilty on the defendant's behalf[91]; it may warn the litigant,[92] adjourn the proceedings briefly,[93] clear the court (where spectators are the indirect source or object of a litigant's disruption), place a defendant under restraint,[94] or exclude the defendant from the court.[95]

These strategies are without prejudice to the possibility of contempt proceedings, where appropriate.[96]

Apart from disruption, during the proceedings a party - especially one who has just been convicted or who has had a judgment made against him - may make some form of disrespectful protest. As *Borrie & Lowe* observe,

> "[a]t this stage the potential interference with the administration of justice, at least in the particular case, is minimal and, especially where the outburst is spontaneous, judges should be, and usually are, tolerant

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89 See *Borrie & Lowe*, 51-53.

90 See Zellick, *The Criminal Trial and the Disruptive Defendant*, 43 Modern L Rev 121, 284 (1980) for a comprehensive analysis.

91 *Id*, at 126-127.

92 *Id*, at 127.

93 *Id*, at 127-128.

94 *Id*, at 133-135.

95 *Id*, at 284 ff. As to safeguards when the defendant is thus excluded, see *id*, at 289 ff. Irish cases where the defendant was excluded include the trial of Eddie Gallagher, in the Special Criminal Court where Mr Gallagher was removed from a preliminary hearing: *id*, at 122, citing The Times 30 March 1976, and *The People (AG) v Jasinski*, 1 Frewen 283 (CCA, 11 March 1963).

96 Zellick, *supra*, at 128-133.

and understanding."[97]

Nevertheless, in some such cases the party will be guilty of a clear contempt, as where he causes an injury or makes a threat,[98] or is otherwise seriously insulting to the court. In *Ex parte Tanner MP*,[99] during criminal proceedings before magistrates, the defendant said to the magistrates: "Do you think I would subject gentlemen of position to gratuitous insult, by placing them on the table before you. I am to be sentenced by you with the sentence in your pocket. Send me to gaol. Do your worst - I defy you". The Exchequer Division was of the view that, while "so much depends upon tone, gesture and manner", these words (unexplained in the judgments by any contextual background) were capable of amounting to contempt.

(d) *Jurors*

Misbehaviour by a juror in court may amount to contempt *in facie curiae*. Misconduct may be as trivial as eating sweetmeats[100]; inane - wearing a horror mask when about to be sworn[101]; neglectful - leaving court during the course of the proceedings without permission[102]; rash - arriving in court having drunk half a gallon of beer[103]; or reckless - deciding a verdict on the toss of a coin.[104]

The practical importance of contempt in relation to juror misconduct has diminished with the enactment of section 34 of the *Juries Act 1976*, which provides as follows:

> "(1) Any person who, having been duly summoned as a juror, fails without reasonable excuse to attend in compliance with the summons or to attend on any day when required by the court shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £50.
>
> (2) A juror who, having attended in pursuance of a summons, is not available when called upon to serve as a juror, or is unfit for service by reason of drink or drugs, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £50.

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97 *Borrie & Lowe*, 51.

98 Cf *Mitchell v Smyth* [1894] 2 IR 351 (QB Div, 1893).

99 *Judgments of the Supreme Court (Ireland)*, p343 (Exch 1889). See also *In re Gregg*, 3 ILR 316 (QB, 184).

100 *Weleden v Elkington*, 2 Plowd 516, at 518a (1578). This would scarcely be considered contempt today: *Borrie & Lowe*, 51 doubt that it would.

101 Daily Telegraph, 11 September 1979, cited by *Borrie & Lowe*, 51.

102 See *Oswald*, 69, *R v Rhode*, The Times 12 February 1894, went very far in fining a juror £20 for rushing out of court without permission when "seized with sickness" (*Borrie & Lowe*, 50).

103 *Borger, Re Reynolds*, 103 CCC 168 (1952).

104 *Langdell v Sutton*, Barnes 32, 94 ER 791 (1737).

(3) Except in a case to which section 14 applies,[105] a person shall not be guilty of an offence under subsection (1) in respect of failure to attend in compliance with a summons unless the summons was served at least fourteen days before the date specified therein for his first attendance."

Three other offences under the 1976 Act should also here be noted. Section 35 provides as follows:

"(1) If any person who has been fully summoned as a juror makes or causes or permits to be made on his behalf a false representation to the county registrar or any person acting on his behalf, or to a judge, with the intention of evading jury service, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £50.

(2) If any person makes or causes or permits to be made on behalf of another person duly summoned as a juror a false representation in order to enable that other person to evade jury service, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £50.

(3) If any person refuses without reasonable excuse to answer, or gives an answer known to him to be false in a material particular, or recklessly gives an answer that is false in a material particular, when questioned by a judge of a court for the purpose of determining whether that person is qualified to serve as a juror, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £50."

Section 36 makes it an offence, with a maximum fine of £50, to serve on a jury knowing that one is ineligible for service or disqualified.

Finally section 37 makes it an offence with the same maximum penalty to refuse to be sworn as a juror on being called to be so sworn.

Jurisdiction

The High Court and Supreme Court obviously have jurisdiction to deal with *in facie* contempts. The Circuit Court[106] and District Court[107] also have power to deal summarily with contempt in the face of the court. The District

105 Section 14 is concerned with the summoning of jurors to make up a deficiency. The urgency of the case explains why it is here excepted from the scope of section 34(3).

106 See J Deale, *Circuit Court Practice and Procedure in the Republic of Ireland*, para 14.22 (1989).

107 J Woods, *The District Court Practitioner - Remedies*, 52 (1987). The District Court may also bind for good behaviour in relation to contemptuous conduct in court: *Ex parte Tanner MP*, Judgments of the Superior Courts (Ireland) 343 (Ex Div, 1889).

Court's powers are derived from section 16(1) of the *Petty Sessions (Ireland) Act 1851* which provides that:

> "if any person shall wilfully insult any Justice or Justices so sitting in any such Court or place, or shall commit any other contempt of any such Court, it shall be lawful for such Justice of Justices by any verbal order either to direct such person to be removed from such court or place, or to be taken into custody, and at any time before the rising of such Court by warrant to commit such person to gaol for any period not exceeding seven days, or to fine such person in any sum not exceeding two pounds."

Where a contempt is committed in court, the District Justice has power to order the apprehension of the contemnor even after he has left the court, at all events where the order is substantially contemporaneous to the discovery of the departure. In *Mitchell v Smyth*,[108] in 1893, a person convicted of having a dog at large without being muzzled was fined two shillings and sixpence. While the next case was in progress, he made a threat against the constable who had been concerned in securing his conviction. He then left the court. The magistrate was immediately notified of what had taken place and he ordered the man's apprehension.

The Queen's Bench Division held that this was a proper exercise of power under section 9. Harrison J said:

> "That being an order which the magistrate had jurisdiction to make, I am of opinion that, as the constable contemporaneously and instantaneously proceeded to put into force that order, he was justified in acting as he did, and properly carried out an order properly made; and I am of opinion that it was not necessary that he should have completed the actual arrest strictly in the presence of the magistrate, and within the Court, if he did so as reasonably near to the moment when it was given as could be."[109]

Madden J concurred in this view of the section:

> "It was designed to preserve the decorum and order of proceedings in Court; and the powers which it gives were intended to apply to contempt of Court committed in court, and to be put into operation immediately or as soon as possible after such an occurrence. But here the offence was committed in court, and the order was made in the presence of the alleged offender, and immediately after the words were spoken, or as soon as the attention of the Justice was called to what had occurred."[110]

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108 [1894] 2 IR 351 (QB Div, 1893).
109 *Id*, at 358.
110 *Id*, at 362.

He rejected the argument that the mere fact that the order so made was carried out and consummated outside the Court was in itself sufficient to vitiate the whole proceeding. He was aware of no authority for such a proposition; and he noted that "such a construction would render the provisions of the section nugatory in a state of circumstances which can easily be suggested, and of which the present case affords an illustration".[111]

Gibson J sounded a warning note as to the limits of the principle which the Court was endorsing:

> ".... [W]here such an oral order as this is made, it should be made contemporaneously, and in the presence of the person sought to be affected thereby. Simultaneity is the essence of this section; and I should be sorry if it was thought that, after a man had gone away, a magistrate would be at liberty to send after him, and to proceed thereupon to adjudicate on an alleged contempt."[112]

Section 9 applies to contempts by lawyers as much as to those of litigants or other persons. In *In re Rea*,[113] the Queen's Bench Division rejected all arguments to the contrary. O'Brien J said:

> "No ground has been suggested for holding that the provisions of the statute respecting contempt of court do not apply to professional persons engaged in the case at hearing, as well as to others; the words of the statute are general, applying to acts done by 'any person', and there is nothing in the statute to restrict the application of those words."[114]

Opportunity for Defence

In the nature of things, many contempts *in facie curiae* will be manifest and present no problems as to proof. In come cases, however, doubts of this nature can arise. A shoe is thrown at a judge from the body of the court: there may be three or four likely suspects. How is the matter to be determined? And what opportunity for defending himself is to be afforded the primary suspect? Even in cases where there is no dispute as to *who* did the act occasioning the intervention of the judge, the question can arise as to whether the act constitutes a contempt. What opportunity for arguing that it is not should be given to the defendant?

In *Re Pollard*,[115] the Judicial Committee stated that:

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111 *Id*, at 363.
112 *Id*, at 360.
113 2 LR Ir 429 (QB Div, 1878).
114 *Id*, at 431. See also *In re Rea (No. 2)*, 4 LR Ir 345 (QB Div, 1879).
115 LR 2 PC 106 (1868).

"no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it be given to him."

In *In re Rea*,[116] in a case dealing with the *in facie* contempt jurisdiction of magistrates under section 9 of the *Petty Sessions (Ireland) Act 1851*, O'Brien, J referred to *Re Pollard* and said:

"It would apparently follow from that judgment that, before any order to commit a party for contempt of Court be made, he should be told what was the conduct on his part which was relied on as a contempt, and for which it was proposed to commit him; and should be allowed an opportunity of showing why such order should not be made."[117]

In *In re Rea (No. 2)*,[118] however, some limitations appeared. A solicitor who had been found guilty of *in facie* contempt sought to challenge the warrant of committal on the basis that, contrary to what it stated, he had not been offered an opportunity of showing cause why he should not be committed. Counsel on his behalf admitted to the Queen's Bench - unwisely as it transpired - that he had committed the contempt. May, CJ referred to the statement from *Re Pollard* quoted above and commented:

"... no doubt as a general rule that doctrine is a well-founded and constitutional doctrine; but I am not aware that where an admitted contempt has been offered to a Court, in the face of the Court, it is necessary for the presiding Judge, before removing or committing the offender, to call on him to show cause why he should not be committed or removed; and it would appear clear that the section of the Act above referred to contemplated no such formality."

Fitzgerald J, concurring, stated:

"In my opinion, if it appeared plainly on the warrant that all the proceedings took place in the presence and hearing of Mr Rea himself, it was unnecessary that there should be such an averment as that in the warrant. I may observe, too, that the statute points out how this statutable authority was to be exercised, and says not one word of any requisition to the defendant to show cause."[119]

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116 2 LR Ir 429 (QB Div, 1878).

117 *Id*, at 433. See also *Ex parte Tanner MP*, Judgments of the Superior Courts (Ireland) 343, where Palles CB expressed strong support for *Pollard*, but felt that, or the authorities, it could not be applied to a case where the magistrates bound for good behaviour as this was the exercise of a preventive rather than a punitive jurisdiction.

118 4 LR IR 345, at 348 (QB Div, 1879).

119 *Id*, at 349. Contrast O'Brien, J's reluctant, and only partial, concurrence, *id*, at 349. It would be wrong to read too much into the case. The Chief Justice intimated that, had the proceedings been for *certiorari* rather than *habeas corpus*, the outcome might not necessarily have been the same: *id*, at 348.

It is doubtful whether such laxity as to due process would survive constitutional scrutiny today.

Irish courts have yet to address in detail the due process requirements in *in facie* contempt proceedings, save on the issue of the entitlement to a jury. Several questions arise. The first relates to legal representation.

In *Balogh v Crown Court at St Albans*,[120] the defendant, a solicitor's clerk, had asked for legal representation, stating that he did not feel competent to conduct his own defence. The judge had refused this on the basis that the defendant was "articulate and intelligent". On appeal, Lord Denning MR observed that the trial judge "would have done well to have remanded him in custody and invited counsel to represent him ...."[121] He noted that "disruption of the court or threats to witnesses or jurors should be visited with immediate arrest. Then a remand in custody and, if it can be arranged, representation by counsel".[122] Stephenson, LJ observed that there might be cases where it is proper to commit a contemnor without legal representation. He added that:

> "a judge can always ask counsel to represent a contemnor ... and for my part I would hope that there would be few cases ... where this course should not be taken if counsel is available. There is every reason not to cut means of justice, which are necessarily curt if not rough, even shorter than they need be. This appellant asked for legal representation and I am of opinion that the judge should have tried to find him counsel".[123]

It may well be that in Ireland the Constitution requires even more stringent precautions in relation to legal aid. In *The State (Healy) v Donoghue*,[124] the Supreme Court emphasised that persons facing a serious criminal charge are entitled to criminal legal aid. O'Higgins CJ stated that:

> "[w]here a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or livelihood, justice requires more than the application of normal and fair procedures in relation to his trial. Facing, as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my

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120 [1974] 3 All ER 283.
121 *Id*, at 289.
122 *Id*.
123 *Id*, at 293.
124 [1976] IR 325 (Sup Ct).

view it does."[125]

It should be noted that in this passage the Chief Justice did not commit himself to the proposition that there is a right to criminal legal aid in *all* cases where an indigent defendant is at risk of losing his liberty. Indeed the right appears to be conditional on the defendant's inability to defend himself adequately because of some specific *incapacity*.

Henchy J's analysis appears to envisage a more wide-ranging entitlement than that favoured by O'Higgins, CJ:

> "A person who has been convicted and deprived of his liberty as a result of a prosecution which, because of his poverty, he has had to bear without legal aid has reason to complain that he has been meted out less than his constitutional due. This is particularly true if the absence of legal aid is compounded by factors such as a grave or complex charge; or ignorance, illiteracy, immaturity or other conditions rendering the accused incompetent to cope properly with the prosecution; or an inability, because of detentional restraint, to find and produce witnesses; or simply the fumbling incompetence that may occur when an accused is precipitated into the public glare and alien complexity of courtroom procedures and is confronted with the might of a prosecution backed by the State."[126]

Griffin J expressed the opinion that, "when the circumstances are such that if, in the event of a conviction or on a plea of guilty, a sentence of imprisonment is likely, a District Justice should inform an indigent defendant of his right to legal aid under the Act".[127] The question of the *likelihood* of a sentence of imprisonment is worth noting. Griffin J appears to be of the view that there should be no necessary entitlement to legal aid where imprisonment is possible but seems unlikely. How the District Justice can make this assessment in the absence of evidence is difficult to discern.

Kenny, J did not attempt to express a final opinion on the question whether every accused person has a constitutional right to have legal representation in a criminal trial for a serious offence. Referring to Article 38.1 of the Constitution, which provides that "[n]o person shall be tried on any criminal charge save in due course of law", he said:

> "The use of the words 'in due course' are an echo of provisions in the Constitution of the United States of America which, through Coke's interpretation, come from Magna Carta. They emphasise that a trial in strict accordance with law may not be a fair one; when the Court is satisfied that this is the position, the proceedings should be quashed

125 *Id*, at 350.
126 *Id*, at 354.
127 *Id*, at 361.

by *certiorari*. It would be foolish to attempt to lay down what constitutes a fair trial because its requisites change from generation to generation. Thus, for hundreds of years a prisoner charged with felony was not allowed the assistance of counsel and our judicial ancestors thought that, despite this, he was getting a fair trial. In every case the question must be whether the matter complained of was a procedural irregularity or a defect which had the result that the accused did not get a fair trial judged by the standards at the time when the case is heard. If the High Court comes to the conclusion that the trial was not fair, it should grant *certiorari*. The cases in which this State-side order may be granted cannot, and should not, be limited by reference to any formula or final statement of principle. The strength of this great remedy is its flexibility."[128]

It would seem fair to interpret *Healy's* case as authority for the proposition that, at least in cases of incapacity and perhaps in all cases, an indigent defendant facing a charge which involves the risk of imprisonment is entitled to criminal legal aid. That this uncertainty as to its exact scope is well founded may perhaps be established by the decision of the Supreme Court the following year in *The State (O) v Daly*,[129] where O'Higgins CJ, this time delivering a judgment with which the other members[130] simply concurred, stated:

> "There is a danger that the decision in *Healy's* case may be misunderstood in the sense that it may be regarded as applying to situations and circumstances which were not contemplated. It is worth recalling, therefore, that the decision in that case applies only to the trial of persons charged with criminal offences and not to the earlier or ancillary stages of criminal proceedings. It has to do with the circumstances in which the interests of justice and the requirements of a fair trial necessitate that the person charged be provided with legal assistance if he cannot provide such for himself. Regard must be had to the seriousness of the charge having regard to the person charged, the nature of the penalty he faces and his capacity in the circumstances to speak for and defend himself adequately. Obviously the approach ought to be flexible rather than otherwise, as the circumstances of each case must dictate what justice in those circumstances requires."[131]

It thus seems that an indigent defendant accused of *in facie* contempt should expect to be granted legal aid. Whether the courts would hold that this entitlement should be restricted to cases of incapacity in addition to indigency is doubtful. In practice, the threat of a sentence of imprisonment would greatly increase his or her prospects of being granted legal aid.

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128 *Id*, at 364.
129 [1977] IR 312 (Sup Ct).
130 Kenny and Parke, JJ.
131 [1977] IR, at 315-316.

As regards due process requirements apart from legal aid, O'Higgins CJ in *Healy's* case considered that the following passage from Gannon J's judgment in the High Court in *Healy* put "very clearly what one would expect to be features of any trial which is regarded as fair":[132]

> "Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence."[133]

Gannon J perceived these rights as being "anterior to and ... not merely deriv[ing] from the Constitution ...".[134]

In the context of *in facie* contempt this passage is of considerable importance. It is difficult to see how *in facie* contempt proceedings, if tried summarily by the Judge before whom the alleged contempt has occurred, could preserve for the defendant the right to have the matter tried by "an impartial and independent court or arbitrator". Of course, the judge would strive to be impartial in such trials but his multiple roles as witness, prosecutor, judge and jury would at the least not make it evident beyond argument in every case that he is completely impartial.[135] Moreover, the accused in *in facie* contempt proceedings will have difficulty in calling evidence in his defence. The main witness (in effect) against him will often be the Judge himself, yet the Judge will not give evidence or be subject to cross-examination.

However, the fact that not all the features identified in *Healy* as essential to a fair trial are present when *in facie* contempt is summarily disposed of does not conclusively establish that the latter procedure is unconstitutional. It is reasonable to suppose that Gannon J, in the passage cited, was concerned with what might be called offences belonging to the mainstream of the criminal

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132 [1976] IR, at 349-350.

133 *Id*, at 335-336.

134 *Id*, at 336.

135 In *The State (DPP) v Walsh*, [1981] IR 412, at 440 (Sup Ct), Henchy J confronted this difficulty. It may be noted that his analysis does not seek to assert that no problem exists. Speaking of contempt proceedings in general, he stated:

> "It may be said that it is short of the ideal that a judge may sit in judgment on a matter in which he, or a colleague, may be personally involved. Nevertheless, in such matters judges have to be trusted, for it is they and they alone who are constitutionally qualified to maintain necessary constitutional standards."

law. *In facie* contempt is an offence *sui generis*, since it is committed in the presence of the court and in circumstances where, if it is not capable of being immediately tried and punished, the administration of justice itself may be seriously threatened. We will return to this aspect when we come to consider whether the present procedure for punishing such contempt is in need of reform.

If the requirements of *The State (DPP) v Walsh*[136] are adhered to, there would also have to be a jury trial on the factual elements of the case, such as whether the defendant made a particular remark, and what exactly was said. In this context it is worth recalling that in *Walsh* Henchy J said:

> "In upholding the current position, to the extent of saying that it is for a judge and not for a jury to say if the established facts constitute a major criminal contempt, I would stress that, in both the factual and legal aspects of the hearing of the charge, the elementary requirements of justice in the circumstances would have to be observed. There is a presumption that our law in this respect is in conformity with the European Convention on Human Rights, particularly articles 5 and 10(2) thereof."[137]

Unsatisfactory Answering in Bankruptcy Proceedings

As a concluding excursus in this chapter, it is interesting to note the position in bankruptcy proceedings. Section 385 of the *Irish Bankrupt and Insolvent Act 1857* provided in part that if any person "... shall refuse to answer any lawful question put by the Court, or shall not fully answer any such question to the satisfaction of the Court ..." it should be lawful for the Court by warrant to commit him or her to such prison as the Court should think fit, "there to remain without bail until he or she shall submit himself or herself to such Court to be sworn, and full answers make to the satisfaction of such Court to all such lawful questions as shall be put ..."

In *In re Garvine*,[138] the Court of Appeal addressed the meaning of section 385. Fitzgibbon LJ is reported as stating that the Court "should bear in mind that this was not a punitive code at all in its original objects, and that its great object was to secure all possible advantage to the assignees."[139] Holmes, LJ, concurring, said that "it was quite clear from the section ... that the committal was not by way of punishment, but with a view to obtaining at some future time more satisfactory answer to questions so as to enable the assignees to collect or realise all the property of the bankrupt ..."[140]

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136 *Supra.*
137 *Id*, at 440.
138 4 NIJR 18 (CA, 1903).
139 *Id*, at 19.
140 *Id.* See also *In re M'Loughlin*, [1916] 2 IR 583, at 606 Rev'd by HL, *sub nom Hollinshed v M'Loughlin*, [1917] 2 IR 28 (1916).

In *Hollinshead v M'Loughlin,*[141] the House of Lords, on appeal from the Irish Court of Appeal, emphasised that the purpose of the section was to enable the court to seek to determine the truth, rather than to achieve any other purpose, such as to force the witness to give an answer which the court wished to hear. Lord Atkinson said that he thought the statute had been passed:

> "for the sole purpose of enabling a thorough and searching examination to be considered to ascertain the truth as to the property of the bankrupt. If it is used for any other purpose, then it is abused ..."[142]

Lord Shaw of Dunfermline warned that the examination of the bankrupt ought to be conducted in such a way as "to avoid any kind of concussion upon the bankrupt to make him give evidence in one direction rather than another. A bankruptcy examination ought not to be converted into a torture chamber".[143]

In the Court of Appeal, O'Brien LC had deprecated the practice of cross-examining the bankrupt; when the Court was exercising its discretion as to "putting in force this tremendous power of depriving a man of his liberty",[144] the protection which the legislature had placed round this examination ought not to be forgotten. On appeal, Viscount Haldane took a different view. Professing agreement with the Lord Chancellor "in thinking that the section is not enacted for the purpose of giving a merely punitive jurisdiction to the learned judge who exercises it",[145] he went on to say that the jurisdiction was:

> "given for the purpose of enabling him to compel an answer which is candid, and, therefore, when you come to ask what is the difference between searching examination and cross-examination in this connection, I think the difference is an illusory one".[146]

The matter came before Kenny J, in *In re Mc Allister*[147] in 1972. Mr McAllister, prior to being adjudicated bankrupt, had by cheque bought large numbers of cattle in the State during a bank strike, and had taken them to Northern Ireland where he sold them for cash. The cheques were dishonoured when the banks reopened. On examination on oath, Mr McAllister gave evidence that he had given £328,OOO to a man from County Down to invest it, on the man's assurance that he could get a higher rate of interest than in hire-purchase companies and bank accounts with the State. The man had disappeared and Mr McAllister gave evidence that he did not know where he was. Kenny J did not believe this evidence and was convinced that "the bankrupt knows where the £328,000 is and that he has probably

141 [1917] 2 IR 28 (1916).
142 *Id*, at 34.
143 *Id*, at 36.
144 [1916] 2 IR, at 596.
145 [1917] 2 IR, at 32.
146 *Id.*
147 [1973] IR 238 (High Ct, Kenny, J, 1972).

placed it in a bank outside the State".[148]

Kenny J noted that Mr McAllister had "not made full answers to lawful questions".[149] When the Official Assignee applied for an order that he be committed to prison until he had given answers to the satisfaction of the Court, Mr McAllister contended that section 385 was repugnant to the Constitution.

On behalf of Mr McAllister it was argued that his failure to make full answers to the satisfaction of the Court was a criminal contempt and that the Court, when it decided to commit a person under the section was, in substance, convicting him of perjury. The offence was not a minor one and thus he was entitled to a jury. Kenny J responded that the failure to make full answers to lawful questions in bankruptcy "is not a criminal contempt even if the categories of criminal contempt are applicable to s.385 ... That section authorises a sentence of indeterminate duration, while there was no provision for this when Miss de Burca refused to answer questions."[150] This passage suggests that the specific prescription of a sentence of indefinite duration would, in Kenny J's view, take conduct out of the domain of criminal contempt, even in contexts other than bankruptcy.

Kenny, J went on to state that the object of section 385 was "not to give the Court power to punish or indirectly to enable it to convict a person of perjury but to make it possible to commit a person to prison until he gives satisfactory answers so that his assets may be made available in the bankruptcy."[151] He was confident that committal in the case would "improve the bankrupt's memory as to what he did with the £328,000 and that it will probably persuade him to disclose where he has this money. If his memory is not made better some creditors will suffer very large losses."[152] He concluded his analysis by observing that counsel for Mr McAllister was correct in saying that the Court must be satisfied that the bankrupt has given false evidence on oath before he convicts him, but Kenny J considered that this "does not mean that he is convicted of perjury or that he has committed any offence. He is not being tried on a criminal charge and so the section is not repugnant to Article 38.s.5 of the Constitution".[153]

Kenny J went on to consider whether the section was repugnant to the Constitution because the bankrupt or a witness could be compelled under it to answer questions which might incriminate him. He reserved the question whether there was a constitutional right against self-incrimination but interpreted the section as entitling a bankrupt or person examined in

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148 *Id*, at 239.
149 *Id*, at 240.
150 *Id*, at 241. Cf *Keegan v de Burca*, [1973] IR 223.
151 *Id*.
152 *Id*, at 242.
153 *Id*.

bankruptcy to decline to answer any question the answer to which might disclose that he had committed a criminal offence. How precisely Kenny J arrived at this interpretation is not clear. His emphasis on the inclusion of the adjective "lawful" before "question" suggests that he considered that a question requiring a self- incriminatory answer would not be lawful. But this analysis is scarcely fully convincing, since a *question* is no less lawful on account of the fact that a "satisfactory" answer would incriminate the witness. In the absence of there being a constitutional entitlement to avoid self incrimination - an issue on which Kenny J studiously declined to commit himself - the matter of interpreting section 385 became one of ordinary statutory interpretation; it is conceivable that the general principle of not having to incriminate oneself could be read into Section 385 as an implicit qualification of its scope. That, in effect, is what Kenny J appeared to do.[154]

Section 24 of the *Bankruptcy Act 1988* replaces section 385 of the 1857 legislation. It provides in part that, where the bankrupt or any person summoned or brought before the Court "refuses or fails to answer any lawful question put by the Court or does not fully answer any such question ...", the Court may order that he or she be committed to prison to await the further order of the Court. It is to be noted that the section contains no requirement, equivalent to section 385, that the question be not fully answered "to the satisfaction of the Court". The issue of interpretation thus arises as to an answer which is full in the sense that it deals completely with the question raised but is, in the Court's view, entirely untrue, and thus not to its satisfaction. Under section 385, as we have seen, the Court could commit in such circumstances; viewing section 24 in isolation, it is far from clear that it authorises or requires the Court to take this course. The position is, however, complicated by section 25, which provides that, where the bankrupt or any person is in prison pursuant to an order of the Court under section 24, the Court may by warrant order that he be brought before the Court. Where he satisfies the Court that he has complied with its lawful requirements, the Court must order his release from custody. In any other case he may be taken back to prison without any further order. The requirement here that the person should satisfy the court is reminiscent of section 385, but it seems that its inclusion in section 25 cannot have the effect of enlarging the *actus reus* of section 24. Section 24 prescribes that the failure fully to answer a question places the person engaging in such contempt at risk of being committed: it does not contain any reference to answers which are full but unsatisfactory.

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154 For an enlightening analysis of Kenny J's approach, see *Casey*, 423-424. Kenny J accepted the argument on behalf of Mc McAllister that the prohibition on *bail* in section 38.5 was inconsistent with Article 34.3.1^{0} of the Constitution. He did "not think that the National Parliament has power to pass legislation that the High Court shall not give bail to an accused person ..." *Id*, at 242. Accordingly he struck down the words "without bail" in the section but otherwise left it intact. Pending his appeal to the Supreme Court Mr McAllister was given bail. He did not answer to his bail, and the appeal was later dismissed for want of prosecution.

CHAPTER 3: SCANDALISING

Introduction

Scandalising the court is an "archaic description"[1] of a form of contempt that has, even today, continuing vitality.[2] In *The State (DPP) v Walsh*,[3] O'Higgins, CJ stated that scandalising the court is committed:

> "where what is said or done is of such a nature as to be calculated to endanger public confidence in the court which is attacked and, thereby, to obstruct and interfere with the administration of justice. It is not committed by mere criticism of judges as judges, or by the expression of disagreement - even emphatic disagreement - with what has been decided by a court. The right of citizens to express freely, subject to public order, convictions and opinions is wide enough to comprehend such criticism or expressed disagreement.
>
> Such contempt occurs where wild and baseless allegations of corruption or malpractice are made against a court so as to hold (*sic*) the judges'... to the odium of the people as actors playing a sinister part in a

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1 *The State (DPP) v Walsh*, [1981] IR 412, at 421 (Sup Ct, *per* O'Higgins, CJ).

2 See *Borrie & Lowe*, 226-247, *Miller*, ch 12, *Arlidge & Eady*, 17-19, 156-165, Walker, *Scandalising in the Eighties*, 101 LQ Rev 359 (1985), *the Phillimore Committee Report*, paras 159-167, the English Law Commission's WP No. 62, *Criminal Law: Offences relating to the Administration of Justice*, 113-115, 118 (1975) and its *Report* (Law Com No. 96, 1979), paras 3.64 - 3.70, the Law Reform Commission of Canada's WP 20, *Contempt of Court*, 30-35 and *Report on Contempt of Court*, 24-27, the Law Reform Commission of Australia's DP No. 26, *Contempt and the Media*, ch - 8 and *Reform on Contempt of Court*, ch 10 Caillard, *Scandalizing the Court*, 14 Melbourne UL Rev 311 (1983), Milton, *A Cloistered Virtue*? 87 S Afr LJ 424 (1970), M Chesterman, *Public Criticism of Judges* (ALRC Research Paper No 5, 1984).

3 [1981] 412, at 421.

caricature of justice'."[4]

This passage appears to recognise clearly the Constitutional dimension to the right of criticism of the courts and of judges. It would, however, seem wrong to believe that the Constitution changed in any significant manner the elements of scandalising at common law. In *Re Kennedy and McCann*,[5] O'Higgins, CJ had said:

> "The right of free speech and the full expression of opinion are valued rights. Their preservation, however, depends on the observance of the acceptable limit that they must not be used to undermine public order or morality or the authority of the State. Contempt of court of this nature carries the exercise of these rights beyond this acceptable limit because it tends to bring the administration of justice into disrepute and to undermine the confidence which the people should have in judges appointed under the Constitution to administer justice in our Courts."

The Chief Justice noted that the distinction between contempt of court and what can fairly be regarded as reasonable criticism had been stated many years previously by Lord Russell of Killowen CJ, in *R v Gray*[6] as follows:

> '... Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke LC characterised as 'scandalising a court or a judge'.[7] That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or to the public good, no Court could or would treat that as contempt of Court'."

O'Higgins, CJ commented that, while of course Lord Russell had been referring to the state of the law of England in his time, his remarks, in the view of the Chief Justice, applied "equally well to the state of the law in our country under the Constitution".[8]

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4 Citing *AG v Connolly* [1947] IR 213, at 220 (*per* Gavan Duffy, P).
5 [1976] IR 382, at 385-386.
6 [1900] 2 QB 36, at 40.
7 *In Re Read and Huggonson*, 2 Att 469 (1742).
8 [1976] IR, at [387].

Unquestionably, Lord Russell's statement is the *locus classicus* of both British[9] and Irish[10] law.

Offence not Obsolete

For a short time in Britain it had appeared that the offence of scandalising had outlived its usefulness. In *McLeod v St Aubyn*,[11] in 1899 the Judicial Committee of the Privy Council expressed the view that committals for contempt by scandalising the Court itself had "become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory to them".[12]

The accuracy of the assessment was quickly disproved by *Gray*[13] and subsequent English[14] decisions, (notably *R v Editor of the New Statesman*[15]).

In Ireland, it is clear that the offence of scandalising is far from obsolete. In *AG v O'Kelly*,[16] in 1928, Sullivan P referred to the Privy Council's opinion in *McLeod v St Aubyn*,[17] and said:

> "In view of the subsequent decisions in England in *Gray*[18] and *R v The Editor of the New Statesman*,[19] I cannot accept the dictum in *McLeod's Case*[20] as accurate. In each of these cases the English courts recognised and exercised the jurisdiction to punish on summary process the editor of a newspaper for contempt of court in publishing scandalous matter of a Judge with reference to his conduct in judicial proceedings."[21]

Hanna J identified the increasing influence of the press as a reason for the

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9 Cf *Badry v DPP of Mauritius*, [1983] 2 AC 297 (PC).

10 Cf *Re Hibernia National Review Ltd*, [1976] IR 388, at 390 (Sup Ct, *per* Kenny, J) *AG v O'Kelly*, [1928] IR 308, at 315, 318, 319 (where the passage is quoted) and 324, *AG v Connolly*, [1947] IR 213, at 220.

11 [1899] AC 549 (PC).

12 *Id*, at 561. The Judicial Committee went on, "less sensibly" (*Pannick*, 110) to add that:

> "in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court."

13 *Supra*.

14 *R v Editor of the New Statesman, ex parte DPP*, 44 Times LR 301 (1928), *R v Commissioner of Police of the Metropolis, ex parte Blackburn (No. 2)*, [1968] 2 QB 150; see also the Privy Council decisions of *Ambard v AG* for *Trinidad and Tobago* [1936] AC 322 and *Badry v DPP*, [1982] 2 AC 297.

15 *Supra*.

16 [1928] IR 308 (High Ct, Sullivan, P, Meredith and Hanna, JJ).

17 *Supra*.

18 *Supra*.

19 *Supra*.

20 *Supra*.

21 [1928] IR, at 315.

resurgence of the offence of scandalising:

> "The cases show that for many years before the hearing of *McLeod v St Aubyn*[22] the practice of proceeding by attachment had not been used, so much so that Lord Morris stated in that case that it had become obsolete. However this may be, it is clear that it has been frequently resorted to both in England and Ireland in the succeeding years during which the Press has attained such a widespread influence, so that, though it may have been at one time dormant, it had at the date of the Constitution become a living procedure, with all its ancient powers. The latest case[23] is but a few weeks ago ..."[24]

In *AG v O'Ryan and Boyd*,[25] in 1945, the High Court took the matter further. Maguire P observed that:

> "[I]n one of the cases cited in the course of these proceedings,[26] it is stated that committal for contempt of Court is obsolete. This, however, is not correct. But in regard to cases which are concluded it is nearly so. The protection of Courts from attacks of this kind where cases are pending is a vital matter, and it is in the public interest in such cases that the Court should intervene and deal severely with the offender. It is different where ... the case is terminated."[27]

Gavan Duffy J contented himself with the observation that:

> "[w]here the circumstances allow, attacks upon judges are left to the discrimination of the public. When the courts have to take action in a case of this kind, they feel that they are vindicating themselves; consequently, when the chapter is closed, when the offence does not concern pending proceedings, the tendency towards all possible forbearance is strong ..."[28]

Risk of Prejudice to Pending Proceedings not Essential

It would be quite wrong to conclude from these passages in *O'Ryan and Boyd* that the rationale for rendering scandalising an offence is based on the risk

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22 *Supra.*
23 Citing the *New Statesman* case, *supra.*
24 [1928] IR, at 331.
25 [1946] IR 70 (High Ct, Maguire, P, Gavan Duffy and Haugh, JJ, 1945).
26 One may assume that this was *M'Leod v St Aubyn*, though the report does not include this as one of the cases cited by counsel. The report (at 77) states, however, that counsel for the Attorney General cited the *New Statesman* case and *AG v Kelly* so the Privy Council decisions would thus have been brought to the attention of the Court.
27 [1946] IR, at 82.
28 *Id*, at 85. In Canada in *Reg v Murphy*, 4 DLR (3d) 289 (1969) the New Brunswick Supreme Court, Appellate Division rejected the argument that contempt by scandalising was obsolete.

of prejudice to pending proceedings.[29] Gavan Duffy J sought to take such a position; instead he went no further than to counsel extreme caution in taking proceedings for scandalising where there are no pending proceedings. It seems clear from later decisions of the High Court (including a judgment of Gavan Duffy P himself[30]) and of the Supreme Court[31] that there is no reason in principle why a person should not be guilty of scandalising on account of the fact that the criticism does not relate to pending proceedings.

The Actus Reus

1. *Who can be scandalised?*

The first requirement of the *actus reus* is that the scandalising be of a *court* or of *a judge in his or her judicial capacity.*

(a) *Courts*

As regards courts, it is clear beyond doubt that scandalising any of the courts established by the Constitution falls within the scope of the offence. Thus, not only the High Court and Supreme Court but also the Circuit Court and District Court and Special Criminal Court, are courts for this purpose. Any doubt about Special Criminal Courts was removed with the decision of *AG v Connolly.*[32] There, the defendant scandalised a Special Criminal Court composed of army officers. He later contended that the offence of criminal contempt could not be committed in respect of that Court any more than it could in respect of an individual in the ordinary service of the State. The High Court, in a judgment delivered by Gavan Duffy P, with which the other members of the Court concurred, disposed of this argument as follows:

> "That Court was represented to us as a species of Government Department, with the corollary, I suppose, that, like civil servants, the members of the Court are fair game for an irresponsible critic. This argument was drawn from the facts that the members of the Court are appointed by the Government and are removable by the Government at will. The members of this emergency Court, as at present constituted, happen to be military officers without, I believe, professional qualifications as lawyers; now fair criticism of the court or its constitution, whether from lawyers or laymen, is legitimate, but a wild charge of conducting a mock trial for a capital offence is not. The members of the Court have now had many years' experience of serious criminal trials; they are no novices, though, of course, they share with

29 Such a view was contended for by Hughes, *Contempt of Court and the Press*, 16 LQ Rev 292 (1900).

30 Cf *AG v Connolly*, [1947] IR 213, at 219-220 (High Ct, Gavan Duffy P, Maguire and Davitt JJ).

31 Especially *The State (DPP) v Walsh, supra.*

32 [1947] IR 213 (High Ct, Gavan Duffy, P, Maguire and Davitt, JJ).

every other Court and every human institution, the liability to make mistakes, notwithstanding their best endeavours. The Court was established under a provision of the Constitution itself and the Legislature has deemed it necessary. The Court was established as a special Court 'for the trial of offences ... where ... the ordinary Courts are inadequate to secure the effective administration of justice and the preservation of public peace and order'. The Court was, therefore, established to administer justice and the defendant in assailing it was attacking the administration of justice and not the administration of the Civil Service or any Government Department. It is one of our functions to protect the administration of justice.

"The power of this court to protect inferior courts against constructive contempts is but one aspect of our general duty of superintendence, another aspect of which is the power to confine them to their proper duties; and the tenure of the members of the Court is irrelevant to the justification that we are asked to exercise for its protection. As we have the necessary power to see that the Special Criminal Court shall not do wrong by straying beyond the confines of its proper jurisdiction, so we have the necessary power to see that its capacity and authority to administer justice within its proper sphere shall not be injured, as they would be if this Court were to let gross attacks upon its credit pass[33] with impunity."

It is now accepted in British law that the proper test to be applied in determining whether a particular tribunal is a court for this purpose is whether the tribunal exercises a *judicial* rather than an *administrative* function. In *Attorney-General v BBC*,[34] Lord Scarman said:

"In my judgment, not every court is a court of judicature, i.e. a court in law. Nor am I prepared to assume that Parliament intends to establish a court as part of the country's judicial system whenever it constitutes a court ... I would identify a court in (or 'of') law, i.e. a court of judicature, as a body established by law to exercise, either generally or subject to defined limits, the judicial power of the state. In this context judicial power is to be contrasted with legislative and executive (i.e. administrative) power. If the body under review is established for a purely legislative or administrative purpose, it is part of the legislative or administrative system of the state, even though it has to perform duties which are judicial in character. Though the ubiquitous presence of the state makes itself felt in all sorts of situations never envisaged when our law was in its formative stage, the judicial power of the state exercised through judges appointed by the state remains an independent, and recognisably separate, function of government. Unless a body exercising judicial functions can be

33 *Id*, at 224-225.
34 [1981] AC 303 (HL (Eng)).

demonstrated to be part of this judicial system, it is not, in my judgment, a court of law."[35]

Legislation[36] has provided that the offence of scandalising, or one equivalent to scandalising, may be committed in respect of other tribunals.

(b) ***Judges' conduct in their official capacity***

It is accepted that the offence of scandalising of a judge may be committed only so far as it relates to conduct in the judge's official capacity.

In *The Queen v McHugh*,[37] Lord O'Brien said:

> "In his personal character a Judge receives no more protection from the law than any other member of the community at large; and, even in his judicial character, he should always welcome fair, decent, candid, and, I would add, vigorous criticism of his judicial conduct ..."

Thus, wrongfully to accuse a judge of private immorality may constitute defamation but will not amount to contempt. Of course this dividing line may on occasion be difficult to draw.[38] The reported decisions in other jurisdictions suggest that the range of liability does not extend as far as might be contended for on theoretical principle. In *Theking v Nicholls*,[39] Griffith CJ observed:

> "In one sense, no doubt, every defamatory publication concerning a Judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a Judge calculated to bring him into contempt in that sense amounts to contempt of Court."

Thus, in *In the Matter of a Special Reference from the Bahama Islands*,[40] the Privy Council held that criticism of a Chief Justice in his personal capacity could not constitute the offence of scandalising, and in *Badry v DPP of Mauritius*[41] the Privy Council went so far as to hold that criticism of a Supreme Court judge sitting as commissioner of an enquiry into allegations

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35 In contrast to Lord Scarman, Viscount Dilhorne appears to have attached predominant significance to the name ascribed to the tribunal by the legislature: *id*, at 339. See further *Miller*, 53.

36 This subject is dealt with in a special chapter on tribunals: see Chapter 9 below.

37 [1901] 2 IR 569, at 579. In *AG v Kelly*, [1928] IR 308, at 327 (High Ct), Hanna, J quoted this passage with approval. See also *Ex parte Tanner MP, Judgments of the Superior Court in Ireland in cases under the Criminal Law and Procedure (Ir) Act 1887*, 340, at 360-361 (*per* Palles, LCB).

38 A tentative analogy may here be drawn with the position before the enactment of section 19 of the *Defamation Act 1961*: cf *McMahon & Binchy*, 616-617.

39 12 Comm LR 280, at 285. (High Ct of Austr, 1911).

40 [1893] AC 138.

41 [1982] 2 AC 297.

of corruption did not affect the judge in his official capacity.[42]

2. *The risk of prejudice to the administration of justice*

The courts have not spoken with one voice on the question of how great the risk of prejudice to the administration of justice must be established before the offence of scandalising is committed. Since the rationale of punishing scandalising is that it may involve such prejudice, rather than that it is merely unpleasant for a court or judge to experience, the question is one of direct relevance.

A number of courts have favoured a general, unspecific formula of a *tendency* to bring the administration of justice into disrepute. Here, the court enquires whether or not the impugned conduct amounts to scandalising, which it defines as conduct having such a tendency.[43] A narrower view was favoured in *Solicitor-General v Radio Avon Ltd*,[44] where the New Zealand Court of Appeal required proof beyond reasonable doubt that there is a *real risk* that public confidence in the administration will be undermined. In relation to the approach there favoured, *Borrie & Lowe*[45] comment:

> "This seems a reasonable standpoint in principle and probably underlines what in practice the courts in various jurisdictions had already acted upon. Assuming the need for a real risk it would seem a minimum requirement that the publication has a wide circulation at any rate in the area where it is claimed that public confidence is impaired. For example, a specialist journal read by a few can hardly be said to be likely to create a real risk of undermining public confidence in the administration of justice.[46] Perhaps the risks are

42 The observations of *Miller*, 369, are worth recording:

> "Although this is a logical development of the rule that the law of contempt applies only in relation to bodies which exercise the judicial power of the State, the limit is in a sense artificial. Judges are invited to chair sensitive political inquiries precisely because of their reputation for impartiality and the general public is unlikely to assume that the accusation or abuse relates to the judge qua commissioner alone. None the less it is right that the criminal law should not be extended by the courts especially in what is at best a sensitive area of the law of contempt."

43 Cf *Re Kennedy and McCann*, [1976] IR 382 (Sup Ct).

44 [1978] INZLR 225, at 233-234. Cf *Weeland v Radio Telefis Eireann*, [1987] IR 662, at 666, (High Ct), where Carroll J articulated two different tests: the first required that the criticism should *actually* bring the administration of justice into disrepute; the second (more conventional) test was that of criticism "done in a manner *calculated* to bring the court or judge into contempt" (emphasis added).

45 *Borrie & Lowe*, 228 (footnote references omitted).

46 *Sed quaere*. A scandalising assault on the judiciary in a specialist legal journal, for example, could, in some instances, have a more damaging effect than when widely disseminated through other sources, since, precisely on account of the particular publication's prestige, greater regard might be given to the views expressed therein. Cf *S v Van Niekerk*, 1970 (3) SA 655(T).

greater where publicised attacks are made on courts of judges serving in small communities and especially where the publisher is an influential and respected member of society. That is not to say, however, that in England, for example, the mass media can publish attacks with impunity on the basis that national confidence in the judiciary cannot be undermined. In the past prosecutions have succeeded against such publications and in principle can still do so."

3. *Mode of publication*
Scandalising a court may be accomplished by any mode of publication. Obviously, an article, report, comment, or letter in a newspaper[47] or on television[48] or radio will suffice; but so also a person may scandalise through a written communication,[49] or speech[50] or other more restricted verbal communication, or by words or a poster[51] or by a cartoon.[52]

Borrie & Lowe, having observed that scandalising a court is not confined to any medium, go on to state:

> "This is not to say, however, that the medium of publication is never relevant. For example, it may be relevant that comment is published in satirical or humorous magazines or television or radio programmes. It could be argued that since the magazine or programme is meant to be humorous, most information can be taken with a pinch of salt and so could hardly be said to undermine public confidence in the administration of justice."[53]

While in some cases this is no doubt the case, it would of course be quite wrong to conclude that a magazine or programme, merely by characterising itself as satirical, in any sense acquires an immunity from prosecution.

The potential range of publication, and the circumstances and qualities of the persons to whom the publication is directed, are not irrelevant factors. In *In re Hibernia National Review Ltd*,[54] discussed in detail below, a student[55] had

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47 In most of the Irish cases the impugned conduct was by these methods: see, e.g., *The State (DPP) v Walsh, supra* (news report and press release), *Re Kennedy and McCann, supra* (article in Sunday newspaper), *Re Hibernia National Review Ltd, supra* (letters prohibited in fortnightly review) *AG v Connolly, supra* (editorial in newspaper), *AG v O'Ryan and Boyd*, [1946] IR 70 (newspaper report of County Council meeting at which a letter was read out by its writer), *AG v O'Kelly, supra* (article in newspaper).

48 Cf *Weeland v Radio Telefis Eireann, supra*, (allegation of scandalising rejected on facts).

49 *AG v O'Ryan and Boyd, supra* (letter to judge).

50 *AG v O'Ryan and Boyd, supra* (letter read out by its writer at County Council meeting).

51 *Borrie & Lowe*, 228, citing *R v Vidal*, The Times, 14 October 1982.

52 *Re AG v Blomfield*, 33 NSLQ 545 (1914).

53 *Borrie & Lowe*, 229.

54 [1976] IR 388 (Sup Ct).

55 The report does not state expressly that the defendant was a student. It records that he was Chairman of Trinity College Dublin's Student Christian Movement.

written to *Hibernia*, a fortnightly review, a letter that scandalised the Special Criminal Court in respect of its handling of the Murrays' trial. Kenny J, for the Supreme Court, observed that this defendant:

> "is a young man and the generation to which he belongs frequently hold their views with passion and express them in extreme language. Such views as those in his letter have been, to the knowledge of the Court, expressed at meetings of undergraduates in the two university colleges in Dublin. Their expression at a meeting of undergraduates is a technical contempt but it is a wiser policy to ignore them. It is altogether different when these views are expressed in a newspaper which is printed for sale to adults."[56]

The Court made no order against this defendant.

Types of Scandalising

Scandalising a court may consist of a wide range of conduct. The essence of the conduct, as we have seen, is that it tends to undermine public confidence in the administration of justice. The courts have carved a distinction between scurrilous abuse of a judge, jury or court, on the one hand, and imputations of judicial corruption or bias, on the other. While this is helpful, it would be wrong to consider that conduct which is alleged to constitute scandalising would automatically be excused by reason only that it does not fall within either of these categories. It may be suggested tentatively that, as in the case of negligence, the categories of scandalising are not closed.[57] Thus, on principle and (admittedly less than coercive) authority, it seems that, provided the administration of justice is imperilled by a communication respecting the courts or any judge, the person may be guilty of contempt. The difficulty from a conceptual standpoint is that the courts have shown little interest in seeking to define the point at which conduct of this nature ceases to be scandalising and falls within some other category of contempt. The issue can seem to be entirely academic but it is not. A practical instance may make this clear. If a newspaper article or television programme utterly misrepresents a court judgment so as to bring the administration of justice into disrepute, it may not be possible to characterise the conduct as either scandalous abuse or imputing corruption, bias or impropriety. Nonetheless it may be considered that such conduct should be punishable as an act of contempt as surely as if it fell within the scope of either of these categories.

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56 [1976] IR, at 392.

57 See *Miller*, 375. *Borrie & Lowe*, *R v United Fisherman & Allied Workers Union*, 65 DLR (2d) 579 (BCCA, 1968).

(i) *Scurrilous Abuse*
There are plenty of examples of scurrilous abuse in the law reports. The leading British decision is *Gray*,[58] where, in response to a warning by Darling J during a trial that he would "make it his business" to see that the law was enforced if the local Press published details of an obscene matter he was trying, the editor of a newspaper, stung by what it considered to be a gratuitous threat, published an article critical of the judge which stated:

> "The terrors of Mr Justice Darling will not trouble the Birmingham reporters very much. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horsehair, a microcosm of conceit and empty headedness, who admonished the Press yesterday."

In the Divisional Court, before which the editor did not seek to justify his remarks, Lord Russell CJ described the article as "personal scurrilous abuse of a judge as a judge".[59]

In *AG v O'Ryan and Boyd*,[60] the first defendant's conduct amounted to scurrilous abuse, as well as a scandalous imputation of impropriety. Judge Sealy had sentenced some farmers to imprisonment after they had pleaded guilty to riot, in an incident arising out of an agrarian dispute. He had not been moved by a plea for leniency from the parish priest of the parish where the defendants lived. Judge Sealy had asked counsel if the parish priest expected that men who had attacked an individual outside his own church should get no punishment.

The first defendant, a county councillor, wrote a letter to Judge Sealy in the following terms.

> "As an humble member of the Catholic community of the diocese of Waterford and Lismore, I take exception to your taunt and sneer at the Most Venerable Dean Byrne, PP of Sts. Peter's and Paul's Church, Clonmel, from your exalted? perch on the Bench of the Court in Waterford last Monday, 5th inst. - that he thought and expected that crime perpetrated outside his church should be exonerated. I fling that taunt back into the face of the worthy representative of the seed and breed of Cromwell. You, Sir, were foisted on the judicial Bench at a time when legal ability was not the qualification best fitting to lead to it. To the foreign, hostile administration of that time there were better

58 *Supra*.

59 [1900] 2 QB, at 40. See also *McLeod v St Aubyn, supra*.

60 [1946] IR 70 (High Ct, Maguire, P, Gavan Duffy and Haugh, JJ, 1945). See also *AG v Kelly*, [1928] IR 308 (High Ct, Sullivan, P, Meredith and Hanna, JJ). (Judge "abused in insulting language" (*per* Hanna, J, at 330)).

qualifications evidently well known to your Lordship. I well remember, in the Spring of 1917, when acting as advocate for Lord Ashtown in a claim for compensation for the burning of his wood, you stated that perhaps it was done to celebrate the anniversary of Easter Week, 1916, although all in the district knew that the burning was accidental. The late Judge, Sergeant Ronan, presiding, indignantly protested against your insinuation, and compelled you to withdraw it. Your suggestion offended his impartial judicial mind. But evidently you had other motives. An adventurous lawyer takes the long view. Evidently the echo of your words reached Dublin Castle, of infamous memory. At any rate you were elevated to the Bench by the Lord French - *cum* Hamar-Greenwood *regime* - to administer 'true British Amelioration' in Ireland. You remember how the IRA chased you off the Bench at Clonmel. Notwithstanding all that you were tolerated and retained by an Executive Irish Government predominantly national and Catholic. And your return for all that was to taunt the second highest dignitary in the Diocese of Waterford and Lismore that he would condone crime which was committed outside his church. You are as poor at marshalling your facts as you were mediocre at law. It was not outside Dean Byrne's church that the regretted affair took place, but at Nire church, some fourteen miles away. But you would overlook all this to give us a display of Righteous Wrathful Puritanism, symbolic of the virtues of Henry the Eighth and the chaste? Virgin Queen. I wonder if, instead of coming from Dean Byrne, the letter came from the local lodge of the Grand Orient and embossed with the Square and Compass how would it be treated by Your Lordship? I know personally that Dean Byrne did not approve or condone the incident in question. He condemned it in no undoubtful terms. But as peace has been restored to the district he would purchase the continuation of that peace even though the price to be paid would be the forgiving of offences against the law of the land. That is the teaching of the Divine and Eternal Church in which Dean Byrne is an outstanding ornament. Your ilk and breed in this country are the inheritors of lands, castles and wealth secured by the brute laws of robbery, spoliation and confiscation of the property of Catholic Ireland. Would your Lordship wish to have them judged by the law of 'a tooth for a tooth', or by the charitable laws of God's Church as represented by Dean Byrne?

I had intended answering you personally in Court, but I had other and more pressing calls. My actions would doubtless have incurred your puritanical wrath and made me suffer for contempt of Court. To those who know me, this would mean little to me. I would defy your best or worst. My words would then reach the public. Now they will not. You can say with truth that my action is an innocent, private letter. The press will not, cannot, publish it. With your consent that can be done. I issue the challenge to you. I hope you will accept it and not funk the issue as is characteristic of your ilk when confronted with strong public feeling. I will be prepared to express my opinion in your

Court anywhere and abide the issue. Now, Sir, as between your humble servant and your Lordship the issue is knit.

I remain,

Sincerely yours,
MICHAEL O'RYAN, P.C.

County Councillor."

A fortnight later he read out this letter at a County Council meeting at which a motion protesting at the "insulting remarks" of Judge Sealy against the parish priest was passed unanimously, and which expressed the Councillors' view that a full withdrawal of these remarks, together with a suitable apology, was "strongly called for". At that meeting, the first defendant referred to the Judge's "taunting sneer" directed towards the Parish Priest. He "hurl[ed] that back in Judge Sealy's face ..."

The High Court held unanimously that the first defendant was guilty of contempt.[61] Maguire P stated:

> "That wild and whirling words were used by O'Ryan could not be gainsaid. The question is whether they amount to contempt of Court. References were made to the Judge's history and to the manner of his promotion to the Bench. It needs no familiarity with the recent history of this country to know that the statements in this letter would at one time have roused very high feelings indeed and excited hatred of the Judge. Even after many years they are calculated to some feelings of distrust and dislike of the Judge.
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> "Dealing with the events which prompted the writer to write the letter there are passages which are even more serious, suggesting that the Judge went out of his way to insult a highly-placed dignitary of the Catholic Church. The letter went on to say that the behaviour of the Judge might have been different if the representations had come, not from Dean Byrne, but from a Masonic Lodge. Now, it is unnecessary for me to point out how offensive such a statement was and how the suggestion, that the Judge could be so swayed, was calculated to injure him and his Court in the eyes of the public."[62]

Maguire P went on to express the view that the punishment inflicted by Judge Sealy had been, "if anything, too lenient".[63] He was satisfied that the first defendant's action in writing the letter had been prompted "rather by his

61 The first defendant made no attempt to argue that his conduct did not constitute contempt: [1946] IR, at 78.

62 *Id*, at 79-80.

63 *Id*. at 80.

desire to identify himself with the agitators than to protect Dean Byrne from insult".[64] In writing the letter and "thus publishing it",[65] he had scandalised the Court.

Gavan Duffy J, referring to the first defendant's letter to Judge Sealy, observed:

> "The language and matter of this monstrous ebullition suggest that Mr O'Ryan was afflicted with a frenzied indignation, which he could not contain; and he had the courage to sign his name. But the attack is so disproportionate to the Judge's supposed offence that there must have been another reason, unavowed, for the interference of the effusions. I think the outburst was really due to the sentences of imprisonment, and that the allegation of a 'taunt and sneer' was a pretext for assailing the Judge."[66]

As to the events at the County Council meeting, he observed that:

> "No faintest protest appears to have been voiced against the resolution, which was passed unanimously. It is therefore impossible to treat the letter as the irresponsible ranting of an *exalté*; it came from a man who had the ear of the County Council[67] .... One is appalled at the malice and at the bigotry displayed by the writer, a public representative and an officer of justice,[68] who aggravated the gross impropriety of his letter to the Judge by giving all the publicity he could at a public meeting to a scandalous attack on the administration and administrator of justice in the City and County of Waterford ..."[69]

Gavan Duffy J went on to refer to the religious dimension:

> "In my opinion, this particular contempt of Court is greater and even more reprehensible in Ireland than it might be in many other countries. A very large proportion of our citizens reveres religion profoundly and an attack on religion is fiercely resented. There is no excuse for a man of influence who works upon the zeal and piety of a Catholic community, like the people of Waterford, by stirring up public feeling against the Judge of the area, who is not a Catholic, on the pretext that he has degraded his office by behaving in Court as a sectary and partisan. On the facts Judge Sealy had done nothing to provoke the

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64 *Id*, at 81.

65 I.e., at the County Council meeting.

66 *Id*, at 84.

67 Gavan Duffy, J noted (*id*, at 84) that the Waterford County council had "had the grace subsequently to rescind that resolution, but the pity is that it was ever proposed". He also was "very glad, indeed" that Dean Byrne, in a published letter, had repudiated the notion that he had been insulted (*id*, at 85).

68 As his letter to Judge Sealy stated, Mr O'Ryan was a Peace Commissioner.

69 *Id*. at 84-85.

ribald letter, and its publication by O'Ryan at the quarterly meeting of the County Council held up his administration of justice to public obloquy."[70]

As had been mentioned, one may scandalise a *jury* through scurrilous abuse. In *Re Nicol*,[71] Clyne J, of the British Columbia Supreme Court, so held.

(ii) *Imputation of Corruption, Bias or Impropriety*

Several reported cases have involved imputations of corruption, bias or impropriety against a court of judge. We have already discussed the decision in *AG v O'Ryan and Boyd*,[72] where the contempt consisted of both scurrilous abuse and imputations of this general nature. An important English decision involving a more discreetly worded attack on a judge in *New Statesman (Editor), ex p DPP*,[73] where the defendant suggested that Avory J, who was a Catholic, had allowed his religious beliefs to prejudice his summing up in a libel trial brought by Dr Marie Stopes, an advocate of contraception and abortion. The offending article had concluded by stating:

> "The serious point in this case ... is that an individual owning such views as those of Dr Stopes cannot apparently hope for a fair hearing in a Court presided over by Mr Justice Avory - and there are so many Avorys."

Holding that this was contempt, Lord Hewart CJ is reported as having stated that the article:

> "imputed unfairness and lack of impartiality to a Judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial duties."[74]

These cases involved imputations of impropriety against a *judge*; but, as has been mentioned, such imputations made against a *court* can also amount to contempt, as several Irish cases have held. Many relate to the constitution or practice of special criminal courts acting in a political environment where politically-inspired conduct in the context of Anglo-Irish relations was the subject of prosecution.

In *AG v Connolly*,[75] the defendant, the 19 year old writer of an editorial in a

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70 *Id*, at 85.

71 [1954] 3 DLR 690 (B C Sup Ct, Clyne, J). See also *White*, 1 Camp 359 n, 170 ER 985 (1808).

72 *Supra*.

73 44 Times LR 301 (1928).

74 *Id*, at 303. See also *Re Duncan*, 11 DLR (2d) 616 (Sup Ct Can, 1958), *Re Borowski*, 19 DLR (3d) 537 (Man QB, Nitikman, J, 1971), *AG for New South Wales v Mundey*, [1972] 2 NSWLR 887 (Sup Ct), *S v Van Niekerk*, [1970] 3 SA 655 (T).

75 [1947] IR 213 (High Ct; Gavan Duffy P, Maguire and Davitt, JJ).

Sinn Fein publication, made the following criticism therein, regarding the possible fate of Henry White, who was subsequently convicted by the Special Criminal Court of the murder of a member of the Garda Siochana:

> "Another soldier of Ireland has fallen into the hands of the Republic's enemies and is fast approaching his martyrdom. This much is certain if the present course of Fianna Fail justice is allowed to take its way. Henry White has been handed over by the Black Police of the North to their equally shaded brokers of the south and now he awaits his death, which sentence will inevitably be passed on him, after his mockery of a trial before the Special Criminal Court is over."

The Attorney General sought his attachment by the High Court for contempt of Court in scandalising the Special Criminal Court and in publishing words calculated to interfere with the administration of justice. The defendant in his affidavit submitted that he had not been guilty of contempt and that the words used were fair comment on a matter of public interest. He also "alleged a number of facts relative to his state of mind at the time of the preparation"[76] of the offending piece, and referred to two earlier trials by the Special Criminal Court, as well as ma[king] allegations concerning the appointment and qualifications of the members of that Court and the manner of applying justice in that Court".[77]

Gavan Duffy P, delivering the judgment of the High Court, held that the High Court had power to deal with the contempt of the Special Criminal Court by the summary procedure of attachment:

> "... the administration of justice is entitled to look to the High Court for vigorous protection, once the necessary conditions are fulfilled. And they are clearly fulfilled in a case of public scandal, where the defendant has held up the judges in a capital trial to the odium of the people as actors playing a sinister part in a caricature of justice."[78]

The Court's consideration of the issues of *mens rea* and justification is analysed below.

In *Re Hibernia National Review Ltd*,[79] *Hibernia*, published letters on the subject of the conviction of Noel and Marie Murray for the capital murder of a Garda. The first letter was signed by Simon O'Donoghue, Chairman of Trinity College Dublin - Student Christian Movement; the second was by Mr Henry, PRO of the Murray Defence Committee. Mr O'Donoghue's letter contained the following passage:

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76 *Id*, at 214.
77 *Id*.
78 *Id*, at 220.
79 [1976] IR 388 (Sup Ct).

> "While we must regret the death by violence of Garda Michael Reynolds, as of any human being, we feel we must give the strongest possible protest at the manner in which the 'trial' of Noel and Marie Murray was carried out ... They were tried without jury and virtually without evidence in circumstances which, to say the very least, cast strong doubt on the machinations of both Gardai and Government in their efforts to procure a 'guilty' verdict. It is not enough that, following the appeal, the sentence be commuted to life imprisonment in a grand vote-catching gesture by the Government; they must be granted an immediate re-trial ..."

In Mr Henry's letter, the following passage appears:

> "The very existence of the Special Criminal Court confers on its defendants a special status. The implication seems to be that people who are brought before it are somehow less innocent than those who appear before the ordinary criminal courts. In fact, many defendants are presumed guilty until they can prove their innocence against the belief of the Gardai. In the ordinary course of events this mixture of special justice and bias towards the police is a reversal of justice ... The only evidence against the Murrays were statements which they claim were extracted by the Gardai under physical and mental torture. Indeed Noel Murray offered to testify to the truth of his claim on oath but was turned down on a legal technicality ..."

The Director of Public Prosecutions sought a conditional order of attachment in the High Court against *Hibernia*, its editor and the two letter-writers. The President of the High Court refused the application and the Director of Public Prosecutions successfully appealed to the Supreme Court.

Kenny J, giving the judgment of the Court, quoted the passages from the two letters set out above and commented:

> "These passages and the use of inverted commas in connection with the word 'trial' mean that the members of the Special Criminal Court conducted a travesty of a trial, that they did not give the benefit of the doubt to the accused, that they were involved in an effort by the Government and the Gardai to procure a false verdict of guilty, and that the *only* evidence against the accused was their own statements. The members of the Special Criminal Court who conducted this trial were a retired judge of the High court, a judge of the Circuit Court and a District Justice. The charges made against them by these letters were very grave."[80]

Kenny J continued:

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80 *Id*, at 390.

"The Court wishes to emphasise that criticism of the retention of the death penalty of the Offences Against the State Acts or of any of their provisions, and of the establishment of the Special Criminal Court are not a contempt of court. These are matters which may validly be debated in public even if the comments made are expressed in strong language or are uninformed or foolish.

The two letters in issue impute improper and base motives and bias to the judges of the Special Criminal Court and, accordingly, are capable of being a contempt of court. Contempt of court also includes serious misrepresentation of the proceedings in a court. In *Read and Huggonson*[81] Lord Hardwicke, LC said that 'nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented ...' and this view was approved by some members of the House of Lords in *Attorney-General v Times Newspapers Ltd.*[82][83]

Kenny J noted that, in the prosecution against the Murrays there had been evidence that a gun had been found in Mr Murray's home and that he had accepted responsibility for it. There had also been evidence that the bullet which killed the Garda was fired from this gun:

"The statements that the only evidence against the Murrays was their statements was a complete misrepresentation of the evidence. The trial was reported at length in the three Dublin daily papers and, if he read the letters, the editor of 'Hibernia' must have known that the statements about the evidence were completely false. Therefore, their publication was capable of being contempt of court.[84][85]

The *Murray* case generated further important Supreme Court litigation in *The State (DPP) v Walsh*,[86] considered in detail below.[87] The defendants, members of an organisation called the Association for Legal Justice, had issued to the press a statement commenting on the Special Criminal Court's trial and conviction of the Murrays. The statement was to the effect that the sentence of death:

"was particularly reprehensible because it was passed by the Special Criminal Court, a court composed of Government-appointed judges having no judicial independence which sat without a jury and which so abused the rules of evidence as to make the court akin to a sentencing tribunal ..."

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81 2 Atk 469 (1742).
82 [1974] AC 273.
83 [1976] IR, at 391.
84 Citing *R v Evening Standard Co Ltd*, [1954] 1 QB 578.
85 [1976] IR, at 391-392.
86 [1981] IR 412 (Sup Ct).
87 In the chapter dealing with the respective roles of judge and jury in criminal contempt cases.

In the Supreme Court, Henchy J stated:

> "The principal impression which this statement was calculated to make on the ordinary reader of the newspaper was that the three judges who constituted the Special Criminal Court were so craven, biased and incompetent or corrupt that they had abused the rules of evidence, to the detriment of the accused, so that they (the judges) were little better than a sentencing tribunal. It would be difficult to conceive of an allegation more calculated to undermine the reputation of the Special Criminal Court as a source of justice. If true, this imputation of judicial misbehaviour would render the three judges in question unfit to hold judicial office of any kind and would cause the Special Criminal Court to be held in the opinion of the public at large to be so debased as to be disqualified from dispensing justice. In short, the facts adduced in this application (to which facts no rebuttal has been offered) constitute a classical example of the crime of scandalising a court."[88]

Not all cases have an overt political dimension. In *In Re Kennedy and McCann*,[89] the question as to the scandalising of the court arose in the following circumstances. Kenny J in the High Court made an order under the *Guardianship of Infants Act 1964* granting custody of two boys to their father. The mother appealed to the Supreme Court. Litigation between the parties as to custody had gone back several years. All proceedings had been *in camera*. While the appeal was pending, there appeared in the "Sunday World" a "biased and inaccurate"[90] account of the custody proceedings. Mr Kennedy was the editor and Mr McCann the author of the article and a staff journalist of the newspaper. The article was headed: "Tug-of-love children in tennis style battle".

The father obtained liberty to bring a motion to attach these two persons for contempt. On hearing the motion, the Supreme Court held that they were guilty of contempt.

O'Higgins CJ, delivering the judgment of the Court, stated:

> "The article purported to give details of the sorry state of a wrecked marriage, with highly offensive references to the boys' father. It published the names and ages of the two boys with their photograph and a photograph of their mother. It gave an account of the legal proceedings to date and referred to the fact that, following the High Court decision, the case was due to 'come up yet again in the next legal session' in this Court. It was written in what could be described as a 'sob story' style and it clearly was based on the mother's account of what had happened and what the issues were. The article tore away the

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88 [1981] IR, at 441-442.

89 [1976] IR 382 (Sup Ct).

90 *Id* at 383 (statement of facts in the Report).

shield of privacy which the Courts had erected and exposed the two children to a glare of publicity which can affect very seriously their ordinary lives, companionship at school and their relationship with their parents.

"In addition, the article contained offensive comments on the handling of such cases by Irish courts. It stated that instead of the welfare of the children being regarded as paramount 'it seems that money and the lifestyle it could buy was regarded by the courts as by far the most important consideration, particularly if the lifestyle was to be enjoyed here in Ireland'. This was a gross mis-statement of how the Courts had dealt with the case and suggested that there had been a disregard by the Courts of the mandatory statutory provisions contained in s3 of the *Guardianship of Infants Act 1964*. The article further carried the direct implication, offensive to all judges and all courts in this country, that justice could not be obtained in Irish courts and that, in this respect, ours was 'a sick society' which was 'hypocritical about motherhood, morality, and the family'."[91]

The two defendants, through their counsel, admitted that they were guilty of the contempt alleged and filed affidavits "apologising in a very full manner"[92] for what they had done.

O'Higgins CJ said:

> "The contempt of one was in writing the article, and of the other in permitting or arranging for its publication. The attitude which they have taken and the apologies which they have tendered to this Court mitigate somewhat the gravity of the offence. However, the offence remains a very serious one which no court could, or should, ignore."[93]

It may be noted that, in his first affidavit, Mr McCann had stated that he had not attended any of the hearings of the custody proceedings and was unaware that there was a prohibition on the disclosure of such proceedings. Mr Kennedy had also stated that he was unaware that there was a prohibition on the disclosure of such proceedings; he also stated that he had been unaware that the attitude taken and the order made in the High Court and Supreme Court in the proceedings had been inaccurately and unfairly represented in the article.

O'Higgins CJ said:

> "The right of free speech and the full expression of opinion are valued rights. Their preservation, however, depends on the observance of the

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91 *Id*, at 385-386.

92 *Id*, at 386.

93 *Id*.

acceptable limit that they must not be used to undermine public order or morality or the authority of the State. Contempt of court of this nature carries the exercise of these rights beyond this acceptable limit because it tends to bring the administration of justice into disrepute and to undermine the confidence which the people should have in judges appointed under the Constitution to administer justice in our Courts."[94]

Having quoted from *Gray's case*,[95] O'Higgins CJ continued:

> "In this instance there has been a contempt of a serious nature. Not only was the article written in breach of an order prohibiting publication but it was a distortion of the facts and was calculated to scandalise the members of this Court who have dealt with or are dealing with this case, for it imputed to them base and unworthy motives which, if substantiated, would render them unfit for their office. Ignorance of the court order is pleaded in mitigation of the prohibited publication. Acceptance of this explanation involves imputing to both offenders a very high degree of unfamiliarity with the care and caution which the Courts exercise in all cases governing children - an imputation which may be conceded in view of the general contents of the article.
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> "However, no explanation has been offered as to how either of the offenders, the one a journalist and the other an editor, could have felt that they were free to scandalise this Court. The offence of contempt by scandalising the court is committed when, as here, a false publication is made which intentionally or recklessly imputes base or improper motives and conduct to the judge or judges in question. Here the publication bears on its face, if not an intent, at least the stamp of recklessness.
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> "The result of the offenders' wrong has been to expose the private sorrows of this unhappy family to public gaze and comment and to prejudice the future happiness of the children and to render the operation in this case of the law with regard to infants.
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> "The aspersions cast on this Court and on the administration of justice in it have not been, and could not be, justified.[9] Had the fullest possible apology not been tendered, this Court would have felt compelled to visit on these offenders a substantial sentence of imprisonment both as a punishment and as a deterrent. However, such apology has been given and it would be unjust not to give to it considerable weight."[96]

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94 *Id.*

95 *Supra.*

96 *Id*, at 387-388.

"Nevertheless", continued the Chief Justice:

> "punishment there must be for this serious offence. It must not go forth from this Court that a contempt of this nature can be met by an expression of regret and apology."[97]

Accordingly, the Court fined Mr McCann £300 with three months in default, and Mr Kennedy twice that sum with twice the length of imprisonment in default.

The Proper Limits of Criticism

The Irish cases which we have mentioned here (save for *O'Kelly*,[98] which we consider in detail below) did not raise, as a serious question, the proper limits of criticism of judicial performance. We must now attempt to outline these limits. In doing so, we must consider several notions, the underlying rationales of which tend to overlap. These are: (i) the notion of legitimate criticism; (ii) the *mens rea* element; (iii) the defence of justification; (iv) the defence of public benefit; and (v) the defence of fair comment. While courts have at different times addressed one or more of these notions, they have not sought to analyse them in conjunction or to examine whether they might, with benefit to conceptual clarity be merged into a single concept. There is therefore something artificial, and potentially damaging to clear thought, in analysing each of the five concepts seriatim; nonetheless, since this reflects judicial practice, it seems best to adopt this course before attempting a synthesis.

(i) *The notion of legitimate criticism*

The best starting-point for analysing the notion of legitimate criticism is Lord Atkin's statement in *Ambard v Attorney-General for Trinidad and Tobago*:-

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or in public, the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are generally exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."[99]

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97 *Id*, at 388.

98 *Supra*.

99 [1936] AC 322, at 335.

This passage would appear to mean that criticism, even though "wrongheaded", should not constitute contempt, provided the speaker neither acts with malice nor attempts to impair the administration of justice, and provided that he or she does not impute improper motives to those taking part in the administration of justice.

The passage was quoted in its entirety by Kenny J, in *Re Hibernia National Review Ltd*[100] with apparent approval. In contrast, in *AG v Connolly*,[101] Gavan Duffy P quoted the passage but excluded from it (though indicating that a section of the passage had been left out) Lord Atkin's proviso that members of the public "abstain from imputing improper motives to those taking part in the administration of justice". This exclusion is difficult to understand unless it suggests that Gavan Duffy P was anxious to ensure that such imputations should not be placed outside the pale of permissible comment.[102]

In this context it may be useful to examine the High Court decision of *Weeland v Radio Telefis Eireann*.[103] There the plaintiff, who had been the successful defendant in a Circuit Court Action which was the subject matter of a television programme produced by the defendants, sought an interlocutory injunction against its further broadcasting pending the determination of the High Court appeal. The issue in the action had concerned the sale of a site by Mr Weeland to Dutch purchasers. The site was at the top of the mountain. The purchasers claimed in the action that they had visited a site at the bottom of the mountain. In a reserved judgment the Circuit Judge had reviewed the evidence relating to the visits by the purchasers to the site. From photographs taken by them in the interior of the mountains, he held that they established that the purchasers' evidence that they had never been on the higher land was wrong.

The programme broadcast by RTE started with a statement of facts and identified as central to the court issue the questions whether the purchasers had been shown the lower land or the higher land and how they had entered the land.

In an interview with one of the witnesses who had given evidence in the Circuit Court, the witness gave his opinion that there was no way in which one could build on the high land or how it could be divided into six or twelve sites for building; he opined that no one would pay the kind of money the

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100 *Supra*.

101 *Supra*.

102 The proviso may perhaps be traced to *III Commentaries*, 361, where Blackstone states that "the law will not suppose the possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority depends upon that presumption and idea". No trace of the proviso appears in the English Court of Appeal's judgment in *Metropolitan Police Commissioner; ex p Blackburn*, [1968] 2 QB 150, but, as *Miller*, 382-383, counsels, "perhaps too much significance should not be attached to this since Quintin Hogg's article did not contain any such imputation".

103 [1987] IR 662 (High Ct, Carroll, J).

purchasers had paid. The programme failed to mention a lapsed planning permission for the site which the Circuit Judge had mentioned in his judgment. The programme also contained an assertion from a Dutch witness that the purchasers had visited the lower land and not the mountain.

The programme went on to set out the defence offered by the plaintiff in the Circuit Court that he had shown the upper mountain land and not the lower land. It referred only to the end of the Circuit Judge's judgment, when he had observed that the onus of proving fraud was a heavy burden on the purchasers and that they had not discharged it. "There was no attempt to deal, however briefly, with [the Circuit Judge]'s analysis of the evidence, the view he took and the weight he attached to certain items of evidence in reaching his verdict."[104]

The plaintiff's application for an injunction was based on several grounds, the most convincing of which related to the possibility of influencing prospective witnesses in the appeal. One of the grounds, however, was in essence that the programme amounted to a scandalising of the court. We need not here consider whether the plaintiff had *locus standi* to make such an argument, though it is worth noting that Carroll J made no reference to this aspect of the case. Instead, she disposed of the plaintiff's application in an analysis which merged the plaintiffs' arguments in a way which is somewhat difficult to unravel. She stated:

> "There is undoubtedly a balance to be found between freedom of expression and contempt of court. In *In Re Kennedy and McCann*[105] Chief Justice O'Higgins distinguished between contempt of court and reasonable criticism. Freedom of expression which goes beyond acceptable limits is criticism which brings the administration of justice into disrepute and undermines the confidence which people should have in judges appointed under the Constitution to administer justice in the courts.
>
> But did the programme go beyond acceptable limits? The programme failed to advert at all to the reasons given by [the Circuit Judge] for the view he took of the evidence and would not appear to be unbiased in that respect. But to allege that a High Court Judge would be influenced by a T.V. programme which was transmitted months before, rather than by the evidence given in court, I find to be unbelievable. The person producing the programmes did not agree with the judgment but there is no suggestion that [the Circuit Judge] acted from improper motives or anything of that nature.
>
> I do not see why a judgment cannot be criticised, provided it is not done in a manner calculated to bring the court or the judge into

104 *Id*, at 665.
105 [1976] IR 382.

> contempt. If that element is not present there is no reason why judgments should not be criticised. Nor does the criticism have to be confined to scholarly articles in legal journals. The mass media are entitled to have their say as well. The public take a great interest in court cases and it is only natural that discussion should concentrate on the result of cases. So criticism which does not subvert justice should be allowed. Even though this programme was, in my opinion, unbalanced in relation to the judgment of [the Circuit Judge] it did not pass over the boundary of acceptable limits. I do not believe that any of the criticisms or allegations by the plaintiff concerning contempt of the court or of [the Circuit Judge] amount to contempt of court."[106]

This analysis raises some questions. First, although Carroll J more than once refers to the right to criticise, the present case, so far as her judgment indicates, did not involve overt *criticism* by RTE of the Circuit Judge's judgment but rather a *misrepresentation of it.* The absence of any attempt to deal, however briefly, with the Circuit Judge's analysis of the evidence, the view he took and the weight he attached to certain items of evidence in reaching his verdict, and the "not unbiased"[107] failure to advert at all to the reasons given by the Circuit Judge for the view he took of the evidence surely led, or risked leading, the viewer to a lack of understanding as to how the judge could conceivably have found in favour of Mr Weeland, in the face of the witnesses' evidence, unless it was by virtue of the heavy onus in proving fraud - the only aspect of the Circuit Judge's judgment to which reference was made.

Weeland v RTE thus seems not to be a case involving legitimate criticism at all, but rather one of misrepresentation, through omission and selective quotation, of the judgment of the Circuit Judge. Precisely why that misrepresentation did not amount to contempt is not clear. All that can be derived from Carroll J's analysis is that the programme's "unbalanced"[108] treatment of the judgment "did not pass over the boundary of acceptable limits."[109]

(ii) *The mens rea element*

There is some disagreement internationally as to whether a *mens rea* requirement features in the offence of scandalising. The famous South African decision of *S v Van Niekerk*[110] held that it does. There a law teacher published an article[111] in the South African Law Journal on the theme of capital punishment. The article included a questionnaire circulated among the

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106 *Id*, at 666.
107 *Id.*
108 *Id.*
109 *Id.*
110 1970 (3) SA 655 (T), analysed by Milton, *A Cloistered Virtue?*, 87 S Afr LJ 424 (1970).
111 "... *Hanged by the Neck Until You Are Dead*", 86 S Afr LJ 457 (1969), 87 S Afr LJ 60 (1970).

judiciary and practising lawyers relating to the possible influence of racial considerations in relation to the death penalty. One of the questions asked the subjects whether they thought that the differentiation shown to the different races as regards the death penalty was conscious and deliberate. The response was:

> Abolitionists: Yes 18; No 14; Uncertain 14.
> Retentionists: Yes 6; No 12; Uncertain 2.
> Doubtfuls: Yes 8; No 2; Uncertain 2.

Commenting on the replies to this and an earlier question, the author wrote:

> "Whatever conclusion one may draw from the[m], the fact which emerges undeniably is that a considerable number of replying advocates, almost 50 per cent in fact, believe that justice as regards capital punishment is meted out on a differential basis to the different races, and that 41 per cent who so believe are also of the opinion that such differentiation is 'conscious and deliberate'."

In proceedings for contempt brought against the author on the basis primarily of this statement, Claasen J held that it might well have amounted to contempt, from an objective standpoint, but that a subjective test of *mens rea* should be applied, under which the author was relieved of liability:

> "[B]efore a conviction can result the act complained of must not only be wilful and calculated to bring into contempt but must also be made with the intention of bringing the judges in their judicial capacity into contempt or casting suspicion on the administration of justice. For this type of intention it is sufficient if the accused subjectively foresaw the possibility of his act being in contempt of court and was reckless as to the result."[112]

Decisions in England,[113] Australia,[114] New Zealand[115] and Canada,[116] however, all dispense with a *mens rea* requirement as to the effect or likely effect of the publication on the administration of justice.

In Ireland the judicial authorities are divided. In the High Court decision of *AG v O'Kelly*,[117] the majority[118] appeared to dispense with a *mens rea* requirement, while Meredith J, dissenting, appeared, on one interpretation, to

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112 1970 (3) SA, at 657.

113 *New Statesman (Editor), ex p DPP*, 44 Times LR 301, at 303 (1928).

114 *AG for New South Wales v Mundey*, [1972] 2 NSWLR 887, at 911-912.

115 *AG v Butler*, [1953] NZLR 944, at 948.

116 *Reg v Murphy*, 4 DLR (3d) 289, at 294 (NB Sup Ct, App Div, per Bridges, CJNB, (1969) (citing *R v Dolan*, [1909] 2 Ir 260, at 284 (*per* Palles, CB), in support). See also *Re Borowski*, 19 DLR (3d) 537, at 546 (Man QB, Nitikman, J, 1971).

117 [1928] IR 308 (High Ct, Sullivan, P, Meredith and Hanna, JJ).

118 Sullivan, P and Hanna, J.

apply such a test, since he said of the criticism made of a judge by the defendant:

> "To my mind, the writer was absolutely entitled to put forward that contention, and to put it forward in the most forcible language, and I am satisfied that the contention was put forward *bona fide*, and with full conviction as to its soundness. Now, if that is so, it seems to me impossible to hold that it is contempt of Court to criticise and describe the comments of the Judge from the point of view of the contention. No doubt, scandalous epithets must not be used; but the Court should not be over-critical to discover contempt in language which attempts to assert, even with some heat and vehemence, what the writer honestly believes to be a legal right.
>
> "I know of no case in the books in which the language used in such a case has been minutely parsed, or in which a writer has been forced to apologise merely because certain expressions exceed the limits of good taste. If the writer here was entitled to contend, even though he may have been wrong, that the learned Judge was not entitled to make the comments which he did make, then for the writer to describe the comments as 'Judge's insolence to jurors' is to my mind bad taste, but emphatically not contempt of Court."[119]

In *AG v Connolly*,[120] the facts of which have already been considered, Gavan Duffy P observed that it was not "any defence in law"[121] for the defendant to say that he had intended nothing wrong; "his article was unquestionably calculated to produce a public mischief and a grave one".[122]

Gavan Duffy P's approach to the question of *mens rea* appears to require no more than that the publication was *likely* to result in a "public mischief": it may be presumed that this is the sense in which the phrase "calculated to produce" is used. The fact that the defendant "intended nothing wrong" offered him no excuse. Another possible, but less likely, interpretation of Gavan Duffy P's remarks, in view of the ambiguity of the concept of intending nothing wrong, is that the mere fact that the defendant would not, or did not, *characterise* the effects of his conduct as wrongful would not afford an excuse where the defendant was aware of the probably factual consequences of his conduct and those foreseen consequences constituted "a public mischief".

In *Re Hibernia National Review Ltd*,[123] the facts of which have already been considered, Kenny J, delivering the judgment of the Supreme Court, noted that the Murrays' trial had been reported at length in the three Dublin Daily

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119 [1928] IR, at 322-323.
120 [1947] IR 213 (High Ct, Gavan Duffy, P, Maguire and Davitt, JJ).
121 *Id*, at 221.
122 *Id*.
123 [1976] IR 388, at 391-392 (Sup Ct).

papers "and, if he read the letters, the editor of *Hibernia* must have known that the statements about the evidence were completely false. Therefore, their publication was capable of being a contempt of court".[124] This observation appears to impose the standard of *due care* in publishing, rather than that of *bona fides*.

In *In Re Kennedy and McCann*,[125] also considered already, ignorance of the existence of a court order prohibiting publication was pleaded in *mitigation* rather than as an absolute defence. O'Higgins CJ, as we have seen, responded caustically:

> "Acceptance of this explanation involves the imputing to both offenders a very high degree of unfamiliarity with the care and caution which the Courts exercise in all cases governing children - an imputation which may be conceded in view of the general contents of the article.
>
> "However, no explanation has been offered as to how either of the offenders, the one a journalist and the other an editor, could have felt that they were free to scandalise this Court. The offence of contempt by scandalising the court is committed when, as here, a false publication is made which intentionally or recklessly imputes base or improper motives and conduct to the judge or judges in question. Here the publication bears on its face, if not an intent, at least the stamp of recklessness."[126]

This statement might suggest the application of a *mens rea* test similar to that applied in *S v Van Niekerk*.[127] It could be argued, however, that it is not identical. The intent to which the Chief Justice refers may perhaps be interpreted, not as an intent to interfere with the administration of justice (as in the *Van Niekerk* test) but rather merely to impute base or improper motives to the judiciary. On this interpretation, a man who intended to impute such motives would not escape liability, under the Chief Justice's test, by showing that he had no intent to interfere with the administration of justice. Where, however, recklessness is in issue, the Chief Justice's remarks may mean that the the recklessness must relate to the matter of the truth or falsity of the accusation rather than to the question of interfering with the administration of justice.

(iii) Justification

There are judicial authorities,[128] of varying strength, throughout the common

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124 Citing *R v Evening Standard Co Ltd*, [1954] 1 QB 578.

125 [1976] IR 382 (Sup Ct).

126 *Id*, at 387.

127 *Supra*.

128 *Vidal*, 14 October 1922, cited by *Miller*, 381, *Solicitor-General v Radio Avon Ltd*, [1978] I NZLR 225, at 231 (*Semble*).

law jurisdictions rejecting the availability of justification as a defence to a charge of scandalising. There are also, however, decisions[129] which refer to the unwarranted nature of the defendant's allegations, though, as *Miller* cautions, they do so "without necessarily suggesting that this is an integral requirement of the offence".[130]

In Ireland, the position is clouded. In *Re Kennedy and McCann*,[131] O'Higgins CJ appeared to recognise the existence of the defence when he observed that the aspersions cast "on the Court and on the administration of justice in it" had "not been, and could not be, justified". This surely means that what had been alleged was simply not true, rather than that the charges challenged the integrity of the administration of justice so radically that no attempt at justification would be entertained, on policy grounds.

In the earlier decisions of *AG v Connolly*,[132] the facts of which have already been considered, Gavan Duffy P, had observed:

> "I should be slow to attribute to the defendant, still a minor, more than partial responsibility for the terms of the deplorable affidavit filed in answer on his behalf; he was entitled to rely on his advisers. It appears that, being oppressed by a deep sense of wrong in another trial before the same Court, he convinced himself that the injustice alleged was sure to be repeated in the trial of Henry White; his sincerity may weakly palliate his offence, but the novel attempt to use it as justification for a glaring contempt of court was grotesque."[133]

These remarks are capable of being interpreted as rejecting the possibility of a justification *ever* being capable of being offered for such a serious accusation as was made by the defendant in respect of the Special Criminal Court. Beyond this the analysis is unclear. Three possibilities suggest themselves. The first is that, as a matter of legal principle, the defence of justification should not be admissible where the accusation reaches a certain degree of seriousness because to allow such a defence to be aired would be too damaging to the process of the administration of justice: this might be called a consequentialist rationale. Secondly, the denial of the possibility of a defence of justification in respect of such a serious accusation might be based on the assumption - reaching the status of a conclusive presumption - that our judiciary are simply incapable of seriously wrongful conduct. Such an assumption would, however, be at odds with human nature (as well as the Constitution, which envisages that judges are capable of serious

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129 *Gallagher v Durack*, 45 ALR 53, at 55 (1983), *Fletcher, ex p Kisch*, 52 Comm LR 248, at 257 (1935), cited by *Miller*, 381.

130 *Miller*, 381.

131 [1976] IR 382, at 387 (Sup Ct).

132 [1947] IR 213.

133 *Id*, at 221.

misbehaviour[134]).

A third, and more convincing, interpretation of Gavan Duffy P's remarks on the question of justification is that they are limited to the particular circumstances of the case before the court and that they did not seek to express a principle of general import. The allegation made by the defendant that the Special Criminal Court would engage in a "mockery of a trial" no doubt seemed to the President to be so manifestly incapable of justification that any attempt to do so had to be regarded as making matters worse. If this interpretation is correct, then *Connolly's* case should be interpreted as no more than a decision on its facts in this context rather than one seeking to address the relevant legal principles.

In *The State (DPP) v Walsh,*[135] the Supreme Court considered the issue of justification. O'Higgins CJ defined the offence of scandalising as involving "wild and baseless" allegations of corruption or malpractice against a court. He noted that the appellants had not disputed that the statement complained of, "if untrue and baseless",[136] amounted to a criminal contempt. Later he observed that if a court were held up to public ridicule and contempt by "baseless allegations of impropriety and corruption"[137] then justice could not be administered fairly and effectively. All of these statements suggest that truth was capable of affording up a defence, in the view of the Chief Justice.

The following passage from O'Higgins CJ's judgment is of central significance to the issue of justification. Having referred to the facts of the case, in which there was no dispute that the appellants were responsible for the statement which was subsequently published in *The Irish Times*, the Chief Justice said:

> "What then is to be tried by a jury?
>
> The only other question which could arise is whether what was said could be justified on any conceivable basis. This, however, has already been fully considered and investigated by the Court of Criminal Appeal[138] in its careful and extensive review of the trial of the two Murrays. I have already quoted from that court's considered view of the suggestion that there was any such imperfection in the trial. Is it to be suggested that the honour and integrity of the judges who conducted the trial and the validity and justification in law of the decision and verdict of the Court of Criminal Appeal are now to be committed to the judgment of 12 citizens untrained in law? If such a result were required by the provisions of the Constitution, then, in my

134 Cf Article 35.4. See also the *Courts of Justice Act 1924*, section 39, and the *The Courts of Justice (District Court) Act 1946*, sections 20-21.
135 [1981] IR at 421.
136 *Id*, at 422.
137 *Id*, at 426.
138 [1977] IR 360.

> view, respect for the courts would quickly disappear and the independence of the Judiciary would be a thing of the past."[139]

This passage appears to accept that justification *is* a defence. Beyond this the position is unclear. By reason of the unusual circumstances in *Walsh*, the Court of Criminal Appeal might (doubtfully[140]) be considered to have adjudicated already on the issue of justification, and on this account the Chief Justice was clearly reluctant to have the judgment of that Court capable of being "overruled" by a lay jury. But in cases where an appellate court has not adjudicated on the issue the case for denying to the jury the function of determining the issue is less strong.

This raises the question of the extent to which the defence of justification is one of fact or of law, a vital issue in the light of the bifurcation of functions between judge and jury posited in *Walsh*. The answer is surely that it is a mixed issue of fact and law. At times the central question at stake will be perceived as one of fact; at other times one of law; and still others, one involving a combination of fact and law.

Henchy J's analysis in *Walsh* also appears to accept that justification affords a defence. In his view, this issue should not be determined by a jury for two reasons. First, the gravamen of the accusation against the Special Criminal Court had been that it had abused the rules of evidence; it "would be the judge and the jury, who would have to rule on that issue of law".[141] Secondly, the Court of Criminal Appeals judgment rendered the issue *res judicata.*

*(iv) **Public benefit***

In *AG v O'Ryan and Boyd*[142] the High Court had to deal with an unusual argument based on the public benefit. The argument was not that the statements critical of the Judge were *true*, but rather on the contrary that they were so manifestly *false* that the publication of them was for the public benefit, in the interests of the Judge, by revealing the unjust circumstances in which a resolution criticising the Judge had been passed at a county council meeting.

The facts of the case have already been considered. We are here dealing with the position of the second defendant, the editor of a local newspaper who authorised the publication of a detailed report of the county council meeting.

The editor stated on affidavit that his attention had first been drawn to the resolution by seeing a very condensed report of it in the *Irish Times*. He was greatly surprised at such a resolution being passed and at a loss to understand

139 [1981] IR, at 429.
140 Since that Court was addressed a related, but not identical, issue between different parties.
141 [1981] IR, at 442
142 *Supra.*

how it had come about. He therefore obtained a copy of the report of the proceedings. He regarded the first defendant's letter as biassed and prejudiced and considered that the resolution had been passed in an atmosphere which was both heated and prejudiced by reason of the reading of the letter.

The editor said that it seemed to him that a report merely stating the fact that the resolution had been passed might leave the public under the false impression that the resolution was justified, whereas, if the letter were also published, the matter would appear in its true light and the public would be able to see the *animus* clearly present in the mind of the instigator of the resolution. He considered that the very terms of the letter would condemn it in the eyes of the public. He also stated that he was satisfied that Judge Sealy's reputation was so high as a fair and upright Judge that no one would give the slightest credence to the suggestions made against him in the letter, nor would the publication of the letter affect his prestige in the slightest degree. He stated that he had deleted portions of the letter which he knew to be incorrect and that he had printed the letter without comment because it seemed to him to be obviously self-condemnatory.

The editor went on to make what was, in effect, a legal point: that the meeting of the County Council was a statutory one open to the public, and that he believed, at the time he published the report, that the editor of a newspaper was entitled by statute to publish an accurate and fair report of the proceedings of a public body on a matter of public concern and for the public benefit, and that he believed the report in question to be such a report.[143]

This defence divided the Court. It failed in Maguire P's eyes. The President noted that the editor had claimed to have rendered a public service by publishing the letter. He commented:

> "I do not wish to challenge the truthfulness of Mr Boyd, but I confess I do not see how he could have come to such a conclusion. The letter had been read at the County Council meeting. I do not know if there were other speeches but from the account in the newspaper it would seem that the only substantial contribution to the discussion was the letter read by O'Ryan and it appears to have been almost solely responsible for the resolution. Mr Boyd, in my view, should have seen the danger that the letter, when published in his paper, might have the same effect on ordinary readers. The public are, as a whole, less educated than the members of the County Council. It seems to me that the letter was the letter of a man who understood the mentality of the ordinary County Councillor and still more the mentality of the ordinary voter. This attack was, to my mind, designed to excite animosity towards the Judge and to arouse sympathy with the prisoners. In my

143 The editor also expressed his "humblest and sincerest apologies" if, contrary to his intention, he had scandalised the Court: [1946] IR, at 76.

> opinion Mr Boyd was also guilty of contempt of Court."[144]

This test is clearly an objective one. It does not apparently deny the existence of the defence of public benefit but requires that it be established according to the standards of the reasonable person rather than on the basis of subjective *bona fides*.

Maguire P went on to state that, giving Mr Boyd the benefit of any doubt that there was as to his motive in publishing the letter and in view of his attitude in the proceedings, the Court would make no order against him, but it was

> "to be clearly understood that we do not accept the proposition that the editor of a newspaper can, in a proceeding of this nature, come in to Court and rely on the Act of 1888. That is not the law. The Act is no protection. An editor is liable equally with anyone else to be punished for contempt of Court."[145]

Gavan Duffy J expressed no dissent from the President's statement in relation to the 1888 Act. However, also applying the objective test to the question of public benefit, he was:

> "personally of opinion that Mr Boyd rendered a public service to the administration of justice, when he put the letter before his readers, [for] the following reasons:-
>
> (1) Anybody reading the proceedings without the letter would be much perplexed to discover just what was the insult to the Dean that had caused all the bother, whereas the letter plainly showed the complaint to be that Judge Sealy had charged a distinguished Catholic prelate with condoning crime;
>
> (2) No sensible person, reading the letter in a calm and detached atmosphere, was at all likely to believe the absurd allegation that Judge Sealy had accused Dean Byrne of condoning crime;
>
> (3) The reading of the letter would convey some idea of the lurid atmosphere in which that amazing resolution must have been passed; and
>
> (4) The tenor and temper of the letter would give a revealing picture of the writer to any impartial observer, whatever his religion, and the best immediate antidote to the Council's defamation was the text of the scurrilous letter itself, which nothing could redeem."[146]

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144 *Id*, at 81-82.

145 *Id*, at 82-83.

146 *Id*, at 86-97.

He concluded:

> "It must never be forgotten to an editor that his task in having to decide, often at short notice, whether or not to publish offensive material concerning a topic of the day, may be arduous and exacting to a high degree, and I should have much sympathy here with Mr Boyd if in the peculiar circumstances he had made an error of judgment; and I should be very slow indeed, to hold that, having no personal interest in the unsavoury episode, he had by a very understandable mistake incurred the penalties of contempt of Court.
>
> The President of this Court proposes that no order be made in this case and I concur in that order."[147]

Haugh J's concurrence "with all that has been said"[148] makes it impossible to discern the basis on which he was willing that no order should be made against Mr Boyd.

As regards Gavan Duffy J's remarks regarding the position which would have arisen if Mr Boyd had make a mistake, there is some uncertainty. The better interpretation appears to be that a *bona fide* error of judgment as to the decision to publish should not constitute contempt, when made under the exigencies of pressure of time in a newspaper office. This would amount to a test of reasonableness not dissimilar to the notion of a reasonable error of judgment in medical negligence litigation.[149]

It must be said that the Court's rejection of the defendant's argument based on section 4 of the 1888 Act was convincing. That Act's Short Title[150] and Preamble[151] clearly limits its scope to proceedings for *libel.* Moreover, the Act[152] which the 1888 Act repeals did not extend to proceedings in respect of contempt of court.

(v) ***Fair comment***

In the law of defamation, the defence of fair comment affords the basis for a complete exemption from liability.[153] It is necessary for the defendant to show:

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147 *Id*, at 87.

148 *Id.*

149 See *McMahon & Binchy*, 262-263, *Dunne v National Maternity Hospital*, [1989] IR 91 (Sup Ct), *Daniels v Heskin*, [1954] IR 73 (Sup Ct, 1952), *Whitehouse v Jordan* [1981] 1 All ER 267 (HL (Eng), 1980).

150 The *Law of Libel Amendment Act 1888,* section 11.

151 "An Act to amend the Law of Libel".

152 The *Newspaper Libel and Registration Act 1881.*

153 See *McMahon & Binchy*, 657-661; Law Reform Commission, Consultation Paper on *The Civil Law of Defamation*, para 72 ff.

(i) that the comment was made on a matter of *public interest*,

(ii) that what he said was *comment* as opposed to fact, and finally

(iii) that the comment was *fair* in the sense of being honest.[154]

There is, however, an important exception to the general rule that honesty is sufficient to establish the defence of fair comment. If the defendant attributes base, corrupt or dishonest motives to the plaintiff then "as well as honesty the defendant must show that the comment was such that it could reasonably be inferred from the facts truly stated".[155]

There is no clearly defined equivalent defence in respect of contempt of court but this does not mean of course that a comment which fairly criticises a judge or court will invariably constitute an offence. On the contrary, criticism that is objectively fair should *not* constitute contempt as it would not be capable of bringing the administration of justice unjustifiably into disrepute.

We have seen, however, that Lord Atkin's classic statement of the law in *Ambard v AG for Trinidad and Tobago*[156] appeared to render imputations of an improper motive on the part of the judge invariably an offence; but, as we have also seen, this qualification has not been clearly endorsed by the Irish courts. It may also be argued that it is not easily reconcilable with principles of justice or sound public policy.

154 *McMahon and Binchy*, 657.

155 *Id*, 661, citing *Campbell v Spottiswoode*, 3 B & S 769, 122 ER 288 (1863) and noting that the rule has been criticised by the Faulks Committee in its Report, para 169 (Cmnd 5909, 1975).

156 [1936] AC 322, at 335. Australian decisions appear to support a defence based, in effect, on fair comment, even where an accusation of bias is involved: see *Nicholls*, 12 Comm. LR 280 (High Ct of Austr, 1911), and the subsequent cases cited by *Miller*, 382, fn 85.

CHAPTER 4: THE SUB JUDICE RULE

Introduction

A "good working definition"[1] of contempt by way of publication interfering with particular legal proceedings was provided by the New South Wales Court of Appeal in *AG (NSW) v John Fairfax & Sons Ltd*[2]:

> "[C]ontempt will be established if a publication has a tendency to interfere with the due administration of justice in the particular proceedings. This tendency is to be determined objectively by reference to the nature of the publication; and it is not relevant for this purpose to determine what the actual effect of the publication upon the proceedings has been, or what it probably will be. If the publication is of a character which might have an effect upon the proceedings, it will have the necessary tendency, unless the possibility of interference is so remote or theoretical that the *de minimis* principle should be applied."

There is, moreover, a need to show a *real risk*, as opposed to a merely remote possibility of prejudice.[3]

Some Irish courts have preferred a two-stage approach. First the court should ask whether there is a *tendency* to prejudice the trial. Here "[t]he *possible*

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1 *Borrie & Lowe*, 60. See *Anon, Contempt of Court by Newspapers*, 24 ILT & Sol J 323, 337, 351 (1890).

2 [1980] INSWLR 362, at 368, para 21.

3 *R v Duffy, ex p Nash*, [1960] 12 QB 188, at 200 (*per* Lord Parker, CJ), *AG v Times Newspapers Ltd*, [1974] AC 273, at 298 (*per* Lord Reid), *AG (NSW) v John Fairfax & Sons Ltd*, [1980] INSWLR 362.

effect of the language is all that the Court looks to",[4] though the possibility must be real rather than merely fanciful.[5] If the publication has this tendency, the Court proceeds to consider whether there is "such a probable interference with the pending trial as to require [it] to make an order against the respondents".[6]

Other Irish decisions[7] eschew these requirements and apply an unadorned test of whether the publication was "calculated" to interfere with pending proceedings.

Thus, in *AG v Cooke,*[8] the applicants had been arrested one evening in O'Connell Street, Dublin, and charged the following morning in the District Court with the offence of watching and besetting the Carlton Cinema with a view to restraining people from entering it. On the evening of the Court hearing, *The Evening Mail* contained a report of the case as well as a leading article, headed "A Disgrace and Menace" to the following effect:

> "Though the merits of the dispute between the Irish Transport and General Workers' Union of Ireland are the concern of Irish trades unions alone, it is, we suggest, the duty of the Government to take drastic action to ensure that the public is not made to suffer because labour cannot keep its own house in order. Anybody who witnessed the occurrences in O'Connell Street last night must share that belief. The scenes outside the Carlton Cinema were not only a disgrace to the city but a menace to its peace. They might easily have resulted in serious rioting, and it is the plain duty of the authorities to see that there is no repetition of them. The legality of the action of supporters of Mr Larkin to picket premises when no trade dispute exists will, doubtless, be challenged in the proper place. At the moment it is sufficient to know that members of the crowd which gathered outside the Carlton Cinema last night adopted intimidatory methods in order to try to keep people away from the premises. From such treatment the public must be protected, and the Government must immediately provide the necessary protection".

The applicants contended that this piece was calculated to obstruct the course

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4 *The King v Dolan,* [1907] 2 IR 260, at 269 (KB Div, *per* Kenny, J), *The King v Freeman's Journal,* [1902] 2 IR 82, at 87 (KB Div, *per* Lord O'Brien, CJ, 1901), *AG v Hibernia National Review Ltd,* unreported, High Ct, Pringle, J, 16 May 1972 (1971-No.18355), at page 13, *Hunt v Clarke,* 58 LJQB 490.

5 Cf *The King v Dolan,* [1907] 2 IR, at 270 (*per* Kenny, J), *The King v Freeman's Journal,* [1902] 2 IR, at 87, adopting Wright J's statement or legal principle in *The Queen v Payne,* [1896] 1 QB 577.

6 *The King v Dolan,* [1907] 2 IR, at 271 (*per* Kenny, J). See also *AG v Hibernia National Review Ltd, supra,* at page 15 of Pringle J's judgment.

7 Eg *AG v Cooke,* 58 ILTR 157 (High Ct, 1924), *Keegan v de Burca,* [1973] IR 223, at 227 (Sup Ct, *per* O Dalaigh CJ), *Reg v Parnell,* 14 Cox CC 474 (QB Div, Ir, 1880).

8 58 ILTR 157 (1924).

of justice and prevent a fair trial of their case, by prejudging the two questions at issue - whether there was a trade dispute and whether intimidatory methods had been used.

The High Court[9] held that the respondents had not committed contempt. Only Sullivan P's judgment addresses the liability issue, and it does so in terms of stating some general, unexceptionable principles and the conclusion, with no linking analysis, that the publication was neither intended[10] nor "calculated to interfere".[11] It may be that the fact that the prosecution was being heard by a District Justice rather than a jury affected the Court's determination[12] but there is little in the judgments to confirm this.

The Prejudgment Test

In *Ag v Times Newspapers Ltd*,[13] the House of Lords held that a publication in respect of particular proceedings was capable of constituting a contempt, not because of the risk of prejudice in these proceedings but on account of the risk to the administration of justice generally. The case concerned litigation then in progress in regard to the alleged effects of the drug thalidomide. The *Sunday Times* had proposed to publish an article dealing with the general subject. The House adopted a test of "prejudgment" which was later held to violate Article 10 of the European Convention of Human Rights. Lord Cross's *rationale* has been widely discussed and criticised:

> "It is easy enough to see that any publication which prejudges an issue in pending proceedings ought to be forbidden if there is any real risk that it may influence the tribunal, whether judge, magistrates or jury, or any of those who may be called on to give evidence when the case comes to be heard. But why, it may be said, should such a publication be prohibited when there is no such risk? The reason is that one cannot deal with one particular publication in isolation. A publication prejudging an issue in pending litigation which is itself innocuous enough may provoke replies which are far from innocuous but which, as they are replies, it would seem unfair to restrain. So gradually the public would become habituated to, look forward to, and resent the absence of, preliminary discussions in the 'media' of any case which aroused widespread interest. An absolute rule - though it may seem to be unreasonable if one looks only to the particular case - is necessary in order to prevent a gradual slide towards trial by newspaper or television."[14]

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9 Sullivan, P O'Shaughnessy and Murnaghan JJ.

10 As will be mentioned, the requirement of the proof of an intention to interfere has usually been rejected in the Irish cases. The idea that intention might be an *alternative* basis for liability to likelihood ("calculation") is not common in the decisions.

11 58 ILTR, at 158.

12 Cf *Casey*, 431.

13 [1974] AC 273.

14 *Id*, at 322-323.

Thus far, the *Sunday Times* case, in its specific *ratio,* has not been adopted here. It was held, however, to be contrary to Article 10 of the *European Convention on Fundamental Rights and Freedoms*, in *The Sunday Times UK.*[15] In Ireland, in *The State (Walsh) v DPP,*[16] Henchy J observed that there was a presumption that our law on contempt is in conformity with the Convention, particularly Articles 5 and 10(2). Whether there is merit in this proposition may be debated, but it affords, at the least, a clear indication of a lack of support for the approach favoured by the House of Lords on this question.

CRIMINAL PROCEEDINGS

We must also now consider the application of the general principles we have outlined in the specific context of publications interfering with the course of justice in current criminal proceedings. *Borrie & Lowe*[17] observe that:

> "[t]here is perhaps a special vigilance to shield particularly first instance criminal proceedings from such a risk partly because the liberty of an accused might be in issue and partly to protect society's interest that the guilty be convicted and the [innocent] acquitted. But also and importantly it is considered that the tribunal, at any rate when comprising ... jurors, is particularly vulnerable to influence by out of court publicity."

Moreover, witnesses who are to give evidence of what they experienced may be so affected by a prejudicial publication that the quality of their evidence may be damaged as a result.[18]

*(a) **Encouraging partiality***

Clearly, publications tending to impair the *impartiality* of the trial judge, the jury or a witness may constitute contempt. In the Irish case of *R v O'Dogherty,*[19] Pigot CB stated that:

> "[o]bservations calculated to excite feelings of hostility towards any individual who is under a charge ... amounts to a contempt of court ...."[20]

*(b) **Accused's criminal record or bad character***

To publish an accused's past criminal record tends to be a very serious contempt throughout the common law world.[21] The courts have sought to

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15 [1979] 2 EHRR 245.
16 [1981] IR 412, at 440 (Sup Ct).
17 *Borrie & Lowe*, 92.
18 See *id*, 93.
19 5 Cox CC 348 (1848).
20 *Id*, at 354.
21 See *Borrie & Lowe*, 96-97.

protect defendants even against the disclosure that they have pleaded guilty to some charges where they are tried for other charges to which they have pleaded not guilty.[22]

Publications, not of an accused's previous convictions, but of his bad character, can also be sufficiently prejudicial to amount to contempt.[23] To describe a defendant as having had "an unedifying career as brothel-keeper, procurer and property racketeer" was (understandably) held to constitute a serious contempt.[24]

It is well established that to publish a pre-trial confession -even a true one, freely made - is a serious contempt. As Darling J commented in *R v Clarke, ex p Crippen*,[25] "[a]nything more calculated to prejudice the defence could not be imagined".

It is contempt to publish material commenting, or reflecting, on the merits of the case against a defendant in criminal proceedings. As *Borrie & Lowe*[26] comment:

> "Publications which directly or indirectly prejudge the merits of a trial and particularly those which impute the guilt or innocence of the accused are classic examples of 'trial by newspaper'. Such publications obviously have a tendency to prejudice the fair trial of an accused, since they could clearly create bias in the minds of those who actually have to try the case. It is therefore a serious contempt to impute directly or indirectly the guilt or innocence of an accused before he has been tried."

In *Reg v Parnell*,[27] the *Dublin Evening Mail*, a "journal which advocates what is known as the landlord interest in Ireland", was attached for contempt in respect of its comments on the defendants, Charles Stewart Parnell and others, in a trial for conspiracy to induce tenants not to pay rent. The impugned article implied that an acquittal was not to be expected save by a verdict contrary to the evidence and procured by intimidation. May CJ observed, "that is to comment by anticipation upon the evidence that was about to be given, and I think there can be no doubt that that passage as it stands is objectionable".

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22 *Id*, 96, citing (*inter alia*) *R v Border Television Ltd, ex p AG*, 68 Cr App Rep 375 (1978).

23 *Id*, 98.

24 *R v Thomson Newspapers Ltd, ex p AG*, [1968] 1 All ER 268.

25 103 LT 636, (1910). See also *R v Willis*, 9 DLR 646 (1913), *Re Ag for Manitoba and Radio 06 Ltd*, 70 DLR (3d) 311 (1976), *Fairfax's* case, *supra*, *R v David Syme & Co Ltd* [1982] VR 173, all cited by *Borrie & Lowe*, 100.

26 *Borrie & Lowe*, 100. See, e.g., *R v Bolam, ex p Haigh*, 93 Sol J 220 (1949), *R v Odham's Press Ltd, ex p AG*, [1957] 1 QB 73, and *R v Parnell*, 14 Cox CC 474 (1880).

27 *Supra*.

(c) ***Prejudicing jury in favour of accused***
It is worth noting that, although the great majority of cases are concerned with comments *damaging to the accused*, it may also be a contempt to publish material which risks prejudicing the jury *in the accused's favour*. In *Davis v Baillie*,[28] Fullager J said that he regarded publication, while a charge is pending, of matters calculated to arouse sympathy with an accused person as "objectionable in itself". *Borrie & Lowe*[29] note that "[i]n other Australian decisions there is a hint, however, that it might be harder to establish a real risk of prejudice to the prosecution".

In *AG v Hibernia National Review Ltd*,[30] Pringle J addressed this question. The Attorney General sought orders of attachment against Hibernia National Review Ltd, Mr John Mulcahy and an tUasal Prionsias Mac Aonghusa arising out of a paragraph in an article appearing in *Hibernia*, of which an tUasal Mac Aonghusa was author. Mr Mulcahy edited the periodical. The article related to treatment of a prisoner in Mountjoy Gaol. The prisoner was on remand at the time, having been sent for trial to the Central Criminal Court, charged with the murder of a Garda acting in the course of his duty, contrary to common law. He was subsequently acquitted.

The impugned paragraph was as follows:

> "Professor Myles Dillon, Professor Con O Cleirigh and the other distinguished citizens who wrote to the press protesting against the jail treatment of Frank Keane are worthy of the greatest respect. This untried and unconvicted fellow-citizen of ours is being systematically tortured in Mountjoy Jail, if the allegations made in court by his counsel, Seamus Sorahan, are correct. It is terrible to find that the District Justice is totally unable to stop the torture. I thought prisoners were in the custody of the courts and not of the Department of Justice. I was wrong. The torture is being carried out on the orders of the Department of Justice and not as a result of any special policy of the Prison authorities, I am told.
>
> Frank Keane is a political prisoner. But even if he were a criminal prisoner it would be outrageous that he should be tortured. So far not one T.D. had queried the Minister for Justice in the Dail about this. Those T.D.s who weep for South African and Russian and United States and Vietnamese and Biafran prisoners are silent. The question to be asked is simple: 'To ask the Minister for Justice if he will make a statement on the conditions under which Frank Keane is held in Mountjoy Jail'. Even a backward deputy might be able to copy that out, and no matter what answer Cicero O'Malley gives the whole ugly story

28 [1946] VLR 486 (Vict Sup Ct).

29 *Borrie & Lowe* 98, citing *Fairfax's* case, *supra* and *Consolidated Press Ltd v McRae*, 93 CLR 325 (1955).

30 Unreported, High Ct, Pringle, J, 16 May 1972 (1975 - No.18355).

can be aired."

The complaints made by Mr Sorohan as to the treatment of his client were threefold: that he was allowed less than the period of exercise normally accorded to remand prisoners, that, contrary to normal practice, he was not allowed to associate with other prisoners on remand, and that, after the normal "lights out" hour of 10.00 p.m., the electric light in his cell was switched on and off at intervals varying from ten minutes to thirty minutes throughout the night. Mr Sorohan had made these complaints to the District Court on four separate occasions. Mr Keane informed him around the time he made these complaints for the fourth time that the switching on and off of the light had been discontinued but that otherwise there was no improvement in his conditions. That these complaints were well founded "appears .... undisputed".[31] They were reported in the newspapers on the first three occasions. On the first occasion, it was reported that Mr Sorohan has said that he was not alleging that his client had been beaten or ill-treated; but he complained about his client's being compelled to attend an identification parade. District Justice Good was reported as having said that he had no control whatever over what happened to a prisoner once he was given back into the hands of the prison authorities.

The letter to which an tUasal Mac Aonghusa referred had been published in the *Irish Times*. It was signed by Myles Dillon, Conn O Cleirigh, Denis Donoghue, Michael Scott, Maurice MacGonigal RHA, and James Mulcahy, and stated:

> "... It has been said in Court that an accused man now on remand, Francis Keane, is being subjected to very harsh treatment amounting almost to torture, in Mountjoy Prison. This man is innocent until he is found guilty and it would be a grave abuse of Justice that he should be so treated. We ask for a public assurance from the Minister for Justice or the Governor of the Prison that the prisoner is receiving the treatment and privileges that are proper for an accused person."

On behalf of the Attorney General it was argued that, notwithstanding the intention an tUasal Mac Aonghusa might have had in writing the article, it tended to interfere with Mr Keane's pending trial in two respects. First, the statements that torture was being carried out on the orders of the Department of Justice would tend to prejudice the case for the prosecution. Secondly, the statement that Mr Keane was a political prisoner tended to prejudice the trial by misrepresenting the nature of the pending prosecution against him, as being for some offence of a political nature and not for the common law offence of murder, and thus tended to suggest that the prosecution was actuated by political motives. Reliance was placed on the fact that the article referred more than once to 'torture' whereas Mr Sorohan had made no allegation of torture as such and had expressly stated that he was not suggesting that his

31 P11 of Pringle J's judgment.

client had been beaten or ill-treated; moreover, the letter to the *Irish Times* had referred to "harsh treatment amounting almost to torture".

Counsel for all the defendants argued that the allegations made by Mr Sorohan had already been widely publicised in the daily press and that the article was simply another forceful protest against the ill-treatment of a prisoner awaiting trial in an attempt to have something done about it.

Pringle J favoured the two-stage approach adopted by Kenny J in *The King v Dolan*,[32] whereby the Court asks first whether there was any contempt and secondly, if there was, considers whether it was such a contempt as would require or justify the making of an order against the defendant.

In regard to the first of these questions, Pringle J considered that he should ask himself whether the article would "tend or be calculated to"[33] affect the mind of a juryman who had read the article and who was impanelled to try Mr Keane.

Pringle J rejected the argument that the allegation of torture amounted to contempt. He thought it necessary to take into account the fact that such a juror might well have already read the statements in the daily papers as to Mr Sorohan's allegations, and already have had some sympathy for the accused; any extra sympathy which might be engendered by reading the references in the article to torture would not be sufficient to constitute such an interference with the course of Justice as to amount to contempt.

Pringle J considered, however, that the statement that Mr Keane was a political prisoner, made by a responsible and well-known journalist who held himself out as knowing the facts, would not only tend to prejudice a potential juror in favour of the accused, or against him, according to the political views of the juror, but would also tend to mislead him as to the nature of the trial, and therefore the statement tended or was calculated to interfere with the course of Justice and was a contempt of court.

Guided by Kenny J's test of likelihood of prejudice in *The King v Dolan*,[34] Pringle J concluded that the statement that Mr Keane was a political prisoner not only tended but was likely in fact to prejudice the trial and to mislead a juror or the public as to the nature of proceedings; it was thus sufficiently serious to require the imposition of a penalty.

The penalties the Court ordered were low: a £50 fine each for Hibernia National Review Ltd and Mr Mulcahy and a fine of £100 for an tUasal Mac

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32 [1907] 2 IR 260, at 267-268, referring to Cotton LJ's judgment in *Hunt v Clarke*, 58 LJQB 490.

33 P14 of Pringle J's judgment. Pringle J did not seek to clarify the distinction between these two concepts.

34 [1907] 2 IR, at 270.

Aonghosa. Pringle J took several mitigating factors into account: the nature of the periodical, the purpose of the article, the absence of an intention by either the author or the editor to interfere with the trial, and the editor's statement that he would greatly regret if any action on his part were to have any such effect.

In *The King v The Freeman's Journal Ltd*,[35] Mr P McHugh MP had been prosecuted for seditious libels on the administration of justice and on the jury that had convicted two men at Sligo. The jury disagreed in Mr McHugh's trial. The next day of publication, there appeared in the *Freeman's Journal* and the *Evening Telegraph* articles entitled "Jury Packing", stigmatising the prosecution of Mr McHugh as "preposterous" and (in effect) wholly misrepresenting the issue tried in that case. The articles also contained reflections on Lord O'Brien LCJ, who had presided at the trial.

In holding that the articles were calculated to interfere with the course of justice, the Lord Chief Justice stated:

> "The substance of the accusation against Mr McHugh was that he had imputed criminal misconduct to certain Protestant jurors who tried the case against Muffeny and Maguire; and the article in the *Freeman's Journal* dealt with his conduct as if the only thing he did was to denounce the action of the Crown in directing Catholic jurors to stand by. The impugned article not only stigmatised the prosecution of Mr McHugh as preposterous, but it entirely misrepresented the issue. 'Preposterous' was the term it applied to the prosecution, and the whole drift of the article was to make Catholic jurors believe that the charge against Mr McHugh involved their rights as Catholics. This was plainly calculated to prejudice the fair trial of the case.
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> The article in the *Evening Telegraph* stated 'that Mr McHugh was not tried on the fair issue - that the Crown, by a system of pleading which, like the Act of Edward 3, dared not be used in England, prevented him from taking up this position of justification'. This was a total misrepresentation of the case. The issue which was presented to the jury was decided, by the concurrent judgment of four members of the Court, to be the legal and proper issue."[36]

Lord O'Brien, LCJ referred to a "well-known passage" in Lord Hardwicke's judgment in the case against the printers of the *St James Evening Post*,[37] "which met with the approval of the very highest legal authorities, including Lord Hatherley and the then Lord Chancellor of England. Lord Hardwicke in this passage had stated:

35 [1902] 2 IR 82 (KB Div, 1901).
36 *Id*, at 86-87.
37 2 Atk 469.

"Nothing is more incumbent on courts of justice than to prevent their proceedings from being misrepresented nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard."

Lord O'Brien LCJ stated:

"The real effect and draft of the incriminated articles was not merely to condemn the fact of Mr McHugh being prosecuted at all, but to misrepresent the issue. This, in our judgment, was clearly a contempt of court."[38]

On the question as to the extent to which the *innocence* of an accused may be canvassed during his or her trial,*R v Castro; Onslow's and Whalley's Case*[39] is the leading English case. The defendants, Members of Parliament, took an active role in a public meeting where it was alleged that the claimant in the Tichborne Succession Claim was the victim of a massive conspiracy in being prosecuted for forgery and perjury. The meeting passed a resolution declaring that, in its opinion, the prosecution was "uncalled for, and in the absence of explanation, which has been refused, wholly unjustifiable"; the resolution demanded "public reprobation".

The Court held the two defendants guilty of a gross contempt. Cockburn CJ said:

"If it is open to those who take the part of the accused to discuss in public meetings the merits of the prosecution in the interests of the accused, it is obvious that it must be equally open to those who believe in the guilt of the party accused and the propriety of the prosecution, and believe a conviction is necessary to the ends of justice, to hold meetings and to use language of the opposite tendency; and thus the course of justice might be interfered with and disturbed by discussion taking place outside the walls of a court of justice, but which might in the end influence proceedings within it."[40]

It may perhaps be doubted whether there is an inevitable logic in this argument. It would be perfectly logical for the law to tolerate a certain range of protest against the prosecution of a person on the basis of his or her innocence without being obliged thereby to concede any right to public calls for the conviction of those who are prosecuted. The protection of the innocent is a legal norm of a different kind than the desirability that prosecutions be successfully brought against guilty defendants.

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38 [1902] 2 IR, at 87.

39 LR 9 QB 219 (1873). See also *R v Castro; Skipwork's Case*, LR 9 QB 230 (1873).

40 LR 9 QB, at 226.

(d) Deterring witnesses from coming forward

It may be a contempt to publish material calculated to prejudice the court's ability to determine the true facts of a case.[41] One way by which this may be achieved is by preventing the court from hearing all the evidence.[42] Thus, if a publication is calculated to deter witnesses from coming forward, this will be a contempt.

In *Re Labouchere, ex p Columbus Co Ltd*,[43] Phillimore, J observed that when a case was to be tried on the evidence of witnesses who might be intimidated by reading an article which tended to prejudice the course of justice, this might be contempt. In the case before the Court, Bruce J, is reported as saying that:

> "[l]ooking at the whole of the article in question he could not doubt that it was calculated to imply that [the witness] was not [one] to be relied on, that it held him up as a person whose conduct was to be condemned, and that it might prejudice the mind of any juryman against [this witness] who happened to read it."[44]

(e) Premature publication of evidence

The premature publication of evidence in a criminal trial may constitute contempt.[45] In England the practice of "investigation by newspaper" received its quietus in *R v Evening Standard, ex p DPP*[46] in 1924. There three newspapers had published the results of an investigation they had carried out into a sensational murder case. Lord Hewart CJ is reported as having stated that it had been urged on behalf of one of the defendants:

> "that it was part of the duty of a newspaper when a criminal case was pending to elucidate the facts. If he understood that suggestion, when clearly expressed it came to something like this; that while the police or the Criminal Investigation Department were to pursue their investigations in silence and with all reticence and reserve, being careful to say nothing to prejudice the trial of the case, whether from the point of view of the prosecution or the point of view of the defence, it had come to be somehow for some reason the duty of newspapers to employ an independent staff of amateur detectives, who would bring to an ignorance of the law of evidence a complete disregard of the interests whether of the prosecution or the defence. They were to conduct their investigation unfettered, to publish to the whole world from time to time the results of these investigations, whether they conceived them

41 See *Borrie & Lowe*, 104 ff.
42 See *Id*, 105.
43 17 Times LR 578, at 579 KB Div (Bruce and Phillimore, JJ, 1901).
44 *Id*.
45 See *Borrie & Lowe*, 106 ff.
46 40 Times LR 833 (KB Div; Lord Hewart CJ, Roche and Branson, JJ, 1924).

to be successful or unsuccessful results, and by so doing to perform what was represented to be a duty, and, one could not help thinking, to cater for the public appetite for sensational matter."[47]

This analysis is less than convincing. It slays the paper tiger of a hypothetical publication containing no regard for the dimension of justice: it has nothing to say on the case where the publisher has sought to exert considerable, sensitive control over what is published, in the light of concern for a fair trial.

The Lord Chief Justice went on to evince an awareness that responsible publishers might not fall within the caricature of their profession he had just portrayed; his remarks made it clear that he saw little scope for publishing the results of such investigation by newspapers:

> "It was not possible for that Court, nor had it any inclination, to suggest to the responsible editors of those newspapers what were the lines on which they ought to proceed. Any such task as that was entirely beyond the province of that or any other tribunal. Those who had to judge by the results could see what a perilous enterprise this kind of publication was. It was not possible even for the most ingenious mind to anticipate with certainty what were to be the real issues, to say nothing of the more difficult question what was to be the relative importance of different issues in a trial which was about to take place. It might be that a date, a place, or a letter, or some other one thing which, considered in itself, looked trivial, might prove in the end to be a matter of paramount importance. It was impossible to foresee what was important."[48]

In *In re MacArthur,*[49] the applicant was arrested and charged with murder against a background of politicial interest and controversy.[50] He sought conditional orders of attachment against the Taoiseach and the owner and editors of two newspapers. He alleged that at a press conference, shortly after he had been arrested, the Taoiseach had used certain words in relation to him which amounted to contempt of court. The Government Information Service had issued a statement after this press conference asking journalists not to report this remark, which the statement characterised as a slip of the tongue, made inadvertently.

Costello, J stated:

> "It has not been suggested that I should disbelieve these statements attributed to the Government Information Service. It is true that the test which the court is to apply in an application of this sort is whether

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47 *Id*, at 835.
48 *Id.*
49 [1983] ILRM 355 (High Ct. Costello, J. 1982).
50 See *Casey*, 438.

the words complained of are calculated to prejudice the due course of justice,[51] and that the test is an objective test.[52] But if, as here, it is established that the words were spoken inadvertently in the course of a long press conference in which it was necessary to answer many questions, some of which touched on a pending criminal trial, and if it is shown, as it is shown here, that immediate steps were taken to avoid any possible prejudice that the words might give rise to and if it can be shown, as it can be shown here, that any possible prejudice can be obviated by the direction which the trial judge can give to the jury, then it seems to me to be highly unlikely that the court would exercise its extraordinary punitive powers[53] and punish such a person for contempt in the circumstances which I have outlined. I do not think therefore that the applicant has made out a *prima facie* case for a conditional order and I refuse this application in so far as it relates to the words which it is alleged were spoken by the Taoiseach on [that date]."[54]

The applicant secondly alleged that the Taoiseach, the day after this press conference, was guilty of contempt in causing to be published in the newspapers the following day part of the contents of the letter which it was alleged was written to him by the applicant. Counsel for the applicant argued that this portion was capable of being construed in a way prejudicial to the applicant.

Costello, J assumed for the purposes of the application that the Taoiseach authorised the publication of the fact that he had received a letter from the accused, and had authorised the publication of certain of its contents as appeared in the national press of the following day. It seemed to him, however, that the publication of the fact that the Taoiseach had received a communication from the accused would not in itself amount to contempt. The publication of the fact that the accused had informed the Taoiseach that the former Attorney General was unaware that he, the accused, was under suspicion by the Gardai would not, in itself, amount to a contempt of court. With regard to the suggestion that there had been authorised publication of a further statement which, it was suggested, was contained in the letter, a statement which was carried in the "Irish Press" on 19 August but not in the other dailies which could be construed as prejudicial to the accused, Costello J thought that it had to borne in mind that contempt "is a criminal offence and, before the court will exercise its extraordinary summary powers to punish someone for contempt, the offence must be proved beyond a reasonable doubt".[55] He was not satisfied that the applicant had established a *prima facie* case that the court would hold that the words of which he complained held the meaning or were capable of the meaning which he alleged. "If this is so

51 Citing *Keegan v de Burca*, [1973] IR 233.

52 Citing *R v Standard Co*, [1954] 1 QB 578.

53 Cf *The State (DPP) v Walsh*, [1981] IR 412, at 428 (Sup Ct, *per* O'Higgins, CJ, dissenting).

54 [1983] ILRM, at 356.

55 *Id*, at 357.

then no court would make an order punishing the publication of that portion of the letter".[56]

The applicant also sought conditional orders of attachment against the editor and proprietor of the "Irish Press" in relation, *inter alia* to the following matters: the publication of information relating to a letter alleged by the newspaper to have been written by the accused to the Attorney General, and the publication of information relating to the finding of an item of evidence in a flat in which the accused had been arrested.

As to the first of these complaints, Costello J said that:

> "the 'Irish Press' ... stated that the accused had written a letter to the Attorney General, Mr. Connolly, apologising for involving him in the affair and that the letter had not been sent out from prison. It is submitted on the applicant's behalf that this statement purported to refer and import a reference to the contents of the earlier letter to the Taoiseach to which I have referred and the report was prejudicial to the fair trial of the applicant. I must accept for the purposes of this application that the accused did not write the letter referred to in the report ... but the publication by the 'Irish Press' of the statement that he did, even if it is untrue, did not in itself constitute a contempt of court. The report in the newspaper of the contents of the alleged letter and what it is claimed was contained in the alleged letter would not, in themselves, prejudice the accused's trial, and further I do not see how prejudice would arise merely because the report ... contains a reference to the earlier letter written by the accused to the Taoiseach."[57]

Accordingly Costello J dismissed the application under this head.

As to the other matter, in which reference was made to the finding of an item of evidence, Costello J said:

> "It seems to me ... that in the present case the applicant has not made out a *prima facie* case in relation to the report to which I have referred. I do not think, for example, that it amounts to contempt to describe a dead person as having been 'murdered' when a person stands charged with his murder. It is true that the report does refer to the Garda opinion concerning an item of evidence but on the hearing of this application for an order for committal or of attachment the court would have to take into account both the nature of the report and the issue in the trial to which the report relates before deciding to exercise its summary powers. I am not satisfied that the applicant has shown that a *prima facie* case exists for the making of such an order in relation to

56 *Id.*
57 *Id.*

the publication ..."[58]

Accordingly Costello J dismissed this part of the application.

(f) Publication of pre-trial interviews

The position regarding the publication, before they give evidence at trial, of what witnesses have said during interviews is somewhat unclear.[59] It is generally accepted that simple and straightforward eye-witness accounts are permissible,[60] provided they do not involve badgering of the witnesses or subjecting them to in-depth interviews.[61]

There is also nothing wrong with conducting interviews for the purpose of publishing material *after* the trial, provided, of course, that these interviews are not conducted in such a way as to deter witnesses from giving evidence at trial.[62]

(g) Publication of photographs

To publish a photograph of an accused person when identification is likely to be an issue in the trial is a serious contempt.[63] The prejudice may of course be to the accused; but it may also affect the efficacy of the prosecution's case since a prosecution witness who has seen a picture of the accused in the paper may find that the validity of his or her identification is thereby impugned.[64]

As *Borrie & Lowe*[65] point out

> "Not all pre-trial photographs of the accused will amount to contempt since it is a fundamental prerequisite of the offence that *at the time of publication*, identity must either be or reasonably likely to be in issue

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58 *Id*, at 358.
59 See *Borrie & Lowe*, 107-108.
60 See *Packer v Peacock*, 13 CLR 577, at 588 (1912).
61 *Borrie & Lowe*, 107.
62 *Id*, 108.
63 *Id*.
64 See *AG v Noonan*, [1956] NZLR 1021, *R v Daily Mirror, ex p Smith*, [1927] 1 KB 845.
65 *Borrie & Lowe*, 107. *Borrie & Lowe* go on to say:

> "If identity is thought to be an issue (and ... the likelihood of this is determined objectively by the courts in the light of the circumstances existing at the time of publication) then it is no defence that identity is not subsequently raised at the trial, nor that the published picture was so bad that no identification could possibly be made from it, nor that no witness in fact saw the photograph. In other words, the rule is that publication of a photograph at a time when identity is likely to come into issue amounts to a contempt. Given that, as Blair, J pointed out In *AG v Tonks*, [1934] NZLR 141, at 150, it is 'abundantly plain' that 'when a man has been arrested only, and formally charged, it is impossible to say what his line of defence will be', it is a particularly perilous enterprise to publish the accused's photograph at that time."

at the trial."[66]

In *Re MacArthur,*[67] Costello, J considered that the publication in a newspaper of a photograph of a defendant charged with two murders was a *prima facie* contempt. Counsel for Mr MacArthur had argued that visual identification might be an issue at his trial. Costello, J considered that such *prima facie* case had been made out even though the possible prejudice in the photograph might be obviated by direction to the jury by the trial judge.

(h) *Temporal Limitations on the Scope of the Sub Judice Rule*

We now must consider the temporal limitations on the scope of the *sub judice* rule. These apply at the start and finish of legal proceedings.

(1) *When does the rule first apply?*

There is some authority internationally for the view that the *sub judice* rule should first apply when proceedings are *imminent.* It has the support of the Northern Ireland judiciary[68] as well as English judges.[69] In Ireland, in *The State (DPP) v Independent Newspapers Ltd,*[70] O'Hanlon J addressed the issue. The Director of Public Prosecutions sought the attachment of the publishers, editor and a journalist of the *Evening Herald* in respect of material in that newspaper which stated that the Director of Public Prosecutions intended to bring indecency charges against a local authority councillor. The article referred to the political party to which the councillor belonged but did not name the person involved nor identify the particular locality to which he belonged. At the time no charge had been brought; however, the affidavit of the Chief State Solicitor, supporting the application, linked the publication with a charge brought against a named accused two days after the publication.

O'Hanlon J refused the application for attachment. He quoted from the English decisions and stated:

> "These, however, are only *obiter dicta*, and I have not been referred to any decided case in this jurisdiction or in the other common law jurisdictions where attachment for contempt of court has been grounded upon material published when no court has actually had seisin of the case in respect of which contempt is alleged. As the courts must always have regard to the countervailing importance of preserving the freedom of the press, I do not consider that the facts disclosed in the affidavit

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66 See *R v Lawson, ex p Nodder*, 81 Sol J 280 (1937).

67 [1983] ILRM 355.

68 *R v Beaverbrook & Associated Newspapers Ltd*, [1962] NI 15 (QB Div, Sheil J, 1961).

69 *R v Parke*, [1903] 2 KB 432, *R v Daily Mirror, ex parte Smith*, [1927] 1 KB 845 (*per* Lord Hewart, CJ); but see *id*, at 832 (*per* Talbot J); *R v Savundrayanagan and Walker*, [1968] 3 All ER 439, at 441 (CA, *per* Salmon LJ, for the Court).

70 [1985] ILRM 183 (High Ct, O'Hanlon J, 1984).

grounding the present application are of such a character as would justify me in extending the law as to contempt of court in the manner now sought by the Director of Public Prosecutions."[71]

It is, perhaps, unfortunate that the Northern Ireland case of *Beaverbrook* was apparently not mentioned as it represents a clear authority for the application of the law of contempt to cases where proceedings are imminent.

(2) *The position between conviction and sentence*

After a person has been convicted, but before sentence, the position as regards contempt is changed somewhat. This is because the judge, who has the exclusive function of sentencing, is less likely to be influenced by media comment than a jury would be.[72] There are, however, decisions in England[73] and New Zealand[74] taking the view that it is too narrow to focus merely on the possibility of influencing the judge. As Myers CJ said in *AG v Tonks*[75]:

> "The court must not only be free - but it must also appear to be free - from any extraneous influence. The appearance of freedom from any such influence is just as important as the reality. Public confidence must necessarily be shaken if there is the least suspicion of outside interference with the administration of justice."[76]

(3) *The position after a jury disagreement*

Where a trial has ended in a jury disagreement, the restraints appropriate to a pending trial continue to apply regarding contempt.[77]

In *The King v The Freeman's Journal Ltd*,[78] to which we have already referred in some detail, the offending articles were published the next day of publication following on a trial which had ended in a jury disagreement. The

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71 *Id*, at 184-185.

72 See *Borrie & Lowe*, 109-110.

73 The *Operation Julie* case (1978) discussed by *Borrie & Lowe*, 110.

74 *AG v Tonks*, [1939] NZLR 533.

75 *Supra.*

76 It is worth recording *Borrie & Lowe's* comments in this context (at 110):

> "Although the rationale of maintaining public confidence and respect for the independence, authority and fairness of the judiciary lies at the heart of other branches of contempt law, such consideration has generally not been applied with respect to comments about decisions pending their appeal and it may seem unduly restrictive to apply them to comments pending sentence. It is worth adding that since Park, J's ruling [in the *Operation Julie* case] there have been no subsequent warnings nor prosecutions though there have been cases where there has been detailed public comment between verdict and sentence."

77 See *AG v News Group Newspapers Ltd*, 4 Cr App Rep 182 (1982).

78 [1902] 2 IR 82 (KB Div, 1901). As to disclosure after jury disagreement in civil proceedings of members in favour of either party, see *Sheehy v The Freeman's Journal Co Ltd*, 26 ILTR 47 (Ex Div, 1892).

editors argued that they should not be held liable for contempt because they believed that the trial was no longer pending. O'Brien LCJ disposed of this contention summarily:

> "We cannot at all adopt this reasoning. The prosecution was, in fact, still pending. To animadvert adversely upon the institution and character of a prosecution, to stigmatise it as preposterous, and wholly to misrepresent the issues involved in it, and to do this immediately after the disagreement of a jury, whilst public attention is fixed upon it, and the public mind, with reference to it, by reason of the excitement which an abortive trial has occasioned, is in a susceptible and malleable mood, seems to me clearly to fall within the definition of 'contempt of court'. No doubt, the belief that the prosecution is at an end is all-important in reference to punishment, as I more than once pointed out."[79]

The question must arise as to what would have been the Lord Chief Justice's view in a case where the defendant's belief that the trial was over was *bona fide* and reasonable, though mistaken, and the criticism or other comment did not amount to scandalising the court. The passage just quoted from the Lord Chief Justice's judgment would not appear capable of supporting the imposition of criminal responsibility in such a case.

The Lord Chief Justice went on to distinguish *Metropolitan Music Hall v Lake*,[80] "even if well decided".[81] In that case, the defendants had not known that legal proceedings had been even commenced; "and there is in the self-same volume of the Law Journal a judgment of the present Lord Justice Stirling, in which he held that the printer of a newspaper could be made responsible in a proceeding against him for contempt of court, although he had no knowledge of the contents of the incriminated article".[82]

This is not a very convincing argument. If a defendant should avoid liability by reason of his belief that no proceedings were in existence at the time of the publication because he had no way of knowing that they *had yet begun*, it is difficult to see why he should not also avoid liability by reason of his belief that no proceedings were in existence at the time of the publication because he had no way of knowing that they *had not been completed*. Of course it is possible to *scandalise* a court in respect of completed proceedings, but that is a different matter. A criticism will be no less a scandalising of the court by virtue of a mistaken *bona fide* and reasonable belief that the proceedings have been completed. In any event it is worth recalling that it is perfectly possible to scandalise a court in respect of proceedings that have not yet

79 [1902] 2 IR, at 88-89.
80 58 LJ Ch 513.
81 [1902] 2 IR, at 89.
82 *Id.*

begun.[83]

The Lord Chief Justice had no difficulty in (rightly) rejecting the respondents' contention that no contempt of court had been committed because there had been a conviction on the second trial of Mr McHugh:

> "The contention that no contempt of court was committed because there was a conviction on the second trial needs only to be stated to be refuted. If such a proposition was maintainable, the most deliberate attempt to obstruct the course of justice should go unpunished if it had not had the desired effect. In order to ascertain whether a contempt of court has been committed, we must regard the incriminated article and the state of things which existed at the time of its publication. The mischief that has been done may be regarded as a element in determining what punishment should be inflicted, if any."[84]

This passage is interesting in raising the question as to why, if a justified mistaken belief that the trial has ended will not afford a defence, the court, in determining whether the defendant is guilty of contempt of court, should have regard to the incriminated article and the state of things which existed *at the time of its publication.* If, as a matter of fact, a published criticism results *some time after its publication* in an interference with the administration of justice, why should that not be a crime? The reason for locating the test at the time of the publication is presumably out of concern for fairness to the defendant. Yet there is no similar concern so far as the issue of reasonable belief as to the termination of proceedings is concerned.

The Lord Chief Justice's treatment of the question of punishment is of considerable contemporary relevence:

> "I now come to what I have all through considered to be the real question in this case - what punishment (if any) should be inflicted. I have considered this matter with the most anxious care, and, in considering it, I have regarded what I believe was the object of the motion on the one hand, and on the other the beliefs and action of the company and its editors. The company, of course, acts through its editors. Now, the object of the present motion was, if I may use the expression, protective and admonitory. I am satisfied that the object was to safeguard the administration of justice, and to give a warning that the fact that a jury has disagreed does not justify public journalists in commenting upon the case in which they have disagreed, as if that case was at an end.
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> "In my opinion the object of the motion has been fully attained. The administration of justice has been safeguarded. Neither the *Freeman's*

83 Cf *AG v Connolly* [1947] IR 213.

84 [1902] 2 IR, at 89.

> *Journal* nor the *Evening Telegraph* repeated the offence of which they were guilty, and justice was done on the second trial. So much for the object of the motion.
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> "Now, as to the respondents, it has been proved that the company gave directions to their editors not to comment on pending cases, and I am satisfied that the editors, though they were entirely mistaken, really believed that, when the jury disagreed, the prosecution was at an end. Taking these matters into consideration, whilst we are of opinion that a contempt of court, in the sense which the law attaches to that expression, has been committed, and whilst we so adjudge, we impose no imprisonment or fine; but we desire very distinctly to point out that, if in the future there is a similar transgression, and those who transgress are severely punished, they will have themselves to blame."[85]

This passage is important in emphasising the predominant motive of *deterrence* of others rather than of *punishment*. There is in *Freeman's Journal* no apparent sensitivity to the punitive implications of criminal contempt, or indeed to the criminal dimensions of the proceedings at all. Contempt proceedings to enforce the *sub judice* rule seem to be perceived as operating as a mechanism of *control* over commentary on judicial proceedings so as to ensure the smooth administration of justice. This is quite consistent with the Court's attitude to the *mens rea* issue which arose for consideration in the case.

In contrast to the Lord Chief Justice, Gibson J is willing to countenance some exception to the rule that a case after a jury disagreement should *always* be treated as ongoing or pending. He said:

> "I accept the statement in the defendants' affidavits that such belief was *bona fide* entertained but none the less were the articles a contempt. An abortive trial is the same in its legal consequence as no trial at all. The proceeding still remains pending and undetermined. Under certain conditions, and even perhaps from the lapse of time, the inference may be fairly drawn that a prosecution or action has been abandoned; but the mere fact of disagreement does not justify such an inference. I can recall many cases in which after two and even more disagreements there has been a conviction, though no doubt the nature of the charge was different from that directed against Mr McHugh. The articles were plainly contempts of court if the prosecution was pending; and, though their *bona fide* belief that the prosecution was at an end may be available by the defendants as a palliation or excuse, it does not answer the contempt; there was no legal justification for such belief."[86]

Gibson J does not mention what these "certain conditions" might be: perhaps

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85 [1902] 2 IR, at 89-90.

86 *Id*, at 91.

an indication by the trial judge to the prosecuting authorities that he does not consider a new trial appropriate[87] would be one such instance. The question must arise as to whether the test of pendency in such circumstances is to be determined by the standard of a reasonable person at the time of the making of the publication or by the way matters worked out in fact, or by some other test. If there has been no retrial by the time the prosecution for contempt is heard, then, of course, inevitably the standard will be one of the reasonable person. But if there has in fact been a retrial, the question becomes a more difficult one.

Firstly, the defendant may argue that he had no reasonable means of anticipating such an outcome. Gibson J's language is not entirely clear on this issue: it seems at least consistent with exempting the defendant from liability in such circumstances.

Secondly, it is worth considering what implications this case has in respect of *general* requirements as to *pending vis a vis ongoing* criminal proceedings. As we have seen, O'Hanlon J, in the *Independent* case, gave an apparent *imprimatur* to publication throughout the pendency stage. He can hardly have meant by this to have committed himself to the proposition that, between the time a jury disagrees and a retrial, the press (and others) can treat the position as an "open season". Talk of pendency should not lead to such a result. Regardless of how this limbo period is characterised, the fact is that it is quite different from the period *immediately before prosecution*. A person who has not yet been prosecuted may never fall within the clutches of the criminal justice system, whereas a person who has been tried and whose prosecution has resulted in a jury disagreement *is already within the criminal justice system* - the only question is whether the prosecuting authorities will release him from their clutches. On this analysis, the *Independent* approach should not authorise comment after a jury disagreement unless, applying some such test as is adumbrated by Gibson J in the *Freeman's Journal*, there is no prospect of a re-trial.

Thirdly, Gibson J's comments in the passage quoted above as to why the defendants' *bona fide* belief did not exempt them differ in an important respect from those of the Lord Chief Justice. Whereas the Lord Chief Justice was clear that a mistaken belief that the prosecution was at an end could *never* afford a defence, whether that belief was based on a mistake of fact or of law, it seems that Gibson J's refusal to recognise such a defence went no further in its express terms than cases of a mistake of law. As we shall see, he accepted that, in certain specified cases, a mistake of fact would be capable of affording an excuse. The manner in which he characterised the basis of the grounds for that excuse, however, suggests that he did not exclude the possibility that certain mistakes of fact - that is, those mistakes of fact other

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87 This occurred in a recent prosecution for unlawful carnal knowledge brought in the Circuit Court before Judge Buchanan and a jury on 15 January 1990: see the Irish Times, 16 January 1990.

than the ones he identified - might (or should automatically) be incapable of affording a defence.

This brings us to what Gibson J had to say thereafter:

> "The case of *Metropolitan Music Hall v Lake*[88] was urged as an authority that innocent intent - there was in that case ignorance that any proceeding was pending - might be an answer not merely to punishment but to the technical offence. No doubt in some cases ignorance may exclude the application of contempt, as where an order to hear a case *in camera* is made, and a journalist, *bona fide*, without being aware of such order, publishes the proceedings. But in such a case the contempt is not founded on any interference with the course of justice, but on the violation of an express order by the Court. Such order cannot be treated as disobeyed if its substance is not known. That a charge of contempt, such as we have here to deal with, cannot be always met by the plea of ignorance is shown by the *American Exchange Case*,[89] where it was held that a printer or publisher who knew nothing of the matter printed could be committed for contempt. *M'Leod v St. Aubyn*[90] and *Vizetelly v Mudie*[91] are to the same effect. In many of the cases there seems to be some confusion between the offence and the punishment of the offence. The essential object of this summary jurisdiction to commit for contempt is preventive -the protection of justice and of those connected with its administration, jurors, witnesses, etc, from external interference. Assuming that Mr Justice Chitty's decision is correct, it has no application here, where the defendants knew that there was a prosecution which was legally undetermined. They believed mistakenly that the Crown would not proceed, but they had no legal grounds for such belief."[92]

This passage brings us back to the troublesome question of the extent to which Gibson J may have *excluded* an excuse based on reasonable belief of fact. It is noteworthy that in the passage quoted above, Gibson J refers to "some cases" without specifying their remit and then goes on to instance *one* such case clearly as an *example* of those cases. He goes on to offer a distinctive characterisation for the existence of an excuse in that instance, namely, that:

> "in such a case the contempt is not founded on any interference with the course of justice, but on the violation of an express order by the Court."[93]

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88 *Supra*.
89 58 LJ Ch 706. This case is referred to, without name, by the Lord Chief Justice.
90 [1899] A C 549, at 562.
91 [1900] 2 QB 170.
92 [1902] 2 IR, at 91-92.
93 *Id*, at 91.

This argument has an initial attraction: it is worth examining whether it withstands closer critical scrutiny. A defendant who publishes material contrary to a judicial prohibition on doing so may of course be exposed to the risk of attachment for the breach of that order - and will, on Gibson J's approach, have an excuse if he could not have been aware of the order. But if what he has said would be likely to interfere with the administration of justice, then he will be liable regardless of his innocence as to his breach of the order not to publish. Gibson J says of an unknown order that "[s]uch order cannot be treated as disobeyed if its substance is not known".[94] It is quite true that, in order to disobey, one must be conscious of the existence of an obligation to obey: here specifically an order was made and it may convincingly be argued that, in the absence of knowledge of the order one could not be under an obligation to obey it. But that would not be an automatic consequence: if a person had reason to know or believe that an order might be, or have been, made, he might in some circumstances fall under a duty of enquiry or of bearing this possibility in mind when planning future behaviour. Is the position any different in relation to a person who makes a comment on a trial which he reasonably believes to be over (or not to have begun)? In such a case he believes (reasonably) that he is *not under an obligation not to do so*, just as the person who makes a comment on a trial where he has not heard of the judicial prohibition against doing so. The fact that, in the one case the comment is of a type capable of interfering with justice and in the other it has not necessarily this quality, may be considered irrelevant. What is relevant is that in both cases the person engages in conduct in respect of which he is reasonably unaware of any obligation not to do so. The particular constituents of that conduct or of the kind of conduct in question are not relevant.

(4) *The position pending appeal against conviction or sentence*

After conviction and sentence, and pending appeal, the position relaxes; whether a publication constitutes contempt can depend on whether an appellate court may order a re-trial and how long it may be before the re-trial takes place. Once an appellate court has ordered a re-trial, of course, the position becomes again as strict as it was during the original trial.

The issue has been considered relatively recently in the Irish Courts.

In *Cullen v Toibin and Magill Publications (Holdings) Ltd*,[95] the plaintiff had been convicted in the Central Criminal Court of murder and of malicious damage and had been sentenced to penal servitude for life on the first count and to fifteen years' penal servitude on the second. His application for a certificate of leave to appeal had been refused. He immediately appealed to the Court of Criminal Appeal against that refusal. When his appeal was pending, the plaintiff sought an interlocutory injunction to restrain publication

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94 *Id.*

95 [1984] ILRM 577 (Sup Ct, 1983, rev'g High Ct, Barrington, J, 1983).

in *Magill* of an article concerning him, written by Mr Toibin.

It appeared from what counsel for the plaintiff told Barrington J in the application for the injunction that "the only evidence against Mr Cullen was the uncorroborated evidence of an alleged accomplice ..." It also appeared that the trial judge, in his charge, had warned the jury that there was no corroboration for this witness's evidence and that, while they could convict on her uncorroborated evidence, it would be dangerous to do so. The publishers of *Magill* had entered into an exclusive contract with the witness to publish an article, based on material supplied by her.

Barrington J granted the injunction but the Supreme Court reversed.

Barrington J said:

> "I have read the article which is a lengthy one. It is written with verve, and is, I am prepared to accept for the purpose of this application, a serious piece of investigative journalism written about matters which may be thought to be legitimate objects of public interest and concern. But it is essentially [the witness]'s story written for her by a talented journalist. It deals with her life and background, her relations with Mr Cullen, issues of guilt or innocence in relation to the offences charged, and with Mr Cullen's background, character, psychological make-up and mode of living. It contains many serious and *prima facie* defamatory allegations. It touches on many matters, some of which were given in evidence at the trial and some of which, according to [counsel for the plaintiff], were not. It purports to enter into [the witness]'s mind and contains many matters and insights which, be they true or false, would not be capable of proof in a court of law.
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> The article, if published before the trial in the Central Criminal Court, would clearly have been contempt of court.
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> This is not an application to convict for contempt of court but is an application to restrain the publication of material on the grounds that it is likely to interfere with a criminal trial. I am satisfied that the court has jurisdiction to grant such an injunction. I am satisfied on the basis of authority that the onus on the plaintiff in this case is to prove to my satisfaction, on the balance of probability, that the article, if published, would be likely to prejudice his trial."[96]

Counsel for the defendants submitted that there was no danger of the plaintiff being prejudiced in his appeal since the three professional judges were trained to exclude irrelevant or inadmissible matter from their minds. Barrington J responded:

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96 [1984] ILRM. at 579. (citations omitted).

"No doubt judges are so trained and for that reason courts have traditionally taken a less serious view of adverse pre-trial publicity where a case was to be tried by a judge or judges alone than when it was to be tried by a judge sitting with a jury. Certainly the courts have taken this view when the adverse publicity consisted of mere general assertions, e.g. that an alleged statement was involuntary, but that is not the present case. Speaking for my own part, I think it would be unwise to assume that judges are totally immune from frailties commonly held to afflict juries."[97]

Barrington J noted that the problem had been discussed by the English King's Bench in the case of *R v Davies, ex p Delbert-Davies.*[98] There Humphreys J had referred to the embarrassment caused to a judge who is told matters he would rather not hear and which make it more difficult for him to do his duty. Oliver J, of the same view, had said:

"In my view, on the authorities, contempt of court can be committed at any time until the case is ended, and it is not ended until after the hearing and decision of an appeal, if there has been an appeal. I fully agree with [Humphreys, J], and I share his view as to the importance of the matter, that jurors are not the only people whose minds can be affected by prejudice. [*In my view, it is absurd to suggest that judges' minds could not be affected by prejudice.*] One of the risks of inadmissible matter being disseminated is that no one can tell what effect a particular piece of information may have upon his mind. [He cannot be sure himself; his mind is not a thing with regard to which it can be said exactly what material brought it to any particular view at any moment.] Why, as [Humphreys, J] has asked, and I can think of no better word, should a judge be 'embarrassed' by having matters put into his mind, the effect of which it is impossible to estimate or assess?"[99]

Barrington J, having quoted this passage, stated:

"Moreover the possibility of a retrial before a jury cannot be eliminated. [Counsel for the plaintiff] fairly admits that the nature of his client's appeal is such that a retrial is improbable, the more likely outcome being the quashing of the conviction or the dismissal of the appeal. Nevertheless the Court of Criminal Appeal has power to order a retrial and, until the proceedings are over, the possibility of a retrial before a jury cannot be excluded. [Counsel for the defendants] submits that

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97 *Id*, at 580.

98 [1945] KB 435.

99 *Id*, at 445, [1945] 2 All ER, at 174. The sentence italicised in the quotation does not appear in the King's Bench reports but does in [1945] 2 All ER 167, at 174. The reporter to the Irish Law Reports Monthly (Mr. Raymond Byrne) notes this distinction: [1984] ILRM, at 580.

such a retrial, until ordered by the Court of Criminal Appeal, could not be regarded as pending proceedings in relation to which the crime of contempt could be committed. That may be formally correct. But we are not here dealing with a prosecution for contempt of court. We are, however, dealing with ongoing criminal proceedings and with the power of the court to restrain the publication of matter likely to interfere with the accused obtaining a fair trial in those proceedings."[100]

Counsel for the defendants had alleged finally that Mr Cullen's case had, since the verdict, and while the appeal was pending, been the subject matter of discussion in the press and on television. If *Magill* were now restrained from doing what other organs of public opinion had already done, this would constitute unfair discrimination. He referred to an argument that had "found some favour"[101] with the English Court of Appeal in *AG v Times Newspapers*.[102] Barrington J responded:

> "That was the Thalidomide case and the pending proceedings raised matters of public importance which had been discussed in parliament and elsewhere. In these circumstances counsel for the Times Newspapers submitted that it was unfair to the Attorney General to move against the Times. In my view *Times Newspapers* case presents no fair analogy with the present case. For one thing the present case is a criminal case whereas that was a civil case. For another the moving party in the present case is not one of the great officers of State but a man who, having been convicted of murder, is appealing against his conviction. If his case has been discussed in the press or on television it has not, I am sure, been of his choosing and is regrettable. He is entitled to have his case tried in accordance with law on the basis of the evidence in the court and not otherwise."[103]

The Supreme Court reversed. O'Higgins CJ noted that it:

> "can be accepted that many of the views expressed by the writer of the article on behalf of [the witness] would be capable of defamatory assessment but this is by the way."[104]

He noted that, whatever the result of the appeal, it seemed "highly improbable"[105] that there would be a new trial. He went on to say:

> "The basis for the application for the injunction which Mr Cullen has been granted is that the publication of the article would be prejudicial

100 [1984] ILRM, at 580.
101 *Id*, at 581 (*per* Barrington J).
102 [1973] QB 710.
103 [1984] ILRM, at 581.
104 *Id*.
105 *Id*.

> to the conduct of the appeal in that in one way or another the judges hearing the appeal would be biased in regard to the consideration of that appeal. I can see no basis for this suggestion. The Court of Criminal Appeal will be asked to consider pure questions of law relative to the appeal. It cannot be suggested that, in considering such questions, publication of this or any number of articles in any number of periodicals would have the slightest effect on the objective consideration of legal arguments. It seems to me that such an argument is unsustainable.
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> "That is not to say that one approves of the publication of this article. I think that better taste might indicate that articles of this kind should not be published during the currency of legal proceedings involving a citizen. There is, however, the matter of the freedom of the press and of communication which is guaranteed by the Constitution and which cannot be lightly curtailed. Such can only be curtailed or restricted by the courts in the manner sought in these proceedings where such action is necessary for the administration of justice.
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> "While I sympathise with the view that anybody reading the article might be affected by the article, that is not the issue. There is not any reason for suggesting prejudice or any form of contempt in relation to the hearing before the Court of Criminal Appeal."[106]

This passage provokes a number of observations. *First*, it is far from clear that the mere fact that the issues facing an appellate court involve questions of law rather than of fact automatically removes the possibility of an appellant (or respondent) being prejudiced by the publication of prejudicial material. In the case in question, the publication could have stimulated in the reader's mind thoughts as to whether or not the witness who was the alleged accomplice should be believed. Of course that would not directly impinge on the rules of *law* as to accomplice evidence; but it would be straining artificiality to breaking point to suggest that no judge has been affected, in his (or her) articulation of legal rules, by an application of their likely or certain outcome in fact. The Chief Justice's statement goes so far as to reject as "unsustainable" the argument that the publication of "any number of articles in any number of periodicals would have the slightest effect on the objective consideration of legal arguments". In his view, thus, such a risk is non-existent. With respect, this is too extreme a statement, at variance with human experience.

The *second* matter relates to O'Higgins CJ's reference to the freedom of the press and of communication "which is guaranteed by the Constitution and which cannot be lightly curtailed. Such can only be curtailed or restricted by the courts in the manner sought in these proceedings where such action is necessary for the administration of justice". The Chief Justice did not indicate

106 [1984] ILRM, at 581-582.

the extent to which this constitutional consideration affected the outcome of the case. On one view it could be interpreted as no more than a general rhetorical nod in the direction of Article 40.6.1. On another view, it could amount to the proposition that, even with a risk of probable (or possible) prejudice, a publication should nonetheless be permitted. The latter interpretation, apart from its dubious justice, seems unlikely in view of the lack of any developed argument by the Chief Justice.

Thirdly, it is worth contrasting O'Higgins CJ's approach with Finlay CJ's statement in the later decision of *The People (DPP) v Conroy*,[107] that "[e]xperience as a judge indicates that even as a trained lawyer there is a very significant difficulty in excluding from one's mind incriminating evidence on the trial of a criminal case which is inadmissible".

In his concurring judgment, Hederman J said that he was "absolutely satisfied"[108] that there would be no prejudice in relation to the hearing. He added:

> "I wish to emphasise what the Chief Justice has said that this is not to say the court approves of the article or that the plaintiff could not take a course of action on the civil side if it is found to be defamatory."[109]

McCarthy J also agreed with the Chief Justice. He said:

> "This appears to be an instance of what is called cheque book journalism; to refuse the injunction sought is far from indicating any approval of the content of articles of this kind. Article 40.6 of the Constitution guarantees freedom of speech subject to certain qualifications or restrictions. The judgment of the Supreme Court in *Re Kennedy and McCann*[110] dealt with an instance of 'a biased and inaccurate account of guardianship proceedings' being published in a Sunday newspaper - a contempt of court by reason of its content and a further contempt by the breach of an order prohibiting publication. Such is not the case in the instant appeal.
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> The courts must be vigilant to protect the citizen who also has the right to be informed - to protect the citizen against any improper prejudice to the due trial of criminal proceedings either of first instance or on appeal. There is no suggestion that the publication of the impugned material would scandalise the Court of Criminal Appeal or undermine, in any sense, the administration of justice or bring it into disrepute. It was suggested that even in the determination of pure issues of law professional judges would, on reading the article, be prejudiced in their

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107 [1986] IR 460, at 472 (Sup Ct).

108 *Id.* at 582.

109 *Id.*

110 [1976] IR 382.

objective determination and assessment of the issues of law involved because of extraneous matters of fact referred to in the article. Such a suggestion fails *in limine*. From a public point of view it would be far worse that the public should think that the judiciary would lose its objectivity in determining a pure issue of law because of some article in a news magazine. My view that *nihil obstat* the publication is far from being an *imprimatur*."[111]

Like the Chief Justice, McCarthy J took the view that in *no* case where issues of law were concerned could a professional judge be prejudiced - apparently regardless of the nature of the publication and its contents. It is surely going somewhat too far to state, as McCarthy J did, that, from "a public point of view", even to suggest that prejudice might[112] occur would be worse than to suggest the contrary.

It is worth noting, finally, in this context the possibility of prejudice to the accused by publications after conviction and sentence which may have the effect of deterring him from appealing. *Borrie & Lowe*[113] state:

> "Adverse comment may induce an accused not to appeal and it may be argued that this constitutes an interference with the due administration of justice. There is no direct authority on this point but in view of the lack of case law despite numerous examples of outspoken criticism of decisions, particularly of sentences, it may be that this possibility of influence is not considered relevant. It has been said[114] to be irrelevant that an article might lead a prisoner to think that he will be or has been prejudiced in his appeal."

It may be argued that there is a serious issue of justice here which has been largely ignored, for tempting reasons of policy. If a man convicted of mugging an old lady is sentenced to a period that certain newspapers think too low, and if they are free to inveigh against the sentence without restraint, this may well deter the man from appealing against sentence. He may form the judgment that, in such a climate, his appeal would have less prospects of success (and might indeed result in an increased sentence) than if the newspapers had not acted thus. No doubt the appellate judges would argue that they would not be affected by the newspapers' campaign; but this assessment of their own freedom from influence might not be shared by the accused. It is one thing to assert such independence; it is another, more wide-ranging, thing to assert that no reasonable person could disagree that judges

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111 [1984] ILRM, at 582.

112 The word used by McCarthy, J was "would" rather than "could". The test set by him was thus too onerous from the plaintiff's point of view; one suspects, however, that nothing hinged on this difference, as McCarthy, J's rationale did not concentrate on this element. It is perhaps worth noting that O'Higgins CJ (at 581) also adopted a "would" test but in a context where it seems to mean "could" in view of his reference to "any ...."

113 *Borrie & Lowe*, 112 (one footnote reference omitted).

114 *R v Duffy, ex p Nash*, [1960] 2 QB 188, at 200 (*per* Lord Parker CJ).

are so independent. The fact that in *Cullen v Toibin*[115] Barrington J considered himself not be so free of influence makes it plain that a similar judgment formed by an accused, though not shared by the appellate judges, would not necessarily be an unreasonable one. If this is so, the prospects of such newspaper commentary deterring a defendant, on reasonable grounds, from taking an appeal which he otherwise would have, are real.

Of course there are strong policy arguments against muzzling newspapers from comment (and other types of publication) immediately after sentence; but, however strong these policy arguments may be, they are not such as to obliterate consideration of the risk of prejudice to the defendant.

(i) Defences

As regards possible defences to the charge of contempt through publications interfering with particular criminal proceedings, two possible defences have been canvassed: *public interest* and *the discussion* of *public affairs*.[116]

1. Public Interest

Borrie & Lowe, in the first edition of their work,[117] argued that the courts might possibly recognise a defence of public interest on the basis that a greater public interest might on occasion outweigh that of the public interest in the due administration of justice, which the law of contempt sought to serve. Their particular concern related to cases where information was published at the request of the police both with a view to securing a person's arrest and at the same time warning the public that he might be dangerous. The rejection by the House of Lords in the *Sunday Times*[118] case of the defence of public interest, and Lord Reid's approach in particular,[119] led the authors to state in their second edition that:

> "[i]f this latter view is right then there seems to be no scope for the application of a defence of public interest though it has to be said that no prosecution has been brought in the type of example we have been discussing."[120]

The authors doubt[121] whether an argument[122] would succeed to the effect that publication in such circumstances would help rather than hinder the administration of justice. In Ireland, where there is no judicial precedent

115 *Supra.*
116 See *Borrie & Lowe*, 115 ff.
117 (1959), at p11.
118 *Supra.*
119 [1974] AC, at 301.
120 *Borrie & Lowe*, 115.
121 *Id.*
122 Expressed by Sir Michael Havers, as Attorney-General, during the Committee Stage of the 1981 legislation.

similar to the *Sunday Times* case, there seems no reason why this argument should not prevail.

2. *Discussion of Public Affairs*

There is support in Australia for the view that discussion of public affairs may warrant publication of material which would otherwise offend against the *sub judice* rule. In *Ex p Bread Manufacturers Ltd, Re Truth and Sportsman Ltd,*[123] Jordan CJ stated that:

> "if in the course of ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a lawsuit it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion of denunciation may, as an incidental but not intended by-product, cause a risk of prejudice to a person who happens to be a litigant at the time".

CIVIL PROCEEDINGS

(a) *Introduction*

We now must consider the legal position relating to publications interfering with the course of justice in particular civil proceedings.[124]

Although there are some *dicta*[125] to the effect that the court's solicitude to protect the stream of justice from interference in criminal cases is stronger than in civil cases, the court's willingness to protect civil cases should not be underestimated. The test, common with criminal cases, is whether there is a real risk of prejudice to the particular proceedings.[126]

In civil proceedings in the High Court, where there is a jury, publications calculated to impair the jury's impartiality may constitute a contempt. The most frequent case where this arises is in proceedings for defamation.

In *O'Connor v Sligo Corporation,*[127] the defendant, Mr P A McHugh, was an MP, an ex-Mayor of Sligo and the proprietor of the *Sligo Champion*. He was a defendant in litigation between Mr O'Connor and the Corporation, in which the plaintiff sought an injunction and damages for trespass in knocking down

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123 37 SR (NSW) 242, at 249 (1937). See *Miller*, 229-230.
124 See generally *Borrie & Lowe*, ch 5.
125 E.g., *Re New Gold Coast Exploration Co*, [1901] 1 Ch 860, at 863.
126 See *Borrie & Lowe*, 128.
127 INLJR 108 (1901).

a wall built by the plaintiff on ground which the Corporation alleged was part of the public street.

During the currency of the litigation, the following article was published in the *Sligo Champion*:

> "We regret exceedingly that Mr Hugh O'Connor, licensed publican, O'Connell Street, has by his injudicious conduct brought his name prominently before the public. He lives by the people, and there should be a sort of give and take in his conduct when he deals with members of the very humblest class in society. He has now taken an action against the Sligo Corporation to recover damages because that body, as a sanitary body, did, at the suggestion of the late mayor, an act which they thought they were justified in doing. He should recollect he was not always the opulent merchant, with the hundreds of empty hogsheads before his door, that he is now. He should have a fellow-feeling with the poor and lowly, if he only looks back to the days of his infancy. Formerly he paraded as an advanced Liberal who, in opposition to conservatives, worked and voted for the then advanced party, one of whose planks was the bettering of the conditions of the poor. Surely he could get on with his acquired property in Abbey Street - with the help of the ex-sergeant of police - without resorting to building up walls against a house to shut out light and air from a poor man's domicile. Considering his former professions we are sorry Mr O'Connor has placed himself in a rather awkward position. We can understand tough old Tories, who have by lineal descent come in for property which belonged to them since Cromwell parcelled out the country, but it is really surprising to us that a man sprung from the people should try and enforce his claims to God's light and air by means of 'the Grace of God' on parchment."

Six days later, an application for attachment was made. On the application by Mr McHugh's solicitor, stating that he had received a telegram from Mr McHugh expressing his willingness to apologise, and that he had been unable to instruct counsel yet, the motion was adjourned for three more days.

One day after the adjournment, the *Sligo Champion* published a report of a speech made by Mr McHugh to a crowd in Sligo, on his return from Dublin after a trial for seditious libel in which the jury had disagreed. Part of the speech referred to the litigation between Mr O'Connor and the Corporation. It read as follows:

> "In Abbey Street, a merchant of this town, Mr Hugh O'Connor, of Knox Street, Sligo, built up a wall to shut out from seven poor little children of a labouring man the light of heaven and the breath of air. I took down that wall, and I can tell you that when Hugh O'Connor has done with the people he will be the sickest man in this town."

In the same issue appeared an article headed "Mum's the Word!", which stated:

> "We are also ordered by the High Court in Dublin not to say anything about the great case of *Hugh O'Connor v the Sligo Corporation*. Before leaving for London to his Parliamentary duties, Alderman McHugh, the proprietor of the paper, was served with a 'conditional order' of some sort, requiring him, under pain of penalties, not to say a word about the case, lest some of Mr O'Connor's witnesses, including Mr ex-Sergeant McTernan, we suppose, would be frightened out of their lives and refuse to go up to Dublin to give evidence before the Master of the Rolls. Mum's the word, then. We must particularly stand by in both cases and abide by the results when they come. In the course of time we may be allowed to have our say about 'the wall that Hugh built'."

The defendant, in a telegram read to the Court, stated that he would not comment further on the case.

Chatterton VC made the requested order of attachment.[128] He stated:

> "Nothing can be more dangerous than to allow comments of such a character as are in this case exhibited being made upon matters pending in courts of law, and it becomes necessary for me to apply the rule applicable in such cases. No excuse has been made by this suitor in an action coming on in this court for in a public speech denouncing the action of the parties, and especially of the plaintiff, in seeking to obtain justice. It is not merely in the interests of this court, but of the public, that this case has been brought forward. This gentleman has made a speech upon the issue of another trial, into which he has gratuitously and improperly imported matters relating to the action in this court now pending as to the building of this wall, the subject-matter of the action. It was on this the plaintiff mainly relied, as creating what he alleged, and what I think may very likely be a difficulty in obtaining evidence for the trial of his action. That speech was addressed to a crowd of persons, some of whom possibly were not very strict upholders of law and order, who might put the spirit of the speaker's remarks into practice, and so witnesses might be deterred from coming forward. I have never, in the whole course of my long service in this court, had a case of this kind before me, and I regret very much it should have occurred. That, however, is a personal matter of minor consideration, and does not at all detract from the obligation which rests upon me of upholding the dignity of this court: and even the upholding of the dignity of this court is subordinate to keeping the stream of justice clean and pure, and enabling suitors to prosecute their actions and

128 The report noted that it was later arranged between the parties that a stay should be put on the order for the present.

> obtain evidence free and undeterred. I do not think that the conduct of this gentleman, though now at the last moment he has come forward with a kind of apology, is at all what might have been expected from him. He should have taken immediate steps to set right what he had done, and in his newspaper, and by every other means in his power, to have expressed his regret, and apologise. He has done nothing to purge his contempt and I must make the order sought."[129]

It is interesting to note that counsel for the defendant had argued that "[p]laintiff's witnesses could not be intimidated; the question in the action is one simply of law".[130] The Vice Chancellor did not expressly address this issue in his judgment, as we have seen. It may be argued from the statement of facts in the report that, while the central issue may well have been one of law, it had to be backed by witnesses as to fact, on such matters as the precise role of Mr McHugh in the affair.

(b) Disparaging one or more of the parties

Another way in which prejudice may be caused is by disparaging one (or more) of the parties.[131] In *Russell v Russell*,[132] a newspaper commented in the following terms about Lady Russell's proceedings against her husband for the restitution of conjugal rights, following her unsuccessful proceedings for divorce:

> "There is a good deal of natural disgust in society at the suit .... At the conclusion of the countess's unsuccessful divorce suit, there was, I am told, a strong attempt on the part of the friends of both parties to patch up the quarrel, but the earl, on the one hand, was unable to stomach the disgusting insinuations against him which were bandied about at that trial, while, on the other hand, the countess obstinately refused to budge from the wrong-headed attitude she had taken up. Her ladyship lost caste considerably in consequence of the divorce action, and that she should now try to compel the man against whom she sanctioned the most abominable charges it is possible to conceive to resume cohabitation with her has certainly not raised her in the estimation of society. I hear that, even at the eleventh hour, a strenuous effort will be made to keep the case out of court."

Bruce J was of opinion that this constituted contempt of a serious character. In fining the editor £50 he said that the comment:

> "refers to a case which is pending in this Court, and which is to be tried by a special jury. In that case Lady Russell is a party, for she is the

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129 *Id*, at 109.
130 *Id*.
131 See *Borrie & Lowe*, 29.
132 11 Times LR 38 (PDA Div (Bruce J) 1894).

petitioner, and the paragraph reflects on her in a manner calculated to excite prejudice against her as such petitioner. It is calculated to prejudice any jury man who may read it."[133]

In *Re South Meath Election Petition*,[134] a writ of attachment was sought against the Rev Father John Fay, PP, of Summerhill, Co. Meath, alleging that, while addressing his congregation at Mass at Dangan, Co. Meath, he had said:

> "Before I have an opportunity of meeting you again I shall be on my trial in Trim, with the other priests of the diocese and the Bishop, and I am glad of the opportunity of showing up the character of those men who will give evidence against me. We will expose again the scandal of the Divorce Court. These people, imbued with the devil, will pursue me to the end. I expect that. I am prepared for that. I tell you the devil will attack me; and they are possessed of the devil of impurity, the most frightful of all passions. Now, this is pure Parnellism. Is it not a glorious thing to put our Bishop, like a criminal, in the box, after 29 years of service and toil, and devotion for you? Now, report every word of this accurately, and put it in your *Independent*. Don't leave out one single word; for I'll prove that every witness that will come up against me is a black-dyed scamp. I never said I would kill you, or break your neck, or said you would go to hell. You may go there if you like. We will resume this in Trim ... They should not look upon him [the priest] as a mere man. If they did, they might have some prejudices against him, for all had shortcomings. The priest is the ambassador for Jesus Christ, and not like other ambassadors. They carried their Lord and Master with them, and when a priest was with the people the Almighty God was with them."

The motion for attachment was brought on behalf of the petitioner, Joseph Dalton, grounded on the affidavit of Peter McCann, solicitor, who stated that he heard Father Fay make the above statement, and that he had immediately afterwards had caused an accurate note of what had been said to be taken down from his declaration, read over and corrected by him.

Father Fay, in his replying affidavit, stated that Mr McCann's report was inaccurate; that some of his parishioners who heard him preach confirmed this in his statement; that persons taking notes had been visiting his church and giving unfair reports of his remarks; that on the day in question he had been led to refer to these; that he had said nothing to intimidate any witness or calculated to defeat the ends of justice; that nothing could be further from his mind or intention than this; that the Parnellites in his parish were a mere handful; and that he had sought merely to warn his flock that position should

133 *Id*, at 39. See also *Greenwood v Leather-Shod Wheel Co Ltd*, 14 Times LR 241 (Chy Div, Stirling J, 1898) (laconic account of the nature of the contempt alleged), *Howitt v Fagge*, 12 Times LR 426 (QB Div; Pollock B and Bruce J, 1896).

134 30 LR Ir 659 (QB Div, 1892).

not be used as an excuse for immorality, as he believed Parnellism was very often; and that he so spoke in discharge of his duty as their pastor; that what he had said was without any preparation, and without the remotest idea of affecting the petition or its result; that, while fully prepared to meet any charge made therein against him, he emphatically disclaimed any intention to act in contempt of the Court or to interfere with its processes; and that, if unwittingly he had offended, he tendered his apologies.

On the hearing of the motion, Father Fay appeared in person; repeated, in effect, the explanations contained in his affidavit; and, offering his fullest apologies, left the case in the hands of the Court.

The Queen's Bench Division[135] first addressed the question of whether the language attributed to Father Fay had been proved to have been used. It held that it had, by "a gentleman in a respectable position, a solicitor ....[136] The failure of the defendant to point to any specific machinery in the report and of his parishoners to support his denial weighed heavily with the Court.

Sir Peter O'Brien CJ said:

> "Now the use of these words was clearly a contempt of Court within the meaning of all the authorities. Lord Hardwicke, many years ago, stated in *Roach v Hall*[137] that there was nothing of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. Lord Hatherley, one of the most eminent of our modern Judges, adopted the opinion of Lord Hardwicke, and stated in *Tichborne v Mostyn*[138]: - 'Those who have responsibility cast upon them -this Court, and every tribunal which has to administer justice - are bound to protect every suitor from such an attempt to pervert the course of justice, and against that which can affect the minds of persons who might be willing to give evidence in the case, and may prevent them from coming forward...' I ask with great pain is this language not calculated to deter witnesses from coming forward? What does it convey? That this proceeding by petition is a polluted thing, that every connection with it is a contamination, and an endeavour to support it is a moral crime."[139]

Sir Peter O'Brien, CJ continued:

> "I refer to the language for a moment, and I must say for myself that I should prefer not to do so. He says:- 'Is not it a glorious thing to put our Bishop, like any criminal, in the box after 29 years of service

135 Sir Peter O'Brien CJ, and Harrison, Holmes and Madden, JJ.
136 30 LR IR, at 661.
137 2 Atk 469.
138 LR 7 Eq 55 (1867).
139 30 LR Ir, at 661-662.

and toil, and devotion for you? Now report every word of this accurately and put it in your *Independent*. Don't leave out a single word, for I'll be there and I'll prove that every witness that will come up against me is a black-dyed scamp'. Is that not calculated to prevent the humble and impressionable Catholic of Meath from coming forward to give evidence? We know with what reverence the humble Catholic regards his pastor. And, then again he says:- 'they should not look upon him as a mere man ... The priest is the ambassador of Jesus Christ, and not like other ambassadors; they carry their Lord and Master about with them, and when the priest was with the people the Almighty God was with them'.

> "What do these words mean? Do they not in effect assert that the Rev. John Fay, even in the action which is challenged by this petition, was the bearer of a divine commission; and that to gainsay the propriety of that action, when arraigned before a civil tribunal, was to go counter to the behests of the Almighty? This is the fair interpretation of the language used; and in my opinion there could be no more potent deterrent, and therefore no more clear 'contempt of Court' within the meaning which the law attaches to that expression."[140]

This passage is of more general interest than might at first appear; for it raises the question of how religious and secular norms and ontologies should be resolved in the context of contempt. It is of the nature of religion that it makes bold claims. A priest could not conscientiously hold himself out as such and disclaim his divine authority and ambassadorship. Those who adhere to that religion will equally recognise and submit to that authority. An opponent in litigation will understandably feel that he cannot compete with this authority; yet has he any reason on this account to complain? If one has rank, may one not remind others within one's social group of that fact, under pain of being found guilty of contempt of court? Or is it a question of the *manner* in which one does this? Or of the educational level of those whom one addresses? Sir Peter O'Brien CJ appears to have attached some weight to the latter aspect, since he stated (as has been noted) in respect of an earlier passage:

> "Is that not calculated to prevent the humble and impressionable Catholic of Meath from coming forward to give evidence? We know with what reverence the humble Catholic regards his pastor."

If this factor is a predominant one, then it would appear that the Parish Priest of St. Stephen's Green, for example, might be free forcibly to assert divine authority and ambassadorship with considerably less apprehension of being imprisoned for contempt.

The Court sentenced the defendant to one month's imprisonment. The Chief

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140 30 LR Ir, at 662.

Justice commented:

> "Never, I believe, on the eve of an important trial, and with reference to that trial, was language - and I say so with much pain - more reprehensible proved to have been used ...."[141]

*(c) **Prejudging merits of the action***

Another way in which prejudice may be caused is by prejudging the merits of an action.[142] In *Re Finance Union; Yorkshire Provident Assurance Co v Publishers of the Review*,[143] an Irish paper with a small circulation in England published the following injudicious comment on current litigation in the English courts:

> "A fierce battle is to be fought in the courts between the Yorkshire Provident Life Assurance Company and the *Review*. We never hesitate to back the winner, and in this case we must say 100 to 1 on the *Review*. The executive of the Yorkshire Provident must be abundantly lacking in foresight and wisdom. Whoever is to blame for advising this puny, weak, and mismanaged company to squander the savings of the people in courts of law has much to answer for. The result, in our opinion, to the Provident will be disastrous, and we would urge the officials to withdraw the action."

The report of the judgments of Wills and Wright JJ is worth recording in detail. Wills J said that the question was not whether the paper was one which had any great circulation or influence, though no doubt the greater it had the worse it was made. But the fact that it was of small circulation or of an unimportant character did not make publications of this kind less reprehensible. It was the tendency of such articles to interfere with the administration of justice which was important, not, perhaps, so much on account of the particular case as with reference to the general principle that such attempts to influence or interfere with the course of justice were improper and ought not to be allowed. The substitution of trial by a preliminary court in the newspapers, when a trial by one of the regular tribunals of the country was going on, was bad for the suitors, bad for society at large; and there appeared to be on the part of some portion of the newspaper Press a great desire to substitute the new mode of trial - trial by newspaper - for the old mode of trial. For his part, however, he thought the old mode of trial was best, and more calculated to lead to just results. In the present case the comments went strongly to show that the plaintiffs had no case and would be the only sufferers, and were a strong attempt to interfere with the course of justice. It was a most reprehensible attempt to interfere with the course of justice.

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141 *Id*, at 663.

142 See *Borrie & Lowe*, 129-130.

143 11 Times LR 167 (QB Div; Wills and Wright JJ, 1895).

Wills J went on to say that it was not a case with which he should be disposed to deal severely. It was possible that the publisher in Dublin might have thought that he was at liberty to say what he thought proper of an action in England; but that was not a correct view; and if a party published a newspaper intended to circulate in England he ought to abstain from comments on any cases in the English courts, whether it circulated in England or not.

Wright J adopted a more moderate position. He doubted whether the court should go so far as to say that it ought to interfere on account of such publications where nothing more was shown than that they were reprehensible. The jurisdiction exercised by the courts in such cases was special and ought to be based on the necessity of securing a fair trial, and ought not be exercised except where there was a case made out showing that it was probable that the publication would substantially interfere with a fair trial.[144]

Wright J's approach seems preferable. It would be wrong to import into contempt proceedings with an international or interjurisdictional dimension a rule equivalent to that applying in defamation proceedings whereby liability is based on the dissemination of even a few copies within the court's jurisdiction.

(d) Publication of information as to trial strategy

It may also be prejudicial to publish the fact that the defendant has paid money into court.[145] The effect of publication of pleadings in litigation is a matter of some slight uncertainty. It seems clear that pleadings may not be made "a vehicle for libel"[146] by a litigant who uses his statement of claim (or defence) as a means of disseminating the libel. For a newspaper to publish the pleadings of one party but not the other may well be contempt[147]; but the converse is far from certain: the publication of the pleadings of both sides is "clearly ... not so likely to prejudice the trial as to publish just one party's pleadings",[148] but there can be no general principle that publication of both parties' pleadings is invariably a safe course of action: "every case must be judged on its own particular facts".[149]

(e) Proximity of publication to time of trial of action

The courts will have regard to the *time* of publication of potentially prejudicial

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144 See also *Wilson v Collison, Re Johnson and Mitchell*, 11 Times LR 376 (QB Div, Day and Wright JJ, 1895), *Ex parte Green; In re Robbins, of the Press Association*, 7 Times LR 411 (QB Div, Cave and Grantham, JJ 1891).

145 See *Borrie & Lowe*, 130-131.

146 *Gaskell and Chambers Ltd*, [1936] 2 KB 595, at 603.

147 See *Chesshire v Strauss; In re Power O'Connor* 12 Times LR 291, at 291 (QB Div, Day and Wright JJ, *per* Day J, 1896).

148 *Borrie & Lowe*, 133.

149 *R v Associated Newspapers Ltd; ex p Beyers*, 80 Sol J 247 (1936).

material.[150] If it is long before the expected date of the trial of the action this may well remove the sting of prejudice,[151] but there is no absolute rule that a long period will inevitably excuse:

> "Much must depend upon the context of the publication and the interest in the particular litigation. It is more likely, for example, that stringent comments about a libel action involving a national figure will be remembered than comment upon an action involving a relatively unknown figure. Secondly, there is a danger that the repeating of comments might produce a cumulative effect and are therefore more likely to prejudice the case, even if repeated early in the proceedings."[152]

(f) Gagging writs

As *Miller*[153] observes:

> "Since defamation proceedings are routinely heard by juries it follows that there is a correspondingly high risk of a contempt being committed in relation to them. However, it has also been the case (and no doubt still is) that the law of contempt has been abused over the years by the issuing of 'gagging writs' which are intended to stifle further comment and exposure. For example, a newspaper may have spent many months investigating a particular scandal which is a matter of legitimate public concern. It may be the fraudulent manipulation of an insurance company, a rigged 'antique ring', football bribery, or suspected corruption in the police force, in awarding local government contracts, or in other areas. Such investigations have not infrequently provided information which has led to subsequent prosecutions and convictions ....
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> A[n] ... immediate problem will arise if the newspaper publishes one of a series of projected articles and this is followed by the issue of a writ for libel. To require the Press in general, and the investigating newspaper in particular, to desist thereupon from further comment on the ground that it might prejudice the libel action would mean that a rogue had effectively purchased immunity from exposure at a very small cost. The immunity might, moreover, continue over a long period if the opportunities for delay afforded by the civil process were cynically manipulated to 'gag' the Press .... On the other hand, the person issuing the writ may not in fact *be* a rogue. He may genuinely intend to vindicate his reputation by proceeding with his action as soon as possible. If this is so, any future disparaging comments may be just as likely to prejudice the fair trial of the action as in any other case

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150 See *Borrie & Lowe* 133-135.

151 See *Brych v The Herald and Weekly Times Ltd*, [1978] VR 727.

152 *Borrie & Lowe*, 134.

153 *Miller*, 247-248.

> involving a jury. The problem lies in distinguishing between the two situations, and it is a problem to which there is no ready solution."

In Ireland, the courts in a number of decisions[154] have addressed the question of when an injunction is appropriate in relation to defamation. In *Sinclair v Gogarty*,[155] the plaintiffs sought an injunction restraining further publication of a book which contained imputations of sexual impropriety[156] against them (including the charge that one of them, the proprietor of an antique shop, "sought new mistresses more highly than old masters"). In the High Court, Hanna J, granting the injunction, said:

> "The ... most important question on this application is whether, under these circumstances, an interlocutory injunction pending the trial should be granted. The Courts have always regarded this procedure as falling under a delicate jurisdiction in libel actions, to be exercised only in special circumstances and only in clear cases. Would it be just or fair on the evidence before me that the publication of these injurious passages in the book should continue for months until this action can be tried? On the authorities, the highest test against the plaintiff's application is whether, if a jury found that these passages were not libellous, such a verdict could stand. I am satisfied, as there is no special defence suggested, such as appear in some of the cases on the subject, that, if the matter came before a jury on the evidence as it stands before me, they could not, as reasonable men, come to any other conclusion than in favour of the plaintiff, and if any other verdict were given, I am of the opinion that it would be set aside as unreasonable. This may not be the only test applicable in the case of the special nature of the one under consideration, where personal character is attacked so as to cause serious, immediate and continuing loss of reputation. I am of opinion that the loss of reputation to the plaintiff by the continued publication of the libellous passages in this book could not be properly compensated by damages alone."[157]

In the Supreme Court appeal, where Hanna J's order was affirmed, Sullivan CJ stated:

> "I realise that in granting an interlocutory injunction to restrain the

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154 *Sinclair v Gogarty* [1937] IR 377 (Sup Ct, aff'g Hanna J), *Dunlop Rubber Co*, [1920] 1 IR 280 (Powell J), *Gallagher v Tuohy*, 58 ILTR 134 (High Ct, Murnaghan J, 1924), *Cullen v Stanley* [1926] IR 73 (Sup Ct, 1925), *"The Derry Journal" Ltd v Rialto Theatres Ltd*, 64 ILTR 87 (NI Chy Div, Andrews LJ, 1930), *Fitzgerald v Clancy* [1902] 1 IR 207, *Scott v Eason & Sons and Batsford Ltd*, *Irish Times*, 9 August 1980, p8 *Dickson (Alex), Sons Ltd v Dickson (Alexander) & Sons* [1909] 1 IR 185 (CA), *Hammersmith Skating Rink Co v Dublin Skating Rink Co*, IR 10 Eq 235 (VC Ct, Chatterton VC, 1876).

155 *Supra*.

156 The details of the libel are not set out in the Report, but are discussed by Ulick O'Connor, *Oliver St John Gogarty* 299-308 (1981 ed).

157 [1937] IR, at 381.

publication of a libel the Court is exercising a jurisdiction which has been described as a jurisdiction of a delicate nature.

The principle upon which the Court should act in considering such applications ... is this, that an interlocutory injunction should only be granted in the clearest cases where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable. It is unnecessary for me to decide whether that principle is applicable in all cases. I accept it as applicable in the present case."[158]

In *Gallagher v Tuohy*,[159] the plaintiff sought an interlocutory injunction to restrain the dissemination of material charging him with gross professional incompetence. Murnaghan J declined to make such an order on the basis that, since the defendants pleaded justification, he could not prejudge the issue and decide that the plea of justification was erroneous.

As regards the defence of justification, the case of *Cullen v Stanley*[160] provides an interesting discussion of its possible limitations. The plaintiff, a parliamentary candidate for the Irish Labour Party, sought an interim injunction against the publication of an accusation that he had acted as a "scab" some years previously. The Supreme Court held that he was entitled to an interim injunction by virtue of statutory provisions[161] designed to curb electoral abuses. O'Connor J, alone among the Judges, held that the plaintiff would be entitled to an injunction at common law. He noted that the alleged libel involved the "most improbable"[162] accusation that the plaintiff has been released from an industrial school in order to act the part of a strike-breaker. He added:

"Let us see, then, what is the evidence which the defendant has presented to the Court to enable it to see whether there is any foundation for the allegation complained of. He gives us nothing but the baldest affidavit, in which he merely states that the whole of the allegations complained of are true in substance and in fact, and that he shall be able to prove the same at the trial by subpoenaing witnesses and by cross-examination of the plaintiff. There is no statement that at the time he published the defamatory matter he had any information to go upon, or has even now any such information. In fact the affidavit is consistent with this - that having made the statement the defendant is now looking round for materials for justification. That is not the way to satisfy the Court that the defendant is in a position to sustain a plea

158 *Id*, at 384, Cf *Dunlop Rubber Co*, [1920] 1 IR 280 (Powell J). See also "*The Derry Journal*" *Ltd v The Rialto Theatres Ltd*, 64 ILTR 87 (NI Chy Div, Andrews LJ 1930).

159 58 ILTR 134 (High Ct, Murnaghan J, 1924).

160 [1926] IR 73 (Sup Ct, 1925).

161 *Prevention of Electoral Abuses Act 1923*, section 11(5) (no. 38). Cf *In the Matter of Thomas M Kettle*, 40 ILTR 234 (High Ct, KB Div, 1906).

162 [1926] IR, at 85.

of justification, or has reasonable grounds for pleading it."[163]

Two more recent important developments, both involving unreported decisions, should be noted. In *Agricultural Credit Corporation v Irish Business*, on 1 August 1985, O'Hanlon J granted an interim injunction, *in camera*, restraining publication of an article which the plaintiff alleged was defamatory of it. For a period of two days, an order prohibiting the media from publishing the fact that the injunction had been made held sway. Whether there was a statutory and constitutional basis for this order has given rise to some controversy.[164]

In *X v RTE*,[165] the plaintiff sought an injunction restraining RTE from naming him as a person who had been involved in the Birmingham bombing of 1974, in a television programme due to be published that evening. His affidavit stated that he was informed and believed it to be true and his name was to be thus mentioned in the programme. He stated that such assertion was completely untrue and added:

> "Such a publication would not only defame me but also expose me to the risk of personal violence by persons excited by animosity against me. I do not believe that damages would be a sufficient remedy if the programme were broadcast."

The plaintiff's solicitor, in an affidavit, stated that she had received instructions from the plaintiff the previous evening, that she had telephoned RTE and that there was nobody there who could deal with the particular matter. At 9.50 on the morning of the hearing she had sent a letter by fax to RTE in which she indicated her belief that her client was going to be named as one of the bombers in the forthcoming programme. She had asked for an undertaking that the programme broadcast would not include any such reference and said that in the absence of an undertaking she must assume that RTE intended to show the programme with defamatory matter and that she would be forced to act accordingly. She also asked for permission to look at the programme.

Permission was not granted. She received a letter, before 11.00 a.m., in which RTE stated that it found it "impossible" to give the undertaking in her letter.

Costello J refused the plaintiff's application on two grounds. Firstly, he was not satisfied, having regard to the plaintiff's failure to name the person who had informed him that his name was going to be used as suggested in the programme, that there was sufficient proof of an apprehension of defamation; secondly, that the plaintiff's delay in moving with regard to an *ex parte*

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163 *Id.*

164 See *Casey*, 454-455, *Boyle & McGonagle*, para 5.37.

165 Sup Ct 27 March 1990, affirming High Ct Costello J, 27 March 1990, Irish Times, 28 March 1990.

application disentitled him to relief.

The Supreme Court affirmed. Finlay CJ stated that he understood the general principle applicable to injunction applications in regard to the publication of defamatory matter to be that if a defendant indicated an intention in the proceedings to justify the matter complained of and provided some substantial grounds to satisfy the Court that he had a reasonable chance of doing so, then, ordinarily, the publication would not be restrained. That general principle seemed to him to make it absolutely essential that, in regard to a publication, the precise time and date of which had been publicly notified more than a week in advance, a plaintiff seeking *ex parte* an injunction against publication would have to have compelling reasons indicated to the Court why he had not moved earlier than on a time scale which made it impossible for the defendant to be heard.

The Chief Justice stated that he understood from counsel that an alternative application made in the High Court had been that short service might be served on the defendant but, having regard to the nature of the defence which might be put into such an application if it were in the interlocutory form and the necessity for the plaintiff to have an opportunity to reply, even at short service from that afternoon to the evening would not, in his view, have been feasible or practical.

In these circumstances, Finlay CJ preferred to refuse the order on the basis of delay. He added:

> "There are two conflicting constitutional questions which arise here. One clearly is the question of the right to citizens to express and have views and the giving of information and views to them and the other is the protection of the plaintiff's good name. In my view there are not grounds for interfering having regard to the delay."

In a short concurring judgment, McCarthy J stated that, in his opinion,

> "the Constitutional guarantee of the vindication of the good name of every citizen must be read in the context of the constitutional guarantee of freedom of expression. That good name can be vindicated in damages but a restraint on freedom of expression cannot be similarly remedied."

(g) Cases where there is no jury

In England it has for long been accepted that, in cases where there is no jury, the risk of influencing trial (or appellate) judges is slight indeed.[166] As Buckley J said in *Vine Products Ltd v Green*[167]:

> "although I suppose there might be a case in which the publication was of such a kind that it might even be thought that it would influence the mind of a professional judge, it has been generally accepted that professional judges are sufficiently well equipped by their professional training to be on their guard against allowing any such matter as this to influence them in deciding the case."

Although judges may be virtually immune from influence by publications, witnesses may well not be similarly impervious to such influence. They may be deterred from giving evidence or, if they do give evidence, it may be affected by what the witnesses have read or heard. Thus, in cases tried by judges alone, it may for this reason be contempt to issue a publication criticising a witness,[168] or even the parties.[169] A publication that prejudges the merits of the case may have a similar effect on witnesses.[170]

(h) Pressure on witnesses and others

The courts recognise that trade warnings to third parties, before or during litigation, designed to protect a right to intellectual property from infringement should not be characterised as contempt, provided they do not seek to enter into a detailed decision of the merits of the litigation against the defendant.[171]

As regards advertisements seeking to encourage witnesses to come forward,

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166 See *Borrie & Lowe*, 139 ff, *Grimwade v Cheque Bank Ltd*, 13 Times LR 305, at 306 (Chy Div, Kekewich J, 1897), *Re William Thomas Shipping Co Ltd, HW Dillon & Sons Ltd v The Co*, [1930] 2 Ch 368, at 373, *Vine Products Ltd v Queen*, [1966] Ch 484, at 496, *Re F (otherwise A) (Publication of Information)*, [1977] Fam 58, at 88, *AG v Times Newspapers Ltd*, [1974] AC 273, at 298, *Schering Chemicals Ltd v Falkman Ltd*, [1982] 1 QB 1, at 29.

167 [1966] Ch, at 496. In the criminal context see *Cullen v Toibin*, [1984] ILRM 577, discussed in detail earlier in the chapter.

168 See *Borrie & Lowe*, 140 and the cases there cited.

169 See *id.* 140-141, *Re Pall Mall Gazette, Jones v Flower*, 11 Times LR 122 (Chy Div, 1894), where Kekewich J (at 123) referred to the risk of witnesses coming to court with their minds prejudiced as a result of what had been published regarding the defendant.

170 See *Borrie & Lowe*, 141-143, *Fielden v Sweeting*, 11 Times LR 534 (Chy Div, North J, 1895), *Suprrell v De Rechberg*, 11 Times LR 313 (PDA Div, Sir Francis Jeune P, 1895). In some instances the court has gone so far as to intimate that an intention to influence the outcome of the proceedings would be sufficient to constitute contempt even in the absence of an objective likelihood of such outcome: see, e.g., *Birmingham Vinegar Brewery v Henry*, 10 Times LR 586 , at 586 (QB Div, Wills and Vaughan Williams JJ, *per* Wills J, 1894).

171 See *Borrie & Lowe*, 143-145, *Carl-Zeiss Stiftung v Rayner and Keeler Ltd*, [1960] 3 All ER 289, *Easipower Appliances Ltd and Frederick Williams (Appliances) Ltd v Gordon Moore (Electrical) Ltd*, [1963] RPC 8.

the courts have adopted a somewhat indulgent approach: even if they offer a reward, they will constitute contempt only if they create a real risk of prejudice.[172]

For a publication to put pressure on a party to desist from pursuing or defending pending litigation can amount to contempt.[173] The view formerly commanding general support in England[174] was that such pressure was *prima facie* objectionable; in the *Sunday Times*[175] case, however, this orthodoxy gave way to divided views, and the judgment of the European Court of Human Rights in this litigation[176] favoured an approach which would protect fair and reasonable criticism, temperately expressed, from the shadow of contempt.

(i) ***Publications pending appeal***

Publications pending appeal are not stringently policed: if they are expressed in fair and temperate terms they are most unlikely to constitute contempt.[177] It is, however, conceivable that in some cases where a new trial is likely to be ordered, prospective witnesses (whether or not they gave evidence in the first proceedings) might be prejudiced or deterred; neither should one overlook the possibility of improper influence being brought upon a party to desist from prosecuting or defending the appeal.

As regards defences, it seems that the public interest will not "trump" considerations of fairness in relation to the trial of civil proceedings. However, where matters of public interest are discussed in a publication it will not be contempt if this "incidentally and unintentionally"[178] creates a real risk of prejudice to pending civil proceedings.

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172 See *Borrie & Lowe*, 145, *Butler v Butler*, 13 PD 73 (1888).

173 See *Borrie & Lowe*, 145-149. See also *AG v Hislop* [1991] 1 All ER 911 (CA, 1990).

174 See, e.g. *Vine Products Ltd v Green*, [1966] Ch 486, at 496.

175 [1974] AC 273. See *Borrie & Lowe*, 146-148.

176 (1979) 2 EHRR 245, at 278, paras 62-63.

177 See *Borrie & Lowe*, 154.

178 *Id*, 157. Cf *Ex p Bread Manufacturers Ltd., Re Truth and Sportsman Ltd*, 37 SR (NSW) 242 (1937), which has been mentioned earlier in the chapter.

CHAPTER 5: ACTS, OTHER THAN PUBLICATION, WHICH INTERFERE WITH THE COURSE OF JUSTICE

> "The tricks and turns by which justice may be obstructed or perverted are so numerous and varied, and the ingenuity of mankind is so constant, that it is impossible to define in a comprehensive way, or rather to delimit, the circumstances under which a contempt of court by the obstruction of justice may be committed, and no Judge or Court has ever presumed to lay down any such limitation."[1]

In this chapter[2] we consider acts, other than publication, which interfere with the course of justice. Many of these acts may constitute criminal offences in their own right. The first part of the chapter deals with the different persons who can be interfered with. The second part addresses general principles of liability. Next, there is the reference to the circumstances in which abuse of the court's process can constitute contempt. Finally, other miscellaneous modes of committing contempt of this category are mentioned.

1. *CATEGORIES OF PERSONS INTERFERENCE WITH WHOM CONSTITUTES CONTEMPT*

A. *Witnesses*[3]

(1) Types of interference

A wide variety of conduct that interferes with a witness may constitute contempt. Clearly actual violence or the threat or violence can do so. Thus,

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1 *In re MM & HM*, [1933] IR, at 341 (Sup Ct, *per* Johnston J). See also *id*, at 314 (*per* Kennedy CJ).

2 Our structure of analysis is derived from *Borrie & Lowe*, ch 10.

3 See *id*, 268-285.

in *Moore v Clerk of Assize, Bristol*,[4] where a fourteen-year old girl, who had given evidence in a case where men had been charged with affray, was reproached and threatened by the brother of one of them, the English Court of Appeal upheld a three-month sentence of imprisonment for contempt. Lord Denning MR said:

> "The court will always preserve the freedom and integrity of witnesses and not allow them to be intimidated in any way, either before the trial, pending it or after it .... It is a contempt of court to assault a witness after he has given evidence; it is also a contempt of court to threaten him or put him in fear, if it is done to punish him for what he has said."[5]

Attempting to induce a witness not to attend the court may constitute contempt. In *In re Kelly and Deighan*,[6] Costello J held that such conduct amounted to an *in facie* contempt. As we note in the chapter on *in facie* contempt, this may be extending the boundaries of that category of contempt rather widely.

The making of a payment for the attendance of a witness is permissible but considerable doubts attach to the offering or making of a payment to witnesses where the sum to be paid is conditional on there being a conviction or is to be increased in that event. In England the matter of payments to witnesses has given rise to much discussion in relation to the Moors murder trial in 1966, the Thorpe trial in 1979 and the "Yorkshire Ripper" trial in 1981.[7] Certainly the damaging effects payments may have on the outcome of trials is a matter worthy of note. In Ireland, our courts have yet to address the question whether payments of this type constitute contempt. The answer would seem to be that a conditional payment, or one to be escalated on conviction, can well constitute contempt. It might be thought that merely paying a witness to talk exclusively after a trial to one newspaper or television or radio station would not constitute contempt; nevertheless no blanket immunity can be guaranteed since the making of such a contract, in particular circumstances, might amount to an implicit encouragement to alter evidence, both parties being aware that, without a conviction (or other particular outcome), the witness's "box office" potential after trial, in terms of interest for readers, listeners, or viewers, is likely to be severely depleted.

(2) Mens rea

As regards *mens rea*, there is no clear Irish authority. In England, in *Re A-G's Application, AG v Butterworth*[8] the Court of Appeal was divided. Lord

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4 [1972] 1 All ER 58 (CA, 1970).
5 *Id*, at 59. See also *R v Martin*, 5 Cox 356, at 359 (*per* Pigot CB, 1848).
6 [1984] ILRM 424 (High Ct. Costello J, 1983).
7 See *Borrie & Lowe*, 272-274, *Miller*, 210-212.
8 [1963] 1 QB 696.

Denning MR favoured a test requiring an intent to deter, influence or punish a witness in respect of his evidence. Thus, intimidation of a witness which lacked this intent would not be contempt. Donovan LJ, however, considered that the test was one of inherent likelihood of interference with the proper administration of justice rather than necessarily involving an intent to so interfere. It seems that, at all events, the alleged contemnor must have known that the object of the threat was a witness or a potential witness.[9] *Borrie & Lowe*,[10] referring to the difference of opinion between Lord Denning MR and Donovan LJ, express the view that:

> "[t]he different approaches will not often produce different results since most impugned acts will be accompanied by an intention to influence witnesses but one example where the different approaches could be significant is where an action is brought against a newspaper for paying witnesses for their story, the amount being contingent on the verdict. In such a case it is doubtful that an editor would have intended to influence the witness but the effect of payment could be thought to interfere with the due course of justice."

If Lord Denning MR's test were modified to embrace cases of recklessness as well as of intention, then the gap between his test and that of Donovan LJ in the context of cheque-book journalism would not be so significant. It would be a singularly naive newspaper editor who could claim that the *possibility* of the witness's being influenced by the payment did not cross his or her mind, however fleetingly.

(3) Punishment of witnesses

(a) Mixed motives

In relation to cases where the contempt consists of punishing a witness for having given the evidence he did in court, some important issues of principle have arisen. Understandably, after litigation the motives of those who seek to take reprisals against a witness may be mixed. The desire to punish may be accompanied by other desires, such as to having nothing more to do with a person who is now no longer trusted as a loyal employee or "one of the boys". In such circumstances is the court to follow the model of the tort of conspiracy and enquire whether the desire to punish was the *predominant*

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9 *Re B (JA) (an infant)*, [1965] Ch 1112, at 1122 (Cross J). See *Borrie & Lowe*, 275.

10 *Borrie & Lowe*, 275.

motive?[11]

In *Butterworth*,[12] Lord Denning MR thought not. Referring to the conduct in which an alleged contemnor engages, he said:

> "If it is done with the predominant motive of punishing witnesses, there can be no doubt that it is a contempt of court. But even though it is not the predominant motive, yet nevertheless, if it is an actuating motive influencing the step taken, it is, in my judgment, a contempt of court. I do not think the court is able to, or should, enter into a nice assessment of the weight of the various motives which, mixed together, result in a victimisation of a witness. If one of the purposes actuating the step is the purpose of punishment, then it is a contempt of court in everyone so actuated."

(b) Publicity of punishment

Another question relating to punishing witnesses concerns the matter of publicity of the punishment. If a witness is assaulted or otherwise punished in private, with no one else being or becoming aware of this fact, how does this damage the administration of justice in any way?[13] The answer is surely that even private conduct does indeed damage the administration of justice, by deterring the witness from giving evidence in future cases; moreover, as *Borrie & Lowe*[14] point out, if it were known that the law did not treat private punishment as a contempt, this would be "likely to operate as a general

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11 Cf *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, at 445 (HL (SC), 1941) where Viscount Simon LC counselled that:

> "it is to be borne in mind that there may be cases where the combination has more than one 'object' or 'purpose'. The combiners may feel that they are killing two birds with one stone, and even though their main purpose may be to protect their own legitimate interests notwithstanding that this involves damage to the plaintiffs, they may also find a further inducement to do what they are doing by feeling that it serves the plaintiffs right. The analysis of human impulses soon leads us into the quagmire of mixed motives, and even if we avoid the word 'motive', there may be more than a simple 'purpose' or 'object'. It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person."

See also *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.*, [1989] 3 All ER 14, at 43-44 (CA), *Taylor v Smyth*, Sup Ct, 5 July 1990.

12 [1963] 1 QB, at 723.

13 In *Chapman v Honig*, [1963] 2 QB 502 (CA), Pearson LJ thought that private victimisation should not constitute contempt. The majority (Lord Denning MR and Davies LJ) thought otherwise. See *Borrie & Lowe*, 279.

14 *Borrie & Lowe*, 279.

deterrence against giving evidence".

(c) Compensation for punishment
Whether witnesses who have been victimised can sue for damages in tort is a question that has greatly exercised English lawyers, in the wake of a controversial decision of the Court of Appeal.[15] Of course, if they are physically attacked or threatened they may sue for battery,[16] assault,[17] or the infliction of emotional suffering.[18] But what is the position where a contemnor, by his conduct which victimises the witness, acts in a manner that is "lawful", in the sense that it is independently authorised by a contract between him and the witness? In *Chapman v Honig*,[19] a subpoenaed witness gave evidence in a trespass case brought against his landlord. The following day the landlord served notice to quit on the witness, his sole purpose being to punish him for having given evidence. This, it was conceded, amounted to a contempt. The English Court of Appeal, by a majority,[20] held that this did not entitle the tenant to sue in damages. The majority were of the view that the notice to quit, being "a lawful exercise of a contractual right",[21] could not at the same time be a tort. Lord Denning, MR, dissenting, perceived that this proposition rested on doubtful analytic foundations. His own analysis lacks intellectual depth but points in the direction of what may be the preferable solution:

> "The principle upon which this case falls to be decided is simply this. No system of law can justly compel a witness to give evidence and then, on finding him victimised for doing it, refuse to give him redress. It is the duty of the court to protect the witness by every means at its command, else the whole process of the law will be set at naught. If a landlord *intimidates* a tenant by threatening him with notice to quit, the court must be able to protect the tenant by granting an *injunction* to restrain the landlord from carrying out his threat. If the landlord *victimises* a tenant by actually giving him notice to quit, the court must be able to protect the tenant by holding the notice to quit to be invalid. Nothing else will serve to vindicate the authority of the law. Nothing else will empower the judge to say to him: 'Do not fear. The arm of the law is strong enough to protect you'."[22]

This discussion of principle draws useful analogies from the torts of intimidation, inducing breach of contract and conspiracy; but it has its own difficulties. First, although an injunction may be obtained against the

15 *Chapman v Honig, supra.*
16 Cf *McMahon & Binchy*, 402-405.
17 Cf *id*, 405-406.
18 Cf *id*, 407-409, *Prosser & Keeton on Torts*, 54-56 (5th ed, 1984).
19 *Supra.*
20 Pearson and Davies LJJ, Lord Denning MR dissenting.
21 [1963] 2 QB, at 521 (*per* Pearson LJ).
22 *Id*, at 513.

commission of the tort of intimidation, a person who successfully resists a threat will not be entitled to sue for damages.[23] Thus, in *Whelan v Madigan*,[24] where a landlord resorted to "outrageous behaviour"[25] towards his tenants, including telephoning one of them (a woman) and breathing but not saying anything when she answered, Kenny J held that he was not guilty of intimidation, since the intimidation had not been successful. Far from leaving the property, the tenants had united against the defendant.

A second difficulty with Lord Denning MR's analysis is that, save for the doubtful analogy with intimidation, the only rationale for imposing liability is that "[n]othing else will serve to vindicate the authority of the law". To base the justification for the establishing of tortious liability on such an indirect purpose, rather than on the claim to justice for the victim in his or her own right is unfortunate.

Three possible bases of liability may be suggested in relation to a person who, by an act constituting a contempt, victimises a witness where the act is in the purported exercise of a contractual (or other) right. The first is the nascent tort of intentional interference with economic interests.[26] In *Merkur Island Shipping Corporation v Laughton*,[27] the House of Lords accepted that there was such a generic tort, and this has been followed by the slow unfolding of its underlying principles.[28] In Ireland there is a good foundation for the tort in the decisions of *Cooper v Millea*[29] and *Riordan v Butler*.[30] In *Pine Valley Developments Ltd v Minister for the Environment*,[31] the Supreme Court may be considered to have adopted a neutral position in that Finlay CJ declined to express any view as to the correctness of the principle enumerated by the High Court of Australia in *Beaudesert Shire Council v Smith*,[32] to the effect that:

> "... it appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other."

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23 *McMahon & Binchy*, 574, *Becton, Dickinson Ltd v Lee*, [1973] IR 1, at 30-31 (Sup Ct, *per* Walsh, J).

24 [1978] ILRM 136 (High Ct, Kenny J).

25 *Id*, at 142.

26 See *McMahon & Binchy*, 580-581, Carty, *Intentional Violation of Economic Interests: The Limits of Common Law Liability*, 104 LQ Rev 250 (1988), Burns, *Tort Injury to Economic Interests: Some Facets of Legal Response*, 58 Can Bar Rev 103 (1980), Elias & Ewing, *Economic Torts and Labour Law: Old Principles and New Liabilities* [1982] Camb LJ 321.

27 [1983] 2 AC 570, at 608 (HL (Eng), *per* Lord Diplock).

28 Cf Carty, *supra*, *Lonrho plc v Fayed*, [1989] 2 All ER 65 (CA); *Associated British Ports v Transport and General Workers' Union*, [1989] 3 All ER 796 (CA).

29 [1938] IR 749 (High Ct, Gavan Duffy J).

30 [1940] IR 347 (High Ct, O'Byrne J).

31 [1987] ILRM 747 (Sup Ct, 1986).

32 120 Comm LR 145, at 156 (1969).

The Chief Justice favoured this approach because the plaintiffs had disclaimed any reliance on *Beaudesert*. The Court did not address the issue of the scope of the tort of intentional interference with economic interests.

In *Bula Ltd v Tara Mines Ltd (No. 2)*,[33] in interlocutory proceedings,[34] Murphy J declined to take a position as to the scope of this tort.

If the tort is part of Irish law, then the question arises as to whether it embraces contemptuous victimisation of the type that arose in *Chapman v Honig*.[35] It may be premature to address the precise content of a tort whose principal features have yet to be adumbrated by an Irish court. Nevertheless it is scarcely rash to suggest that conduct of this nature will be recognised as coming within the scope of the tort. Whether this is because it is capable of being characterised as an "unlawful act"[36] which is "in some sense directed against the plaintiff or intended to harm the plaintiff",[37] or whether the courts adopt conceptual scaffolding akin to the "proximity" lexicon of negligence,[38] it is easy to envisage that liability would be imposed in such a case.

The second basis of liability for such conduct may be that of wrongful interference with the plaintiff's constitutional rights.[39] In a situation such as arose in *Chapman v Honig*[40] these rights might be identified as including property rights, but rather than requiring liability to depend on the contingent consequences of conduct of this nature, the Irish courts may recognise that in all cases of contemptuous victimisation of a witness, there is an interference with the plaintiff's right and obligation to participate in the judicial process as a witness. To let him or her suffer for having done so, with no legal redress, may be considered an unconstitutional infringement of his or her rights as a participant in the legal process - which the public policy of the State clearly endorses. It may also be considered an aspect of the concept of "contempt of the courts", which has been formulated by the Supreme Court, though whether such a rationale would warrant the imposition of a remedy for damages in addition to the exercise of the court's contempt jurisdiction is not clear.

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33 [1987] IR 95 (High Ct, Murphy J).

34 As to which see R Byrne & W Binchy, *Annual Review of Irish Law 1987*, 167-169, 339 (1988).

35 *Supra*.

36 The approach favoured by Lord Diplock in *Merkur Island, supra*.

37 *Lonrho plc v Fayed*, [1989] 2 All ER 65, at 69 (CA, *per* Dillon LJ).

38 See *McMahon & Binchy*, ch 6 and p581.

39 See, e.g, *Meskell v CIE* [1973] IR 121, *Murtagh Properties Ltd v Cleary*, [1972] IR 330, *Kearney v Minister for Justice* [1986] IR 116, *McHugh v Commissioner for Garda Siochana* [1986] IR 228, *Kennedy v Ireland*, [1988] ILRM 472 (High Ct, Hamilton, P, 1987), *Hayes v Ireland*, [1987] ILRM 651, *Conway v INTO*, Sup Ct, 14 February 1991. As to the relationship between interference with Constitutional rights and tortious liability, see *Hanrahan v Merck Sharp and Dohme (Ireland)* Ltd, [1988] ILRM 629 at 636 (Sup Ct), and *McMahon & Binchy* 9-11.

40 *Supra*.

The third basis for imposing liability would be that of an entirely new, innominate tort[41] (such as those in *Rylands v Fletcher*[42] or *Wilkinson v Downton*,[43] for example). The advantage of this approach is that the courts would not have to squeeze the liability into the confines of an established, nominate tort where this would do violence to the principles and policy underlying the tort.

Whatever approach may ultimately be favoured, it is as well to scotch the assertion in *Chapman v Honig* that conduct which is "a lawful[44] exercise of a contractual right" cannot at the same time be "unlawful as being tortious" in constituting contemptuous victimisation. It all depends what one means by "unlawful": to fail to be conscious of the ambiguities of the term will lead to error. Conduct may correctly be described as lawful in one respect and unlawful in another. There is no logical contradiction in this. Giving a party to a contract notice to quit may be lawful in the sense that it is "permitted" by the contract; but permission here necessarily relates only to specifically contractual norms.

Tort law operates in a separate legal order. Inevitably, of course, there is a close mutual regard and overlap between tort and contract. Otherwise our law would be in chaos. But the law of tort in no sense has to give "right of way" to contract. Such principles as those of consent and voluntary assumption of risk provide the bridge between tort and contract. Thus, the mere fact that conduct is contractually permissible does not inevitably render it immune from tortious liability, even as between the parties.

It is also worth noting that, in certain torts, the question of the defendant's motive will be an important factor in determining whether what he did was lawful. This is clearly so in relation to nuisance,[45] where an act which may seem to be incidental to the ordinary, every day use of one's property may be inspired by an unneighbourly motive. Conduct which is, as it were, *prima facie* lawful is rendered tortious by the actor's bad faith. It is useful here to note the Irish decision of *Boyle v Holcroft*[46] in 1905. The defendant was the

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41 See *McMahon & Binchy,* 16.

42 LR 3 HL 330 (1868), affirming LR 1 Ex 265 (1866). See *McMahon & Binchy,* ch 25.

43 [1897] 2 QB 57.

44 *Miller,* 362, does not concede that the giving of the notice to quit was lawful:

> "Contractual rights may be exercised, as Pearson LJ put it [in *Chapman v Honig,* [1963] 2 QB, at 520], 'for a good reason or a bad reason or no reason at all'. But surely it is a wholly different proposition to say that what would otherwise have been a legitimate exercise of a contractual right is still lawful as between the parties notwithstanding that it constitutes a contempt of court."

45 See *Christie v Davey* [1893] 1 Ch 316 (North J, 1892), *Hollywood Silver Fox Farm Ltd v Emmett,* [1936] 2 KB 468, [1936] 1 All ER 825, Fridman, *Motive in the English Law of Nuisance,* 40 Va L Rev (1954), Ames, *How Far an Act may be a Tort because of the Wrongful Motive of the Actor,* 18 Harv L Rev 411 (1905), Gutteridge *Abuse of Rights,* 5 Camb L J 22 (1933).

46 [1905] 1 IR 245 (Barton J).

judicial tenant of the plaintiff. He had been imprisoned for fishing on the plaintiff's fishery and his brother had been fined for a similar offence. He thereafter erected a wire paling which obstructed the plaintiff in the exercise of his exclusive right of fishing, and the plaintiff successfully sought an injunction against him for trespass on, and obstruction to, the fishery. Barton, J said:

> "I take it that, as a general rule, so long as the tenant is *bona fide* and reasonably managing and using the lands, the owner of the fishing rights must be content to exercise his rights upon the lands in the condition in which they happen to be from time to time. On the other hand, the tenant must not, under cover of farm user or management, unreasonably or *mala fide* cause or maintain an obstruction to the exercise of the right of fishing, and may be restricted by injunction from doing so .... The defendant having adopted a kind of paling which prevents the exercise of a legal right, questions of motive and reasonableness become legitimate subjects of inquiry."

Another subsidiary issue arising in *Chapman v Honig*[47] was of a practical nature: if the landlord's notice to quit was to be condemned as tortious on account of the fact that it constituted a contempt, for what period would a notice in such circumstances be tainted with the contempt? And how would the court be able to know the point beyond which the motivation to victimise had lost its potency so as to render efficacious a subsequent exercise of the contractual right to give a notice to quit? Pearson LJ found this problem insurmountable; but Lord Denning MR, dissenting, resolved it by placing on the landlord the onus of showing that the notice to quit was free from taint. This seems a reasonable solution. No doubt evidentially the problem may on occasion prove difficult to resolve but evidential difficulties are inherent in the process of adjudication and should not generally, by reason of the fact of their difficulty, be a reason for not adopting a principle which otherwise commends itself.[48]

In this context, it is worth noting that the mere fact that a wrongdoer can subsequently accomplish his goal lawfully, and thus reduce the plaintiff's compensatory damages to the minimum, is not a reason for the court's refusing to award *any* damages.[49] Even if the tort in question does not compensate dignitary interests there is always the possibility of some other damage, however small, having been suffered, as well as the real possibility that an award of exemplary damages will be in order.[50]

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47 *Supra.*

48 Cf *Glover v BLN Ltd (No 2)*, [1973] IR 432, at 441-442 (High Ct, Kenny J, 1968). Note also McCarthy, J's approach in *O'Byrne v Gloucester*, Supreme Ct, 3 November 1988.

49 Cf *Garvey v Ireland*, [1981] ILRM 266 (High Ct, McWilliam J).

50 Cf *Conway v INTO*, Sup Ct, 14 February 1991.

B. *Jurors*

In *R v Martin*,[51] Pigot CB observed:

> "It is important that there should be no improper interference with the administration of justice; and above all, that juries should be protected from every interference with them in reference to the discharge of their important and sacred duties; they form a portion of the tribunals by which the law of the land is administered."

Judges have authority for protecting the proceedings which are essential to the administration of justice; but jurors, with infinitely greater risk, have no protection of their own, and must depend for it upon what the law affords them.[52]

Thus, intimidating a member of a jury before or during a trial, or punishing him or her for having come to a particular verdict will constitute contempt (as well as a criminal offence in certain cases, such as embracery or conspiracy to prevent the course of justice[53]).

In *R v Martin*, the brother of a person who had just been convicted of an offence[54] under the Crown and Government Security Act went immediately to the house of the foreman of the jury and challenged him to mortal combat "for having bullied the jury". The foreman denied that he had done so, declined the challenge and had the man charged. In response to an abject apology by the contemnor, the Court committed him to prison for a month. Pigot CB said:

> "It has been found necessary in the course of these proceedings to protect jurors from all interference with them in the discharge of their duties, from all attempts to assail their characters or reputations, and from the imputation of motives other than those which should actuate men having such solemn and important duties to discharge: if it is necessary to guard their reputation, how much more necessary is it to guard their persons from outrage, and the consequences of threats of outrage to their persons or their houses. It is therefore necessary for the court, when such a case as this is brought before it, to exercise the powers which the law has vested in it for the protection of those engaged in the administration of justice; and above all, to protect jurors from intimidation and outrage."[55]

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51 5 Cox 356, at 359 (1848). See also *In re MM and HM* [1933] IR 299, at 323 (Sup Ct, *per* Fitzgibbon J).
52 Cf 5 Cox, at 359.
53 See *Borrie & Lowe*, 285-286.
54 Cf *R v Dougherty*, 5 Cox 348 (1848).
55 5 Cox, at 359.

C. *Judges*

Interference with a judge may constitute contempt.[56] This is clearly so where the action is done in the knowledge of the judge's status and with the intent to interfere with the administration of justice. Where these elements are lacking, the position is less certain. In the absence of modern judicial authority, one may only speculate as to the precise *mens rea* requirement: a test based on intent or recklessness as regards interference with the administration of justice would seem consonant with modern requirements of criminal justice, provided also the alleged contemnor was aware of - or perhaps reckless as regards - the status of the person with whom he interfered.

In *Atcheson v Morgan*,[57] William McKinney, a witness in a case which had been adjourned on account of his absence through illness wrote a letter to one of the judges (Lord Justice Best) hearing the case. The letter was headed "William McKinney, building contractor, timber importer, and box manufacturer, Lisavogue, Tandragee", and read as follows:

> "Rt Hon Sir -
>
> Just a line on behalf of my good friend, Mrs Morgan, of Tandragee, hoping I am not infringing on your good nature. You being one of the judges of the case in which Mrs Morgan figures as defendant, I must humbly ask you to use your influence in seeing justice done by her. Mr George Atcheson, deceased, intended leaving all his property beside Tandragee to Mrs Morgan, and if she is decided against it would put her on the broad road. I trust you will see your way to safeguard her interests. Please accept my apologies for taking the liberty of writing you.
>
> I remain, yours fraternally,
>
> William McKinney."

When called on to answer this contempt, Mr McKinney filed an affidavit of apology.

The short report of the case states that the Lord Chief Justice said that the court had considered the case, and it recognised it as necessary that the public should be satisfied that any interference, or attempted interference, with the free flow of justice in the King's Courts in Northern Ireland would be heavily punished. It was a monstrous matter that a thing like this should be contemplated by any business man - that by using indirect influence on one

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56 In *Birch v Walsh*, 10 Ir Eq Rep 93, at 96 (1846), Cusack Smith, MR noted that the Courts of Equity exercised the jurisdiction of committing for contempt where "letters or pamphlets have been addressed to the judge who had to decide upon the case, with the intention either by threats or flattery, or bribery, to influence his decisions".

57 60 ILT & Sol 937 (NI CA, LCJ and Andrews LJ, 1926).

Judge of the Court he would be able to secure judgment in favour of his friends. The sooner not only this man but the public - if there were others - had their minds disabused of such a possibility, the better for justice. The letter was simply a futile letter. It was a direct insult to Lord Justice Best. In view of the contemnor's apology a fine of £25 was appropriate (as well as costs for the day when the hearing of the appeal had to be adjourned). Were it not for the apology an order of absolute committal would have issued.[58]

Of course many acts which constitute an unwarranted interference with a judge will amount to scandalising him or her. But some -attempted bribery, for example - will not. Very often where acts appear to offend against both types of contempt, the proceedings against the alleged contemnor will characterise the conduct as scandalising. This is not an invariable rule, however. Thus, in *AG v O'Ryan and Boyd*,[59] where the first defendant, a County Councillor, wrote a letter to a judge which reflected on him in his judicial and personal capacity and later read the contents of the letter to a meeting of the County Council, and where the second defendant, a newspaper editor, published the contents in his newspaper, both defendants were the object of attachment proceedings for (a) scandalising the Court and (b) publishing words calculated to impede and interfere with the administration of justice. The case is authority for the proposition[60] that one may be guilty of interfering with a judge through private communication, apart from cases of scandalising, even after proceedings have been completed. Any other rule would expose judges, and the administration of justice, to the risk of unwarranted interference without redress through contempt proceedings.

D. *Officers of the Court*[61]

"Acts which prevent or which are intended to prevent officers of the court from carrying out their duties constitute a contempt of court".[62] The list of such officers has yet to be definitely established. It includes solicitors, sheriffs, receivers, liquidators, sequestrators and process servers.[63]

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58 See also *Martin*, 71 ILT & Sol J 87 (NI High Ct, Megan J, 1937) (letter by a defendant to the judge which "showed a clear desire to get the private ear" of the judge held to amount to contempt; the case was a mortgage suit by a bank against members of the family of a deceased man who had been engaged in a substantial way in the linen trade but whose business had deteriorated and whose family had been reduced to a state of poverty; this was one of the reasons why the letter had been written).

59 [1946] IR 70 (High Ct, Maguire P, Gavan Duffy and Haugh JJ, 1945).

60 Not expressly addressed in the judgments, which must be premised on the correctness of the proposition. *Oswald*, 48-49, argues that, when the proceedings have terminated, only private communications to a judge which amount to scandalising should fall within the scope of contempt. *O'Ryan and Boyd* is to the contrary, as we have seen. Cf, *Borrie & Lowe*, 288, who submit that, to write a letter to a judge threatening physical harm by way of punishment for a decision he has given could be considered a contempt on the *Butterworth* principle already discussed.

61 See generally *Borrie & Lowe*, 288-295, *Miller*, 387-393.

62 See *Borrie & Lowe*, 288.

63 *Id.* The law of contempt here supplements the criminal law: see, e.g. the *Bankruptcy Act 1988*, section 128.

Conduct constituting an interference of this nature may consist of physical assault[64] and false imprisonment,[65] for example. Whether threatening or abusive language will suffice is less clear: the courts[66] have shown a surprising indulgence to defendants, presumably in recognition of the feelings of exasperation that may naturally attend being served with process.

As regards the refusal to allow persons to be served with process, the courts are again somewhat indulgent. Certainly, refusal accompanied by force or actual physical obstruction can constitute a contempt.[67] Similarly, preventing service by fraudulent misrepresentation would amount to a contempt.[68] But where the default consists of passive lack of assistance it seems that no contempt will be committed.[69] The courts regard an attempt to frustrate a writ of possession with less indulgence, however, though again they stress that contempt is to be found in only extreme cases.[70]

Disturbing receivers, liquidators or sequestrators is treated as a serious contempt.[71] In *Ames v Birkenhead Docks*,[72] Lord Romilly MR said:

> "There is no question but that this court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive, by anyone, although the order appointing him may be perfectly erroneous; this Court requires and insists that application should be made to the Court, for permission to take possession of any property of which the receiver either has taken or is directed to take possession."

In *Doran v Kenny*,[73] the Master in an administration suit ordered that a house held under an agreement for a lease, with a clause against sub-letting, be sold by an auctioneer. The solicitor for the landlord attended the auction and required the auctioneer to read the agreement. The auctioneer declined to do so. The solicitor then stated that the landlord objected to the sale being proceeded with, and cautioned the auctioneer against proceeding with it, because the landlord's consent had not been obtained. There was only one bidder and the house was sold at one third of its value.

Walsh MR, reversing the Master's decision, held that the solicitor was not

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64 *Williams v Johns*, Dick 477 (1773) and the other cases cited by *Borrie & Lowe*, 289, fn 15.

65 *Price v Hutchinson*, LR 9 Eq 534 (1870), *Lewis v Owen*, [1894] 1 QB 102.

66 See *Borrie & Lowe*, 290.

67 *Wylam v Wylam and Roller*, 69 LT 500 (1893).

68 *Borrie & Lowe*, 292.

69 Cf *Wylam v Wylam and Roller*, *supra*.

70 *Alliance Building Society v Austen*, [1951] 2 All ER 1068. Cf *Lacon v De Groat*, 10 TLR 24 (1893).

71 *Borrie & Lowe*, 292-293, *Miller*, 388-391. See *Larkins v National Union of Mineworkers*, High Ct, Barrington J, 18 June 1985, *Binchy*, 195-197.

72 20 Beav 332, at 353 (1855).

73 IR 2 Eq 255 (Walsh MR, 1868).

guilty of a contempt for which an attachment should be ordered. He said:

> "What is the matter complained of? No doubt if, after the appointment of a receiver, a party to the cause receives rent from the tenant, or if any one, knowing of the appointment, brings an ejectment or distrains the tenant, such acts may be punished as contempt, as may other acts tending to frustrate a decree or obstruct the process of the Court; or even mere words, if intended to insult, or designed to corrupt or intimidate those engaged in the administration of justice. But it is otherwise with mere words spoken by a stranger to the cause, and used not disrespectfully or corruptly, but in the *bona fide* (though mistaken) assertion of a supposed right, or discharge of a supposed duty. The authority approaching most nearly to such a case is the *dictum* referred to in *Courtenay v. Courtenay*, where the Master of the Rolls is reported to have stated that he attached a party for interfering with a receiver, and desiring a person not to pay him rent. If this is to be understood of a party who did no more than caution a tenant not to pay his rent to the receiver, *bona fide* believing that he himself was entitled to receive such rent, I should doubt the accuracy of the report. I have not succeeded in finding any such case.
>
> "On the whole, therefore, I cannot agree in the Master's decision that what occurred here was a contempt of court. I should be glad if I had jurisdiction to make Madden recoup the loss to the parties in the cause, but I do not see how this can be done. I think the view put by counsel is correct, and that there was no legal injury in the nature of slander of title. But as I disapprove of Mr. Madden's conduct - the more so as he is a solicitor, - I shall give him no costs, either of the motion below or the appeal."[74]

E. *Parties to an Action*

Parties to an action are in a somewhat different position from witnesses in that, unlike witnesses (who can be compelled to give evidence), litigants have at least the theoretical option whether or not to bring or defend legal proceedings.[75] They may therefore expect to have to put up with a degree of pressure, whether publicly or privately expressed, at all events if it is moderate, fair and reasonable, and there is a common interest between the person exercising the pressure and the litigant,[76] and perhaps even without these qualifications if it is fair and temperately expressed.[77]

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74 *Id*. at 259-260.

75 See *Borrie & Lowe*, 298, resiling from their position, adopted in the First Edition, 223, 229, that litigants and witnesses should be subject to the same principles so far as the law of contempt in relation to interference with them is concerned.

76 *Borrie & Lowe*, 298, citing the *Sunday Times* case, [1974] AC, at 319 (*per* Lord Simon).

77 *Id*, citing the view of majority in *Sunday Times*, so far, as public pressure is concerned, and Lord Diplock's view that this applied *a fortiori* to private pressure.

An attempt to blackmail or intimidate a party with a view to forcing him or her to withdraw a suit constitutes contempt.[78] Similarly, attempts to bribe a party to withdraw from litigation or change his or her evidence.[79] Preventing a party from obeying a court order also amounts to contempt, as where a child's mother hid him and thus prevented him from being served with an order directing him to execute a conveyance within fourteen days.[80]

The question whether the temporal limits of liability for contempt of this kind are the same as for those in relation to witnesses and jurors is as yet unresolved. There is authority[81] in England for the proposition that the fact that the victim is not yet an actual litigant, if he intends to be such, is not a reason for excluding the application of the law of contempt. The position where a litigant is punished for having taken (or defended) proceedings is not covered by any clear authority.[82]

Borrie & Lowe[83] take no final position on this latter issue. They state:

> "It could certainly be argued that, for example, a company that dismisses an employee for bringing a legal action against it could deter future employees from bringing an action. Whether such conduct would be considered an actionable interference with the administration of justice is perhaps doubtful and it may be that this is another example of where the difference between the litigant who has a choice whether or not to bring an action and a witness who can be compelled to give evidence, is crucial".

In spite of this difference, it may be argued that the rationale for contempt in respect of victimisation of a witness or juror is not by any means restricted to the element of compulsion affecting those categories of participant in the legal process. Moreover, the idea that a litigant is free to sue or not is a debatable one. The victim of a tort or breach of contract is in only the most formal of senses "free" to neglect to protect his or her rights through the judicial process. Freedom to refrain from seeking to obtain that to which one is entitled is an odd basis on which to justify the failure to apply the contempt jurisdiction to those who seek their due through legal action. Where an old-age pensioner is victimised by her mugger for having successfully sued him for battery, society in general and the administration of justice in particular, may

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78 *Re Mulock*, 3 Sw & Tr 599 (1864), *Smith v Lakeman*, 26 LJ Ch 305 (1856), *Borrie & Lowe*, 299-300.

79 *Re Hooley Rucker's case*, 79 LT 306 (1898), *Borrie & Lowe*, 300.

80 *Thomas v Gwynne*, 8 Beav 312 (1845).

81 *Raymond v Holey* [1983] AC 1.

82 Lord Simon's speech in the *Sunday Times* litigation, [1974] AC, at 320 "seem[s] to hint" that such reprisals are not contempt: *Borrie & Lowe*, 302, fn 6. The general tenor of the speech, however, scarcely affords a sound principled basis for making a distinction between litigants and witnesses or jurors, so far as punishment (as opposed to public discussion) is concerned.

83 *Borrie & Lowe*, 302 (footnote reference omitted).

be considered to have as proper an interest in taking contempt proceedings against the mugger as they would if the mugger victimised a witness or juror. The right to litigate is a constitutional right which is deserving of effective protection. In this regard it is worth noting that, perhaps even more strongly than in the case of victimisation of witnesses, the victimisation of litigants would seem to afford a remedy in the form of damages for interference with a constitutional right.

F. Wards of Court

Interference with the exercise of the court's wardship jurisdiction may constitute a contempt.[84] Formerly liability was strict,[85] with the question of lack of intention, recklessness or negligence as to the ward's status being a matter merely for mitigation of punishment. Today the thrust of decisions internationally is towards establishing a *mens rea* test of intention or recklessness.[86]

Two particular areas may be mentioned briefly: (1) marrying a ward; and (2) wrongfully removing a ward from the jurisdiction.

(1) Marrying a ward

In the days when settlements of property linked to marriage were more common, quite a volume of litigation in relation to the marriage (or attempted marriage) of wards was reported.[87] Today, this source of litigation has been greatly reduced. Nonetheless, it remains a contempt to marry or attempt to marry a ward,[88] or to assist in the marriage of a ward, without

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84 See generally N Lowe & R White, *Wards of Court* ch 8 (2nd ed, 1986), *Shatter*, 399-402, *Binchy (Family Casebook)*), ch 16, *Miller*, 393-396, *Bomie & Lowe*, 305-308.

85 *Herbert's case*, 3 P Wms 116, 24 ER 992 (1731), *Re H's Settlement*, [1909] 2 Ch 260, *Re J, an Infant*, 29 TLR 456 (Chy Div Sargant J, 1913).

86 Cf *Re F (otherwise A) (a minor)*, [1977] Fam 58, at 88 (*per* Lord Denning MR). Cf *Miller*, 395-396.

87 Cf *Bomie & Lowe*, 306. See, e.g, *Black v Creigton*, 2 L Recorder 10 (1828); cf *In re Murray, a Minor*, 5 Ir Eq 266 (1842). English decisions include *Warter v Yorke*, 19 Ves 451, 34 ER 584 (1815), *Brandon v Knight*, 1 Dick 160, 21 ER 230 (1752) and *Re H's Settlement*, *supra*.

88 In Ireland the marriage of a person found to be of unsound mind is void even if contracted during a lucid interval: *Marriage of Lunatics Act 1811* (51 Geo III, 37), *Turner v Meyers (falsely calling herself Turner)* 1 Hag Con 414, at 417, 161 ER 600, at 601 (*per* Sir William Scott, 1808).

having obtained the court's prior consent.[89]

(2) Wrongfully removing a ward from the jurisdiction

It is criminal contempt of court to take a ward of court out of this jurisdiction wihout consent.[90] This is because the removal "effectively deprives the court of its power to supervise the child's upbringing".[91] The contempt jurisdiction is in addition to other legal responses which may be appropriate, such as a

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89 *In re JL*, unreported, Supreme Court, 21 December 1965 (156-1965), extracted in *Binchy (Family Casebook)*, 480-484. The *Age of Majority Act 1985* reduced the age of majority from twenty-one to eighteen (or younger in the case of marriage under the age of eighteen). The drafting of certain provisions, in particular section 2, has given rise to some uncertainty: see Binchy *Annotation to the Age of Majority Act 1985* (ICLSA). In his General Note to section 2, Binchy states:

> "So far as wards of court are concerned, the position is ... uncertain. It would appear that, by reason of section 2(1), wardship ends at 18 rather than 21. Moreover, Paragraph 2 of the Schedule is premised on this assumption .... Marriage by a ward without judicial consent constitutes contempt of court although this would not appear to invalidate the marriage. What is the position where a person whose wardship has ceased at 18 wishes to marry before he or she attains the age of 21? Three possibilites may be canvassed. First, it could be contended that the policy of section 2(4) of the 1985 Act is to preserve a judicial control over former wards until the age of 21 with respect to consent to marriage. The reason why wards do not fall within the 'consent' requirements of the 1972 Act is that in 1972 (and up to the commencement of the 1985 Act), wards, independently of section 4, required the consent of the President of the High Court to marry. It would be a policy of debatable consistency to permit former wards of court, aged between 18 and 21, to marry without the consent of any third party, while requiring former minors in general to obtain the consent of their former guardians or, possibly, of the President of the High Court.
>
> A second possibility is that the former guardians (if any) of the ward should have to provide their consent. Thirdly, it might be argued that former wards are entirely free to marry, without any restraint. The express words of the revised section 19 of the 1844 Act would appear to support this interpretation but ... the policy is debatable".

90 *Miller*, 394, *Borrie & Lowe*, 306-307, *Re J (an Infant), supra*, *Re O (Infants)*, [1962] 2 All ER 10.

91 *Borrie & Lowe*, 306. The Constitutional protection of the family may also be relevant in this context: cf *Re Corcoran an Infant*, 86 ILTR 6, at 18 (Sup Ct, per Murnaghan, J, 1950), *Binchy (Conflicts)*, 3[illegible] 532.

criminal prosecution,[92] proceedings brought under the *Guardianship of Infants Act, habeus corpus* proceedings or (when it is enacted into Irish law, as has been promised) the *Hague Convention on International Child Abduction.*[93]

2. *GENERAL PRINCIPLES*

The Scope of the Actus Reus

In *In re MM and HM*,[94] the question of the scope of the *actus reus* of conduct interfering with the administration of justice was discussed in some detail. One Birmingham was the foreman of a jury which was engaged in an inquiry as to whether two persons, an elderly brother and sister, were of unsound mind. The jury, after much difficulty in reaching agreement, eventually brought in a verdict with respect to the brother that he was of unsound mind, in the face of strong evidence to the contrary.[95] Another jury failed to agree in relation to the sister's sanity; and it was accordingly discharged. While that jury was hearing the evidence, Birmingham (who was a retired Station Sergeant from the Dublin Metropolitan Police) went to the house of the brother and sister and had a conversation with the brother in the presence of the sister. The substance of that conversation - the nature of which was

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92 E.g., for false imprisonments, or under sections 55 or 56 of the *Offences Against the Persons Act 1861*, or for kidnapping, or under section 40 of the *Adoption Act 1952*. As to the scope of kidnapping in this context, see *The People (AG) v Edge*, [1943] IR 115 (Sup Ct, 1943, rev'g CCA, 1942); cf *R v D*, [1984] AC 778 (HL (Eng)). In our *Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 12-1985), p44, we recommended the creation of an offence of abduction of a child under sixteen out of the jurisdiction. This offence would be committed by anyone "who takes or sends or keeps a child (being a child habitually resident in the State) out of the State in defiance of a court order or without the consent of each person who is a parent or guardian to whom custody has been granted unless the leave of the court is obtained; it should be a defence that the accused (i) honestly believed the child was over sixteen; (ii) obtained the consent of the requisite persons or of the court; (iii) has been unable to communicate with the requisite persons, having taken all reasonable steps, but believes that they would all consent if they were aware of all the relevant circumstances; or (iv) being a parent or guardian or person having custody of the child, had no intention to deprive others having rights of guardianship or custody in relation to the child of those rights". We recommended that no prosecution should be brought without the consent of the person in breach of whose rights in relation to the child that was abducted out of this jurisdiction. For critical analysis, see McCutcheon, *Child Abduction: A New Offence?*, 3 Ir L Times (ns) 233 (1985). (More generally, see O'Connor, *"Kidnapping" and the Irish Courts*, 2 Ir L Times (ns) 4 (1984), McCutcheon, *Kidnapping Reconsidered*, 3 Ir L Times (ns) 146 (1985)).

93 See our Report on the subject (LRC 12-1985), *supra; Binchy (Conflicts)*, 332-346. We also recomend that the Garda Siochana should have greater powers than at present to detain a child who is being abducted from the State. Section 37 of the *Child Abduction and Enforcement of Custody Orders Act 1991* gives effect to this latter recommendation.

94 [1933] IR 299.

95 Cf *id*, at 303.

strongly disputed in evidence[96] - was an offer by Birmingham to interfere with the jury trying the Inquisition into the sanity of the sister, and "to bring such influence or pressure to bear upon that jury as to secure that the jury, irrespective of the evidence and without regard to their oaths, would bring in a finding establishing her sanity"[97]; this proposal "was made and was recognised by [the brother], as based on valuable consideration to pass from [him]".[98] The prompt intervention of neighbours of the brother and sister resulted in Birmingham being brought before the court, accused of contempt.

On the basis of the pact, Kennedy CJ held Birmingham guilty of contempt. He was of the opinion that it was "not necessary to prove actual interference with the jury to establish the case ... [of] contempt."[99]

On appeal, the Supreme Court, by a majority,[100] reversed. Fitzgibbon J referred to the Chief Justice's statement and responded:

> "If by that ... sentence he means that it is not necessary to prove that the jurors were actually persuaded to give a false verdict, I entirely agree, but that it is necessary to give some evidence of some actual attempt to interfere with a juror or jurors before a party accused can be punished for making such an attempt, I have no doubt whatever ...
>
> The utmost point to which [the holding] can be pushed is that Birmingham made an offer to secure the acquittal of Mr M by tampering with the jury ... and I not prepared to hold, in the case of a grave criminal charge, that an offer to do, or to attempt to do, an act which would be a crime if done, amounts to doing, or attempting to do,

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96 A woman who was a neighbour of the brother and sister and whose husband was a tenant of the brother, stated in an affidavit that she had heard Birmingham set out his proposal to the brother. In language reminiscent of O'Casey, she reported that Birmingham had said to the brother: "I incensed it into the jury that you were not to be brought out insane and I will see that the same verdict will be brought out for this poor sister of yours, because I know you a number of years and I would not think it right to go against you". The brother had replied: "I was delighted to see you on the jury as I knew I would be all right". Birmingham responded: "I was sure that I would have been on the jury of your sister and everything would have been all right, but I will see that your sister will not be convicted". To this, the brother, who appeared to be very excited, said: "You know I have something for you and I will see you all right". The neighbour stated further that she then knocked on the window of the brother's kitchen and said to Birmingham: "I don't think it fair of you to come to HM's premises to conversate over what you have done ...". She intimated that she would consult the solicitor having carriage. The light in the kitchen was then extinguished. An hour later, when Birmingham emerged from the house, the neighbour again remonstrated with him, asking whether he called himself a just man "for to conversate with Mr M in the manner you have done?" Birmingham became excited, threw down his attache case and threatened her saying "Only you are a woman I would take your sacred life. I would get you and tear you up and down the street only you are a woman".

97 [1933] IR, at 313-314.

98 *Id*, at 314.

99 *Id*.

100 Fitzgibbon and Murnaghan JJ, Johnston J dissenting.

> the crime. I can find no evidence, assuming the truth of all that has been sworn to against Michael Birmingham, that he did more than make an offer, or, at most, express an intention, to try to influence the jury.
>
> A man may have in his mind a criminal purpose to commit a felony or misdemeanour, but so long as that purpose rests in bare intention, he does not become amenable to the criminal law. *Attempting to commit a crime is distinct from intending to commit.*[101]"[102]

After reference to earlier decisions dealing with attempt to commit offences other than contempt, Fitzgibbon J concluded his analysis as follows:

> "In my opinion the mere making of such an offer (if there were any evidence that it was made), not followed by any act in attempted fulfilment of it, does not amount to an interference, or an attempt to interfere, with the jury or with any juror, and as the Chief Justice has expressly stated that he had 'no evidence as to Birmingham's having actually approached any juror or jurors, or as to whether the disagreement of the jury was brought about by his efforts', I have come to the conclusion that the conviction of Birmingham upon the charge of tampering, or of attempting to tamper, with the jury then trying M M's case cannot be sustained."[103]

Fitzgibbon J pointed out that it was "entirely erroneous"[104] to assume that, without contempt proceedings, nothing could be done to restrain interference with jurors until after the mischief had been done. The court had the fullest power to intervene by granting an injunction to restrain any threatened or anticipated interference with its proceedings. But, he added:

> "the existence of a power in the Court to restrain a man from making an attempt to commit a crime does not imply the existence of a power to inflict imprisonment or a fine for the expression of an intention to commit one, and the distinction between an intent and an attempt appears to me to have been overlooked in the present case."[105]

Murnaghan J, concurring, expressed the same opinion in concise terms:

> "An exhaustive examination of the authorities will show that no case exists where a person has been committed for contempt upon a mere expression of intention to do some act calculated to interfere with the due administration of justice. Long experience enshrined in the

101 Citing *Russell on Crimes*, 7th ed, Vol I, p142.
102 [1933] IR, at 329.
103 *Id*, at 331.
104 *Id*, at 332.
105 *Id*. Cf *The People v Ryan*, [1989] ILRM 333 (Sup Ct, 1988).

criminal law has refused to punish as a crime mere expressions of intention to do acts which, if committed, would amount to crimes. Interference, or attempted interference, with the due course of justice means some act which will actually influence, or is possibly calculated to influence, the decision of the jury. States of facts do occur which are calculated to influence a jury without proof that any juror has been approached, such as publications in newspapers or circulars which may, and probably will, come to the notice of the jury. However improper or wrong the conversation of Birmingham with H M was, on the evidence this conversation could not possibly have influenced the decision of the jury, for the jury were upon the evidence and on the finding of the Chief Justice utterly unaware of any act or interest of Michael Birmingham in the trial of the issue, and I cannot hold that what took place in [M M's home] was an interference or attempted interference with the due course of justice by way of tampering with the jury. Nor was the expression of intention made in that house, but not carried into execution, an attempt to commit the crime of tampering with a jury."[106]

Johnston J, dissenting, considered that Birmingham's conduct had gone far beyond the formulation of a mere intention. It was "the beginning - and the necessary beginning - of the actual commission of the offence".[107] It involved solicitation which on the authority of *Higgins*,[108] was sufficient to constitute an attempt. Applying Baron Parke's well known test in *Eagleton*,[109] Johnson J was of the view that in the case before the Court:

> "Birmingham's act in walking towards the house of the parties would probably have to be regarded as an act only remotely leading towards the commission of the offence. But when he reached the house and embarked on the discussion that took place, the position became entirely changed."[110]

The majority's approach is surprisingly restrained. It might have been thought that the narrow confines of the general criminal law of attempt would have little attraction in the area of contempt where, in relation to such aspects as scandalising and the *sub judice* rule, the emphasis has been on the tendency or likelihood of the defendant's conduct to result in interference with the

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106 [1933] IR, at 338-339.

107 *Id*, at 346-347.

108 2 East 5.

109 24 LJ MC 158, where Parke B had said:

> The mere intention to commit a misdemeanour is not criminal. Some act is required: and we do not think all acts towards committing a misdemeanour indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it; but acts immediately connected with it are".

110 [1933] IR, at 347.

administration of justice. Undoubtedly Birmingham's conduct, although it had not gone as far as he had promised (and presumably intended), had a definite tendency or likelihood to result in such interference. It is worth noting here that the fact that a jury was not, or could not actually have been, influenced by conduct in breach of the *sub judice* rule will not afford a defendant an excuse.

3. *ABUSE OF THE COURT'S PROCESS*[111]

The courts have wide-ranging powers to deal with abuse of the court's process.[112] Generally, they will be slow to invoke the contempt jurisdiction[113] but it is always there in reserve. It has tended to be used in cases of forging or altering the process itself, falsehoods intended to deceive the court, and acts of misuse of process which prejudice other persons.[114]

In this context it is worth recalling the case of *The State (Quinn) v Ryan*,[115] where the Supreme Court invoked the concept of "contempt of the courts" in relation to conduct by the Garda authorities which had the likely effect of frustrating the administration of justice.

4. *OTHER EXAMPLES*[116]

It seems that the categories of interference with the administration of justice are not closed. Thus, the mere fact that there is no direct precedent to cover the impugned conduct is not a reason for holding that contempt proceedings have no application. Provided the courts maintain a cautious approach as to the need for real prejudice to the administration of justice, this open-endedness should not prove oppressive.

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111 See *Borrie & Lowe*, 308 - 313.

112 Cf, e.g. the *Rules of the Superior Courts 1986*, Order 19, rules 27 - 28.

113 Other strategies are available: the court may strike out proceedings on the basis that they are frivolous or vexatious: see *Rules of the Superior Courts 1986*, Order 19, rule 28 and *Barry v Buckley*, [1981] IR 306 (High Ct, Costello J). In certain circumstances a tort action may lie, either for the malicious prosecution (cf, e.g., *Kelly v Midland Gt Western Ry of Ireland Co*, IR 7 CL 8 (QB, 1872), *Davidson v Smyth*, 20 LR IR 326 (CP Div, Murphy, J, 1887), *Cruise v Burke*, [1919] 2 IR 182 (KB Div, 1918)), the malicious institution or continuation of civil proceedings (*Dorene Ltd v Suedes (Ireland) Ltd*, [1981] IR 312 (High Ct, Costello J), or the abuse of process (*Speed Seal Products Ltd v Paddington*, [1986] 1 All ER 91 (CA), *Grainger v Hill*, 4 Bing NC 212 (1838)); cf *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*, [1989] 3 All ER 14 (CA). See *McMahon & Binchy*, ch 36, Wells, *The Abuse of Process*, 102 LQ Rev 9 (1986).

114 See *Borrie & Lowe*, 310.

115 [1965] IR 110.

116 See *Borrie & Lowe*, 313.

One matter on which there is only one reported decision[117] in Ireland, so far as we are aware, concerns the disclosure of what took place in the jury room. Judges may warn juries against making such disclosures, but that does not resolve the question as to whether they constitute contempt.

In England, in *AG v New Statesman & Nation Publishing Co Ltd*,[118] in 1980, the view was taken that such disclosures are *capable* of constituting contempt but will not do so in every case. The basic question is whether disclosure tends to imperil the finality of jury verdicts or to affect adversely the attitude of future jurors and the quality of their deliberations.

Thirteen years previously, the Home Secretary, Mr Roy Jenkins, had asked the Criminal Law Revision Committee to consider:

> "whether statutory provisions should be made to protect the secrecy of the jury room; and in particular whether, and, if so, subject to what exemptions and qualifications, it should be an offence to seek information from a juror about a jury's deliberations or for a juror to disclose such information."[119]

The Committee came to the conclusion that there was not "a mischief so extensive or serious"[120] that it called for legislation. It baulked at the prospect of the legislation's having to provide exceptions to deal with cases where irregularities occur during the trial. It added:

> "Should any newspaper be tempted to take advantage of the freedom which at present exists to approach jurors for information in order to prolong the sensationalism of a criminal trial, we should hope that intervention by the Press Council, which exercises so valuable an influence in maintaining standards of journalism, would be effectual to check any such abuse."[121]

In *Attorney-General v New Statesman & Nation Publishing Co. Ltd*,[122] Lord Widgery CJ referred to the Criminal Law Revision Committee's report, and stated:

> "The evidence before us shows that for a number of years the publication of jury room secrets has occurred on numerous occasions.

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117 *Sheehy v The Freeman's Journal Co Ltd*, 26 ILTR 47 (Ex Div, 1892), where a newspaper published the numbers voting for the plaintiff and the defendant in a jury disagreement in libel proceedings, a retrial then pending. This was held to be a contempt. *Per* Palles CB, at 48: "... [T]he ground on which the comments are dealt with as contempt is not secrecy, but their tending to obstruct or pervert the course of justice".

118 [1981] 1 QB 1 (QB Div, 1980).

119 *Secrecy of Jury Room*, para 1 (Cmnd 3750, 1967).

120 *Id*, para 4.

121 *Id*, para 5.

122 *Supra*.

To many of those disclosures no exception could be taken because, from a study of them it would not be possible to identify the persons concerned in the trials. In these cases, jury secrets were revealed in the main for the laudable purpose of informing would-be jurors what to expect when summoned for jury service. Thus, it is not possible to contend that every case of post-trial activity of the kind with which we are concerned must necessarily amount to a contempt."[123]

It has been observed that:

"But for the *New Statesman* case the Government's Contempt of Court Bill of 1980 would probably not have dealt with jury secrecy at all. The Bill had been designed to give effect to some of the recommendations of the Phillimore Committee on Contempt of Court and to bring the so-called sub-judice rule into line with the requirements of article10 of the European Convention on Human Rights. The Phillimore Committee had not touched on jury secrecy at all; nor had the English Law Commission in its report (1979) on Offences Relating to Interference with the Course of Justice."[124]

Clause 8 of the Government's Contempt of Court Bill provided as follows:

"(1) Subject to subsections (2) and (3) below, it is a contempt of court -

(a) to publish any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings;

(b) to disclose any such particulars with a view to their being published or with knowledge that they are to be published;

(c) to solicit the disclosure of such particulars with intent to publish them or cause or enable them to be published.

(2) This section does not apply to publications which do not identify the particular proceedings in which the deliberations of the jury took place, or the names of particular jurors, and do not enable such matters to be identified, or the disclosure or solicitation of information for purposes of such publication.

(3) This section does not apply to any disclosures of any

123 [1981] 1 QB, at 11.
124 Campbell, *op cit*, at 176.

particulars -

(a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict or in connection with the delivery of that verdict, or

(b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings, or to the publication of any particulars so disclosed.

(4) Proceedings for a contempt of court under this section (other than Scottish proceedings) shall not be instituted except by or with the consent of the Attorney-General or on the motion of a court having jurisdiction to deal with it."

One commentator has observed that:

> "Had this clause been enacted it would have taken care of the concerns which had been expressed both by the Criminal Law Revision Committee it its 1968 report and by the Divisional Court in the *New Statesman* case. It would have accommodated the various exceptions which, the Committee had said, would need to be built into any statutory rule on jury secrecy. It would have met the Committee's point that 'there is no objection to jurors discussing their experiences in a general way and without identifying cases'. It would have taken account of what the Divisional Court had said were 'strong arguments in support of the view that certain categories of disclosures fall outside the law of contempt, for example where serious research is being carried out' and where the disclosures for that purpose do not identify particular trials. And the provision whereby prosecutions for breach of the proposed section could be initiated only by the Attorney General or with his consent, or by a court of competent jurisdiction, would have offered some assurance that proceedings would not be taken against those who were guilty of only minor infractions - disclosures which few people would regard as deserving of punishment".[125]

As matters transpired, clause 8 did not survive. It was considered to be too liberal and to fail to afford adequate protection to jurors against harassment

125 Campbell, *op cit*, at 177.

or being offered payment for their disclosures.[126]

Also critical of clause 8 on the ground that it was too liberal were Lord Chief Justice Lane, Lord Scarman and the Criminal Bar Association.[127]

Criticism also came from the other side. A commentator notes that:

> "the authors of a pamphlet entitled *Changing Contempt of Court*,[128] published under the joint auspices of the National Council of Civil Liberties and Campaign for Press Freedom, argued that the law proposed by the Lord Chancellor was not sufficiently liberal. They argued that some restrictions ought to be placed on disclosure of jury deliberations, for example disclosures when a trial was in progress. They conceded also that there ought to be laws to prohibit payments being made to jurors in consideration of their agreement to disclose jury secrets, and to prohibit public identification of jurors without their consent. But, in their opinion, a law of the kind proposed by the Lord Chancellor ought to allow a defendant to a charge of prohibited disclosure to plead public interest as a defence.[129]

When the Bill came for debate in the House of Commons, the Government offered an amendment which was considered to go some way towards allaying the concerns expressed by Lords Wigoder and Hutchinson. It proposed the insertion at the beginning of clause 8 of the following words:

> "Without prejudice to any rule of law which prohibits disclosures by or approaches to jurors during or after the trial".

The idea here was to preserve the courts' "common law contempt jurisdiction to deal with cases in which there had been improper dealings between jurors

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126 *Id.* Criticism that clause 8 was not *sufficiently* liberal was voiced by A Nichol and H Rogers, in a pamphlet, *Clarifying Contempt of Court* (1981), published under the joint auspices of the NCCL and Campaign for Press Freedom: see Campbell op cit, at 178, and the Editorial, 131 New LJ 101 (1981). The editorial stated:

> "We ourselves believe that clause 8 is in fact, as the Lord Chancellor said it was, 'about right' and that any attempt either to extend or restrict the application of the law of contempt in this particular context of jury-room deliberations would have highly unsatisfactory results in practice. The only question we of ourselves would ask is whether invoking the law problem of safeguarding jury-room deliberations, as opposed to the creation of a new specific offence. But in any event there would have to be an exemption, on the lines of that provided in Clause 8 of the Contempt of Court Bill to protect investigations carried out for the purposes of *bona fide* research into the operation of the jury system which, to the extent that they were made public, did not identify individual jurors or the particular cases in which they have taken part."

127 Campbell, *op cit*, at 178.

128 A Nichol & H Rogers, *Changing Contempt of Court* (1981).

129 Campbell, *op cit*, at 178.

and non-jurors."[130] This amendment was agreed to, and thus another amendment, adopting a quite different strategy, proposed by Mr Edward Gardner, M.P. was not put to a vote. This would have redrafted clause 8 as follows:

> "(1) Subject to subsection (2) and (3) below, it is contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.
>
> (2) This section does not apply where any such particulars are obtained, disclosed or solicited with intent that they should be published and
>
> (a) the publication does not identify the particular proceedings in which the deliberations of the jury took place or the name of the particular jurors, and does not enable such matters to be identified, and
>
> (b) the consent of the Attorney-General to the publication has been obtained before any such particulars are solicited.
>
> (3) This section does not apply to any disclosures of any such particulars -
>
> (a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict; or
>
> (b) in any appeal from the verdict of the jury in the proceedings in question; or
>
> (c) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings."

Commenting on this proposed redraft, Campbell states:

> "The clause proposed by Mr Gardner was much more restrictive than that proposed by the Lord Chancellor. Under Lord Hailsham's Bill, a juror who disclosed particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury, otherwise than in the course of the jury's deliberations or in subsequent legal proceedings for the offence in relation to the jury, would not be guilty

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130 *Id.*

of an offence unless it was proved that he disclosed those particulars with a view to their being published or with the knowledge that they might be published. Likewise a person who solicited disclosure of such particulars from a jury would not be guilty of an offence unless it was proved that he did so with the intention of publishing the information or of causing or enabling it to be published. But under Mr. Gardner's proposed clause, a juror who disclosed such particulars, and a person who solicited disclosure of them, could be guilty of an offence even if there was no intention to publish them or any thought that they might be published. The only concession made by Mr. Gardner to the proposal that scholarly research into the workings of the jury system should be exempted was that no one would be liable to be prosecuted for disclosing jury deliberations or soliciting disclosure with the intention that the disclosures be published, if the consent of the Attorney General had been obtained before any information was solicited, and the ultimate publication did not identify the particular proceedings in which the deliberations of the jury occurred, or jurors' names, and did not enable such matters to be identified.[131]

"Another respect in which Mr Gardner's proposed law differed from Lord Hailsham's was that whereas under Lord Hailsham's Bill, a prosecution for an offence could not be launched except by the Attorney General or with his consent, Mr. Gardner's proposal would have permitted prosecutions to be initiated in the ordinary way."[132]

When the Bill, as amended, returned to the House of Lords, Lord Hutchinson:

"renewed his attack on clause 8 by moving that it be replaced by another clause similar to that which had been moved by Mr. Gardner in the Commons. The proposed amendment had, he said, the support of Lord Scarman, Lord Chief Justice Lane and the Criminal Bar Association. In the course of debate on Lord Hutchinson's proposed amendment, one of the law lords, Lord Edmund Davies, let it be known that he too was opposed to the Government's proposal, and that though he had been a member of the Criminal Law Revision Committee which, in 1968, had recommended that disclosure of jury secrets not be made a criminal offence, he was now persuaded that what had hitherto been a rule of conduct should be made a rule of law. And, like the mover of the amendment, he did not believe an exception should be made in the interests of scientific research. In his view, the prospect of their being approached to talk about their experiences on juries would make people reluctant to undertake jury service and would inhibit candour in jury deliberations. To prohibit merely the publication of identifying

131 Campbell notes that "[i]t appears that the Criminal Bar Association was divided on whether research into the jury system should be exempted (*id.* 925-6).

132 Campbell, *op cit*, at 179-180.

details would not, he thought 'remove discomfiture of juries on being subjected to ... post trial interrogation'."[133]

Lord Hutchinson's amendment provided as follows:

"8. (1) Subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

(2) This section does not apply to any disclosures of any particulars -

(a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or

(b) in evidence in any subsequent proceedings for an offence in relation to the jury in the first mentioned proceedings, or the publication of the particulars so disclosed ...."

This section was enacted in due course.

Campbell states:

"The enactment of section 8 of the Contempt of Court Act 1981 did not put an end to the debate over the extent to which disclosure of jury deliberations should be a criminal offence. In the closing stages of the parliamentary debate on Lord Hutchinson's amendment the Lord Chancellor made his position very clear. What was being proposed was, he said, 'thoroughly bad because it is too draconian'.[134] His sentiments were shared by many others. The editors of the New Law Journal, in an editorial published on 30th July 1981, were equally critical of the new law. Its effect was, it was suggested, to prevent 'jurors from revealing things they perhaps considered ought to be revealed about the administration of justice'.[135] Jurors, it was further argued, should not be given immunity from reasonable public scrutiny or responsible investigation.[136] HV Lowe queried whether section 8 might not violate the freedom of speech article (article 10) in the European Convention

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133 *Id*. at 180.

134 422 HL Deb. cols 252-253.

135 131 New LJ 789 (1981).

136 *Id* 790.

on Human Rights.[137] Patricia Hewitt also considered that the new law had gone too far. It had, she commented[138]:

> imposed a complete ban on jury disclosures, whether during or after trial, whether paid for or not, whether anonymous or identified. Research interviews with jurors are prohibited, as are articles by journalists who have themselves served as jurors. Indeed, any juror who refers publicly to his jury-room experiences will be in contempt. It is, of course, necessary to protect jurors from press approaches before a verdict has been given, and it would seem inappropriate to allow researchers or journalists even to pay jurors for interview or to identify a juror without his or her consent. But the risks that a verdict will not be regarded as final if jurors may comment publicly on their decision or how it was reached, or that the institution of the jury will be undermined if jurors' deliberations are open to public scrutiny and comment, seem to be exaggerated. Considerable publicity has been given in the past to jury-room disclosures, without consequent injustice to defendants or injury to the jury itself. Because the jury provides the only democratic element in the enforcement of the criminal law, there is considerable public interest in its conduct and real public value in allowing jurors to discuss their experience, within certain limits, if they choose to do so.

"The effect of section 8 of the Contempt of Court Act 1981 is certainly to erect an almost impenetrable wall of secrecy around a jury's deliberations. It bans not merely disclosures which are made to the public at large or sections of the public, but also disclosures by jurors to intimate friends or family. It prohibits also approaches to jurors to elicit information about their deliberations. In limiting the power to institute proceedings for contempt to the Attorney General and to courts, the section does, of course, provide some safeguards, for it is unlikely that anyone would be proceeded against for minor and unpublicized breaches of jury secrecy. And since the section is a penal provision, it is to be expected that it will be strictly construed, so that no offence will be held to have been committed if the information disclosed by a juror or the information solicited from him is not particularised information of the kind referred to in sub-section (1) but rather information of a general character.

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137 "The English Law of Contempt of Court and Art 10 of the European Convention on Human Rights" in Furmston, Kerridge and Sufrin (eds), *The Effects on English Domestic Law of Membership of the European Communities and the Ratification of the European Convention on Human Rights* 344-5 (1983).

138 P Hewitt, *The Abuse of Power: Civil Liberties in the United Kingdom* (Oxford, Martin, Robertson 1981) 92-3. See also J Baldwin & M McConville, "*The Effect of the Contempt of Court Act on Research on Juries*" 145 JP 575 (1981).

"Section 8 does not purport to affect the common law regarding the admissibility of evidence from jurors to impeach their verdicts. However the presence of paragraph (b) of sub-section (2) could be interpreted as an indication by Parliament that the only circumstance in which evidence may be received of particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in legal proceedings is when that evidence is tendered in subsequent proceedings for an offence alleged to have been committed in relation to the jury. If that is the case, then such evidence would never be admissible in proceedings for the impeachment of the jury's verdict, and in so far as the common law may allow such evidence to be admitted for that purpose in the exceptional cases, section 8 will have the effect of changing it. One cannot be certain that the courts will treat section 8 as having this effect. It could be argued that if Parliament had intended this result, it would or should have expressed its intentions more plainly.

"There is, to date, no reported case of anyone having been prosecuted for an alleged violation of section 8 so its precise meaning and effect is still speculative."[139]

139 Campbell, *op cit,* at 181-182.

CHAPTER 6: CIVIL CONTEMPT

In this chapter, we examine the law relating to civil contempt. Civil contempt proceedings differ from proceedings for criminal contempt in that their aim is primarily coercive: to bend the will of a person who is not disposed to comply with a court order. As we shall see, the distinction between civil and criminal contempt is not always easy to draw.

DISOBEDIENCE OF COURT ORDERS

A. Disobedience of Orders requiring certain acts to be done

A judgment requiring a person to do any act other than the payment of money, may be enforced by order of attachment or by committal.[1] Judgments for the payment of money may be enforced by execution order[2] or by any other mode authorised by the *Rules of the Superior Court 1986* or by law.[3] If a person fails to comply with an order to answer interrogatories, or for discovery or inspection of documents, he is liable to attachment.[4] If a person to whom an order of *habeas corpus* is directed disobeys the order, application may be made to the Court, on an affidavit of service and disobedience, for an attachment for contempt.[5]

The concept of a failure "to do any act ..." is obviously of the widest breadth. Apart from the matters already mentioned, it includes such disparate

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1 Order 42, Rule 7 of the *Rules of the Superior Courts 1986*.

2 The term includes orders of *fieri facias*, sequestration and attachment and all subsequent orders that may issue for giving effect to them: *Id*, rule 8.

3 *Id*, rule 3.

4 Order 31, rules 21 and 29.

5 Order 84, rule 12. See also *Re Fitzpatrick, an Infant*, IR 6 CL 507 (QB, Barry J, 1872), *Re Earle*, [1938] IR 485 (Sup Ct, 1937), *Egan v Macready*, [1921] 2 IR 265 (O'Connor MR).

omissions as the failure to comply with an order for specific performance of a contract[6]; or to deliver up goods[7]; or to hand over a child in compliance with a custody order.[8]

In *Re Earle*,[9] the Supreme Court was equally divided on the question whether the High Court had inherent power to commit for contempt for non-compliance with an order for *habeas corpus*, without the necessity of compliance with the requirement of notice of motion for attachment under the *Rules of the Supreme Court (Ireland) 1905*. Fitzgibbon J stated:

> "In my opinion, the arguments on behalf of the appellant ignore the vital distinction which, so far as I know, has always been recognised between attachment at the instance of a party to a cause which is part of a process of execution of a decree of a Court as, for instance, when an injunction has been disobeyed, and committal by a Court in exercise of its own inherent jurisdiction to punish or prevent interference with property or persons in its custody, or with the course of justice.
>
> In this case it appears to me that [the appellant] was sentenced to imprisonment not at the request of any party to the proceedings, but by the Court itself because by persistent refusal to make any return, even an illusory one, to the writ of *habeas corpus* she prevented the Court from investigating the merits, if any, of her suggested defence to a charge of complicity in the abduction of the infant ...."[10]

And Meredith J observed:

> "For the purpose of upholding and protecting the authority of the Court there has always been an inherent jurisdiction in the court to intervene of its own motion by committal for a contempt that then and there openly defies the authority of the Court.
>
> "I do not consider that either the old Crown Office Rules, or the Rules of the Supreme Court 1905, contained in Order 84, were intended to limit or regulate the exercise of this jurisdiction ....
>
> "There are in fact many well recognised cases in which this inherent jurisdiction may be exercised, which have not been made the subject of any prescribed rule. It was this jurisdiction which, in my opinion, was exercised by the Court when [the appellant] neglected to make any return to the writ of *habeas corpus*, and I think it was clearly invoked."[11]

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6 *CH Giles & Co Ltd v Morris*, [1972] 1 All ER 960.
7 *Bethinson v Bethinson*, [1965] Ch 465.
8 *B (BPM) v B (MM)*, [1969] P103.
9 [1938] IR 485 (Sup Ct, 1937).
10 *Id.* at 501.
11 *Id.* at 507.

On the other hand, Murnaghan J said:

> "There was, in the present case,[12] in my opinion no such conduct as amounted to insult to the Court beyond that contemplated by Rule 196 which requires notice of motion to be served. In one sense every person who disobeys an order of *habeas corpus* contemns the Court and he can be punished for that contempt. But the procedure for dealing with this matter is prescribed by Rule 196 of Order 84 .... The absence of the required notice of motion has been treated as a matter of form, but it seems to me that more than mere form is involved .... If a notice of motion as required by the rules of Court had been served it must have been made clear upon what ground the order was sought, and [the defendant] would have had an opportunity of filing any affidavit on which she wished to rely .... I feel that [the defendant] must have been embarrassed by this procedure. She was deprived of the advantage of knowing the specific ground of complaint which she was required to answer."[13]

Geoghegan J agreeing with Murnaghan J, expressed his views simply:

> "The seriousness of depriving a citizen of personal liberty has often been stressed in the authorities and I think it is well established that before a person can be committed for contempt of the nature alleged in this case strict compliance with the rules of court is essential. Because of the irregularity in procedure I am of opinion that this appeal should be allowed.
>
> "The contempt alleged in this case differs from wilful contempt committed in the face of the Court, or interfering with the dignity of the Court, or its officers or authority."[14]

B. Disobedience of Orders prohibiting certain conduct

A person who disobeys an order prohibiting him or her from doing, or

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12 In contrast to *Egan v Macready*, [1921] 1 IR 265 where O'Connor MR ordered a writ of attachment against the military and prison authorities for their disobedience of an order of *habeas corpus*. The Master of the Rolls observed (at 280) that the respondents had been guilty of "a deliberate contempt of Court - a thing unprecedented in this Court and the whole history of British law". Cf *The State (Quinn) v Ryan*, [1965] IR 70.

13 [1938] IR, at 506-507.

14 *Id*, at 510-511.

continuing to do a certain act, may be guilty of contempt.[15] It is, of course, possible to obtain an injunction against a very wide range of wrongful conduct,[16] including torts,[17] interference with constitutional rights[18] and acting in defiance of the criminal law.[19]

C. *Scope of Order, Notice, Proof of Breach and Related Matters*

In this section we examine a number of questions which apply to all court orders, the breach of which may constitute contempt. Our analysis concentrates on injunctions, since these are the most fertile source of applications for contempt.

(i) *Strict compliance necessary*

It has been noted that a defendant against whom an injunction is ordered cannot excuse himself by saying that he "did his best"[20]: strict compliance is necessary (according to judicial doctrine, though clearly the courts have regard to all the circumstances in deciding whether an injunction has been breached and in determining their response in that event).

(ii) *No distinction between interlocutory and final injunctions*

In this context it is worth noting that no distinction is to be drawn as regards the scope of the obligation to obey an injunction on the basis of whether the injunction is interlocutory or final. In the Supreme Court decision of *Gore-*

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15 See *Borrie & Lowe*, 395 ff; *Miller*, 409-411; ALRC Research Paper No. 6, *Non-Compliance with Court Orders and Undertakings, 10-11 (1986)*, *Rules of the Superior Courts 1986*, Order 42, especially rule 7 thereof. See, further *Mullin v Hynes*, Sup Ct, 13 November 1972 (46-1969) (private nuisance), *Hastings v Henry*, 46 ILTR 308 (O'Connor, MR, 1912), *Fortescue v McKeown*, [1914] 1 IR 30 (CA, 1913, rev'g O'Connor MR, (1913) (contempt in respect of mandatory injunction to pull down building that interfered with plaintiff's right to light); *Ross Co Ltd (in receivership) and Shorthall-Swan*, [1981] ILRM 416 (High Ct, O'Hanlon J) (deliberate disobedience of an order restraining trespass), *Clarke v Smith*, 48 ILTR 244 (High Ct, Barton J, 1914) (trespass on plaintiff's lands), *Smith-Barry v Dawson*, 27 LR (Ir) 558 (Chatterton, VC, 1891) (disturbance of plaintiff's markets and fairs), *Little v Cooper (No. 2)*, [1937] IR 510 (High Ct, Johnston J) (interference with fishery), *Mining Company of Ireland (Ltd) v Delany*, 21 LR (Ir) 8 (Chatterton VC, 1887) (defendants mined coal under plaintiff's lands).

16 See generally *Keane*, ch 15, Michael W Tyrrell, *Injunctions* (Incorp L Soc of Ireland, Continuing Legal Education, 1 June 1989).

17 See *McMahon & Binchy*, ch 45.

18 See *Society for the Protection of Unborn Children Ltd v Open Line Counselling Ltd*, [1989] ILRM 19 (Sup Ct, 1988), *Society for the Protection of Unborn Children Ltd v Coogan*, [1990] ILRM 70 (Sup Ct, 1989), *Crotty v An Taoiseach*, [1987] ILRM 400. See further *McMahon & Binchy*, 14-15.

19 Cf *AG v Paperlink Ltd*, [1984] ILRM 373, and see *Byrne & Binchy 1987*, xvi-xvii. See also *AG v Harris*, [1961] 1 QB 74.

20 *Howitt Transport v Transport and General Workers Union*, [1973] ICRI, at 10 (*per* Donaldson J).

Booth v Gore-Booth,[21] Lavery J expressly rejected this distinction, which had found favour with Murnaghan J in the High Court.

(iii) *Terms of injunction must be clear and unambiguous*

A person will not be guilty of contempt unless the terms of the injunction were clear and unambiguous.[22] *Borrie & Lowe* state:

> "Where an order is ambiguous on its face it is submitted that that ambiguity cannot be resolved by examining the transcript of the proceedings.[23] On the other hand it may be possible to argue that an order is too wide given the background of the proceedings that preceded its making.[24]"[25]

(iv) *Proper notice to defendant essential*

The defendant must have proper notice of the terms of the injunction.[26] Order 41, rule 7 of the *Rules of the Superior Courts 1986* provides that every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, is to state the time, or the time after service of the judgment or order, within which the act is to be done; and on the copy of the judgment or order which is to be served upon the person required to obey it,[27] there must be endorsed a memorandum in the words or to the effect following:

> "If you the within named AB neglect to obey this judgment or order by the time therein limited, you will be liable to process of execution including imprisonment for the purpose of compelling you to obey the same judgment or order."

The purpose of this memorandum is "to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him

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21 96 ILTR 32, at 36 (Sup Ct, 1956).

22 *Borrie & Lowe*, 395, citing *Iberian Trust Ltd v Founders Trust and Investment Co Ltd*, [1932] 2 KB 87, at 95 (*per* Luxmoore, J), *Re Distillery Brewery, Winery, Soft Drinks and Allied Workers' Union 604 and British Columbia distillery Co Ltd*, 57 DLR (3d) 752 (1976) and *United Steelworkers of America Local 663 v Anaconda Co (Canada) Ltd*, 67 WWR 744 (1969).

23 Citing *Northwest Territories Public Service Association v Commissioner of the Northwest Territories*, 107 DLR (3d) 458 (1980) "where it was held (Morrow JA dissenting) that court could not examine transcripts of proceedings to determine the scope of an undertaking".

24 Citing *MacMillan Bloedel (Alberni) Ltd v Swanson*, 26 DLR (3d) 641 (1972).

25 *Borrie & Lowe*, 396.

26 *Id.*

27 Other than an order directing a mortgagor to deliver possession to a mortgagee, or an order under section 62(7) of the *Registration of Title Act 1964*.

to penal consequences".[28]

(v) ***Proof of breach***
The courts have repeatedly stressed that the breach of an injunction must be proved beyond all reasonable doubt.[29] In *Re Bramblevale*,[30] Lord Denning, MR said:

> "A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must some other evidence."

In *Society for the Protection of Unborn Children v Grogan*,[31] Carroll J held that newspaper reports as to what a person has done constitute hearsay evidence on which no one ought to be committed to prison.

(vi) ***What conduct amounts to a breach?***
The Court is sometimes faced with a dispute as to whether to characterise certain conduct as amounting to a breach of an order.

In *Gore-Booth v Gore-Booth*,[32] the Supreme Court, by a majority,[33] reversed Murnaghan J's refusal of a motion to commit two sisters of a ward for contempt of court in obstructing the removal of cattle by the servants and agents of the ward's committee from the ward's lands, contrary to the terms of an earlier interim injunction.

Lavery J (Maguire J concurring) accepted that everyone would understand and sympathise with the sisters' dismay that the family home and estate should be broken up and sold but he stated that:

> "these considerations must give way to the paramount consideration that orders of the court must be obeyed, and that if deliberate action to

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28 *Iberian Trust Ltd v Founders Trust and Investment Co Ltd*, [1932] 2 KB 87, at 97. See further *Century Insurance Co. Ltd v Larkin*, [1910] 1 IR 91 (Meredith MR); as to time limits in Circuit Court, see *McClure v McClure*, [1951] IR 137 (High Ct, Maguire J).

29 *Borrie & Lowe*, 399-400; *W Watson & Sons Ltd v Garber*, 106 Sol J 631, (*per* Lawton, J, 1962), *Re Bramblevale*, [1970] 1 Ch 128. See also *Society for the Protection of Unborn Children v Grogan*, High Ct, Carroll, J, 11 October 1989, Irish Times Law Report, 13 November 1989.

30 [1970] 1 Ch, at 137.

31 High Ct, Carroll J, 11 October 1989, Irish Times Law Report, 13 November 1989.

32 96 ILTR 32 (Sup Ct, 1956).

33 Lavery and Maguire J; O Dalaigh J dissenting save in respect of issue of costs.

obstruct the administration of the estate and to frustrate Court orders is established, the offence involved must be punished."[34]

Lavery J noted that neither the question of ownership of the castle nor the right of the committee to remove and sell them was in dispute. This explained the "rather unusual character"[35] of the interlocutory injunction:

"Ordinarily, the purpose of such an injunction is to preserve the *status quo* but here the defendants are restrained from interfering with the plaintiffs in realising the estate - i.e. procedures forthwith to do so."[36]

Lavery J noted that a number of elements in the case had not been disputed:

"Shortly, these ladies who had admittedly no proprietary interest in the cattle and who had been ordered by the court not to interfere came to the place where [the auctioneer acting on behalf of the Committee] was carrying out the orders of the Committee and, first, declared they would not allow the removal to take place; second, entered the field and moved about among the cattle; third, physically obstructed or attempted to obstruct the loading of the cattle; fourth, followed the cattle when they were being driven away; fifth, drove their car through the herd striking one of the animals so that the bumper of the car was knocked off or fell off or, lastly, used abusive language of an extreme kind to [the auctioneer]."[37]

Lavery J held "without hesitation"[38] that the defendants had breached the injunction and were guilty of contempt. He also held that the breach was serious. He went on to say:

"I have no difficulty - for myself - in holding that the Court has power to review and, if thought right, to reverse the decision of Murnaghan J. The order is discretionary and should not be interfered with unless there has been an error in principle, and, in the words of one of the authorities, there has been a gross miscarriage.

"In my opinion, there has been such an error and such a miscarriage. If the operation of the Courts is not to be frustrated their orders must be obeyed and, if not obeyed, the disobedience cannot, in principle, be regarded as trivial.

"I am far from saying that every disobedience to a Court order must be punished by imprisonment. I do not say yet that this contempt must

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34 96 ILTR, at 36.
35 *Id.*
36 *Id.*
37 *Id* at 37.
38 *Id* at 38.

> be so punished; but the learned Judge has not only refused to commit but he has ordered the plaintiffs to pay costs and expenses. That is, in my opinion, an error in principle."[39]

The plaintiffs had stated during the hearing that they did not press for committal to prison if any expression of regret was forthcoming or even a statement that the acts of obstruction and interference would not be repeated. No such statement was forthcoming from the defendants, who adopted "a defiant attitude in the affidavits and before th[e Supreme] Court".[40]

The Supreme Court, "[w]ith hesitation and some fear that it m[ight] be acting with undue leniency",[41] did not make an order for committal, on the basis that there were circumstance which, while incapable of excusing the defendant's activities, might, "in some degree, be taken into account in extenuation".[42] Lavery J added:

> "These defendants will, I hope, appreciate the consideration given to them and guide their future conduct accordingly. Any repetition of their conduct certainly would merit severe punishment."[43]

The defendants were ordered to pay costs in both courts.

O'Daly J dissented on the substantive issue. He considered that, in the face of the denials by the defendants that they had attempted to impede the progress of the loading up of the cattle and the failure by the plaintiff to cross-examine them on their affidavits, he could not hold that this default had been proven. He then agreed with the trial judge's finding. O'Daly J added:

> "However, my personal agreement is of no real moment. It is enough that an order for committal is discretionary, that there was no error of principle on his part in the way he approached the evidence, that he is not shown not to have acted judicially, and that otherwise, in the phrase used by Jessel MR, in *Jarmain v Chatterton*[44] and repeated by the members of the English Court of Appeal in *Re Wray*,[45] there was no 'gross miscarriage' in his Lordship's refusal of an order for committal."[46]

On one issue the Court was unanimous. The defendants argued that the injunction restrained only interference with the Committee individually and did not extend to his agents and servants; and that thus interference with the auctioneer could not constitute a breach of the injunction. Rejecting this

39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*
44 20 Ch D 493 (1882).
45 26 Ch D 138.
46 96 ILTR, at 40.

argument, Lavery J (with whom Maguire J concurred) said:

> "In my opinion the circumstances of the case and indeed the necessity of the case makes it clear that any intelligible construction of the order must extend its operation to the servants or agents of the Committee through whom he must act."[47]

And O'Daly J said:

> "Interference with or obstruction of the acts of duly appointed agents of the Committee ... are plainly interference with and obstruction of the Committee of the estate in the management of the lands. The meaning of the order is too clear to admit of a refinement which the defendants seek to make."[48]

(D) Mens Rea

(i) In general

As regards *mens rea* in relation to the breach of injunctions in *Stancombe v Trowbridge UDC*[49] Warrington J made the following "classic exposition"[50] of the law on this question:

> "If a person or corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order."

But this does not mean that a defendant who fails to comply with an injunction is absolutely liable: the test thus favoured seems to be one of strict liability in the sense that the absence of negligence or intention to disobey will not exempt.[51] Such a test would excuse a defendant where it was impossible for him to comply with the injunction, but the onus of showing this would lie on him.[52]

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47 *Id*, at 38.
48 *Id*, at 41.
49 [1910] 2 Ch 190, at 194.
50 *Borrie & Lowe*, 400.
51 Cf *Re Agreement of Mileage Conference Group of Tyre Manufacturers' Conference Ltd*, [1966] 2 All ER 849, at 862.
52 Cf *Lewis v Pontypridd, Caerphilly, and Newport Ry Co* 11 TLR 203 (1895).

(ii) Of companies

A matter yet to be resolved by our courts concerns the extent to which a distinction is to be drawn between the requirement[53] in respect of companies that the disobedience be wilful before sequestration may be obtained against the corporate property. No such express requirement applies in relation to attachment or committal. In England, in a decision[54] dealing with a case where wilful disobedience by a company had to be established, Lord Russell CJ said:

> "We desire to make it clear that in such cases no casual or accidental and unintentional disobedience of an order would justify commitment or sequestration. Where the court is satisfied that the conduct was not intentional or reckless, but merely casual and accidental and committed under circumstances which negative any suggestion of contumacy, while it might visit the offending party with costs and might order an inquiry as to damages, it would not take the extreme course of ordering either of commitment or of sequestration."

In England the matter has since been clarified, in *Heatons Transport (St Helens) Ltd v Transport and General Workers' Union.*[55]

As regards responsibility for a breach of an injunction, clearly the person who must obey the order is responsible if he or she breaches it. Where an injunction is granted against a married couple and one of the spouses breaches it, the other spouse, if innocent of any complicity, will not be liable.[56]

The question of the extent (if any) to which mental illness might vitiate the *mens rea* requirement arose in the Supreme Court decision of *The State (H) v Daly.*[57] In this case the psychiatric evidence, admitted *de bene esse*, was to the effect that the prosecutor had been suffering for many years from a deep-seated condition of paranoia which made it impossible for him, as a result of a mental disease, to accept the correctness or validity of any decision of the Circuit Court - particularly with regard to the dispute between himself and his brother concerning land, which was the basis of the original injunction against the prosecutor - and which, "therefore, prevent[ed] him from acting properly ... and render[ed] him, in the opinion of [the psychiatrist], not a free agent because he [was] acting under very strong delusion".[58] In the opinion of the psychiatrist, the delusions and his mental condition did not prevent the prosecutor from understanding the consequences of what he was doing, nor the consequences of refusing to purge his contempt. The psychiatrist considered that the prosecutor required, in his own interest, continued

53 Order 42, rule 32 of the *Rules of the Superior Courts 1986*, discussed further below.

54 *Fairclough & Sons v Manchester Ship Canal Co (No. 2)*, 41 Sol J 225 (1897).

55 [1973] AC 15.

56 *Hope v Carnegie*, LR 7 Eq 254 (1868).

57 [1977] IR 90 (Sup Ct, 1976).

58 *Id*, at 93 (*per* Finlay, P).

institutional medical treatment for his mental condition. On the question whether the prosecutor's insanity excused the civil contempt, O'Higgins CJ said:

> "Since the basis of the prosecutor's transfer to the Central Mental Hospital was a certificate to the effect that he had become insane, the question also arose as to whether such insanity could have excused the civil contempt and avoided the original order of committal. I have considered very fully the evidence adduced in relation to this and I am satisfied that whatever degree of mental illness the prosecutor suffered it was not such as rendered him incapable of knowing fully what he was doing. Therefore, without considering further whether in such circumstances mental illness may be a bar to an order for committal, I am satisfied that the degree and nature of such illness in this case could not be considered a reason why an order for committal should not have been made."[59]

*(E) **Apology***

In *Little v Cooper (No. 2)*,[60] defendants who had trespassed on the plaintiff's fishery in conscious breach of an injunction offered an undertaking that they would not do so in the future. They also offered to apologise to the Court. Johnston J was not impressed and ordered that they be committed. He said:

> "I ... question the reality of the apology ... I am satisfied that these parties wish to gain more time in order to despoil the plaintiffs' property further before the fishing season ends, as it will very shortly. This meagre apology, unsupported by affidavits or written statements of any kind, without any offer of amends to the plaintiff, is probably as much of an insult to the process of the Court as is the poaching itself."[61]

During the hearing of the motion, Johnston J had asked why "the police" in Ballina had made no move to protect the plaintiffs' property. He was told that in the previous years the police had interfered to some extent but that the officers of the Civic Guard (*sic*) who were responsible for that course had been removed from that neighbourhood. He responded:

> "I cannot accept the suggestion that lies at the back of that statement. Such a suggestion means that rank anarchy exists in the West of Ireland, and I repudiate such a suggestion and cannot take it into account for a moment."[62]

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59 *Id*, at 97-98.
60 [1937] IR 510 (High Ct, Johnston J).
61 *Id*, at 512.
62 *Id*, at 512-513.

(F) *Third parties*

Those, not defendants in injunction proceedings, who act contrary to the terms of the injunction when they know of its existence and terms are guilty of contempt.[63] Their participation may of course extend to aiding and abetting the defendant, but liability attaches on the basis of the third parties' own wrong.

In *Smith-Barry v Dawson*,[64] the plaintiff had obtained an order against certain persons, their servants and agents, restraining them from disturbing the plaintiff's markets and fairs. Copies of the injunction had been conspicuously posted in the Fair Green (according to an affidavit filed on behalf of the plaintiff). The defendant said that he had cautioned some of the persons named in the injunction against engaging in sales and weighing produce without paying tolls. Two persons, in disobedience of the injunction (though apparently they had not been named in it), had acted as weigh-masters.

Counsel for the plaintiff said:

> "This action is in the nature of a bill of peace; and therefore the plaintiff is entitled to have third persons who have disobeyed the injunction attached. Even if the action were not one to quiet possession, if third parties identify themselves with persons whom the Court has restrained, and place themselves in the position of workmen and agents of those named in the order, they are liable to attachment: *Weale v West Middlesex Waterworks Co*[65]; *Downshire v O'Brien*[66]; *Avory v Andrews*.[67] Such an order has been made in the Killiney Foreshore Case.[68] This is a mere attempt to evade the order of the Court."

There was no appearance for the parties served with notice against whom the order was sought.

The Vice-Chancellor said:

> "It has been clearly shown that these parties are liable to attachment. With full knowledge of the judgment pronounced by the Court, which is a judgment to quiet Mr Smith-Barry in possession of his patent rights to hold markets and fairs in the town of Tipperary, and to receive the customs and tolls thereof, these parties have acted in direct

63 See *Borrie & Lowe*, 403-406, *Smith-Barry v Dawson*, 27 LR (Ir) 558 (Chatterton VC, 1891), *Moore v AG*, [1930] IR 471, at 486-487 (Sup Ct, *per* Kennedy CJ) *Little v Cooper (No. 2)*, [1937] IR 510 (High Ct, Johnston J), *Seaward v Paterson*, [1897] 1 Ch 545, *Z Ltd v AZ and AA-LL* [1982] QB 558, *Society for the Protection of Unborn Children (Ireland) Ltd v Coogan*, [1990] ILRM 70 (Sup Ct, 1989).

64 27 LR Ir 558 (Chatterton VC, 1891).

65 1 Jac & W 358, at 369.

66 19 LR Ir 380.

67 30 WR 564.

68 Unreported.

contravention of its terms, and are, in my opinion, in just the same default as the original defendants would have been if they had done similar acts. The cases cited clearly establish the right to have these attachments issued, and nothing can be more in point than the Killiney Foreshore Case.[69] But even without any of these authorities, ordinary common sense would show that persons cannot be allowed to set at defiance the order of the Court because they do not happen to be named in the injunction."[70]

In the Supreme Court decision of *Moore v AG*,[71] Kennedy CJ noted that a number of English cases[72] had laid down that a motion to attach a third party is technically wrong because he is not bound by the injunction, but that he may be committed for contempt of court "because he is acting so as to obstruct the course of justice".

In *Little v Cooper (No. 2)*,[73] the plaintiffs had obtained an injunction perpetually restraining the defendants, their servants and agents from fishing the entire tidal portion of the waters of the River Moy to which the plaintiffs were declared by the Court to be entitled. Certain *other* persons, not parties to the action, but with knowledge of the existence of the injunction, together with some of the defendants, fished the plaintiffs' portion of the river without leave.

Johnston J held that the plaintiffs were entitled to an order attaching all of the persons so fishing. He noted that there was "no question as to the knowledge of all of these persons of the injunction ...."[74] There was "no question as to the illegality of their conduct".[75] He went on:

"The litigation, as well as the result of that litigation, is notorious in Ballina, and indeed in the whole of the West of Ireland. No litigation for years has roused so much interest. I am satisfied beyond all doubt that these persons trespassed upon the fishery and took the salmon of the plaintiffs in huge numbers, in clear defiance of the injunction granted by this Court ...."[76]

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69 *Supra.*

70 27 LR Ir, at 559-560. See also *Johnson v Moore*, [1965] NI 128 (Chy Div, Lowry J, 1964). See also *AG v Newspaper Publishing plc* [1987] 3 All ER 276.

71 [1930] IR 471, at 486 (Sup Ct).

72 *Seaward v Paterson, supra, Brydges v Brydges*, [1909] P187, at 191 (*per* Farwell LJ), *Ranson v Platt*, [1911] 2 KB 291, at 307 (*per* Farwell LJ) and *Scott v Scott*, [1913] AC 417, at 457 (*per* Lord Atkinson).

73 [1937] IR 510 (High Ct, Johnston, J).

74 *Id*, at 512.

75 *Id.*

76 *Id.* As to the position of banks and other third parties in relation to *Mareva* injunctions, see *Z Ltd v AZ*, [1982] 1 All ER 556, *Keane (Equity)*, paras 15.38 ff. See further Zuckerman, *Practice and Procedure*, All ER 1989, 212, at 212ff.

(G) *Court's discretion as to whether or not to order committal or attachment*

The Court has a discretion as to whether or not to order committal or attachment even where the defendant's default is clear. In *Ross Co. Ltd (in receivership) and Shorthall-Swan*,[77] O'Hanlon J described as "correct and prudent"[78] the principle enunciated by the English Court of Appeal in *Danchevsky v Danchevsky*,[79] to the effect that the power to commit to prison for civil contempt, for disobedience to the court's orders, was a jurisdiction that should not be exercised when it was unlikely to produce the desired result and where there was some reasonable alternative course available. O'Hanlon J went on to say:

> "It is undesirable that the High Court should commit to prison for an indefinite period a person who has no intention of obeying the order of the court, and who may even welcome the publicity he gains by the making of such an order as a means of furthering his own course. If no other reasonable course is open, then the order may have to be made to vindicate the authority of the court. If some other reasonable course is open, then it is preferable that it should be adopted."[80]

In *Ross* the defendants (who included two members of the executive of a trade union) were deliberately disobeying an order of the court restraining trespass with no intent to purge their contempt in the future. The plaintiffs applied for an order for attachment and/or committal. O'Hanlon J was of opinion that a sufficient case for attachment and imprisonment for contempt had been made out. But he considered that an alternative course was in the circumstances preferable. Since the case appeared to fall squarely within the scope of the *Prohibition of Forcible Entry and Occupation Act 1971*, which had been passed "specifically to deal with the kind of unlawful conduct which [was] admitted to have taken place",[81] it seemed to O'Hanlon J that the better course would be for the Gardai to use the powers of arrest under section 9 of the Act.

In *Clarke v Smith*,[82] the defendant had been committed for contempt of court for refusal to obey an interim injunction against trespassing on the plaintiff's lands. The defendant later undertook not to repeat the acts complained of and agreed to judgment being entered against him in the action; he swore that he was unable to pay any of the costs, as he was an unemployed labourer without any means.

Barton J was satisfied that, if he was to make an order making the payment of costs a condition precedent to discharge, it would be one "which the

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77 [1981] ILRM 416 (High Court, O'Hanlon, J). See further *Kerr & Whyte*, 334-336.
78 *Id*, at 417.
79 [1974] 3 All ER 934 (CA).
80 [1981] ILRM at 417.
81 *Id*, at 418. See further *Kerr & Whyte*, 313-315.
82 48 ILTR 244 (High Ct, Barton J, 1914).

defendant could not comply with".[83] Accordingly he ordered the defendant's discharge, leaving the plaintiff to enforce the payment of the costs as he might be advised.

(H) The Breach of an undertaking

A party who either personally or through his or her solicitor gives an undertaking to the Court is under the same obligation to abide by its terms as if it were an injunction.[84] The same rules as to the clarity of terms, proper notice and breach apply here as apply in respect of injunctions.[85]

In *Re H, a Bankrupt*,[86] the defendant was ordered by the court, and undertook to the court, to give up possession of certain lands before a certain date. He was still in possession after that date, and the order served on him subsequently. An application to have the defendant committed for contempt was unsuccessful so far as it was based on the order but successful (subject to a stay) so far as it related to the undertaking. O'Byrne J said:

> "... [I]t appears from the affidavits that the order was not served until ... a considerable time [after the date on which possession had been ordered to be given up]. Accordingly, if this were merely an application for an order for attachment based on the order, I would be bound to refuse it, but it is also an application for an order committing [the defendant] to jail for failing to carry out an undertaking given by him to the court. It appears from the order that [the defendant] appeared and gave evidence, and gave an undertaking to give up clear possession. I am satisfied that so far as the undertaking is concerned there was no necessity for the Official Assignee to serve on [the defendant] a copy of the order in which it is recorded for the purpose of eventually taking steps to enforce it.
>
> "It is clear that an undertaking was given in Court, and it is clear that it was not carried out. I am satisfied that [the defendant] is guilty of contempt of Court, and that he ought to be committed for that contempt."[87]

(I) Execution: General Principles

Order 42 of the *Rules of the Superior Courts 1986* deals with execution and execution orders. An "execution order" includes orders of *fieri facias*, sequestration and attachment and all subsequent orders that may issue for

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83 *Id*, at 244.

84 *Borrie & Lowe*, 406.

85 *Id.*

86 70 ILTR 199 (High Ct (In Bankruptcy), O'Byrne J, 1936). See also *Re H, An Arranging Debtor*, IR 11 Eq 106, 334 (1877), *In re M & R, Arranging Debtors*, 30 ILTR 137 (CA, 1896), *In re Birt, An Arranging Debtor*, [1906] 2 IR 452 (CA).

87 *Id*, at 200. Cf *Century Insurance Co Ltd v Larkin*, [1910] 1 IR 91 (Meredith MR).

giving effect to any of these orders.[88]

A judgment for the recovery by or payment to any person of money may be enforced by execution order (or by any other mode authorised by the Rules or by law).[89] A judgment for the payment of money into court may be enforced by an order of sequestration, or, in cases where attachment is authorised by law, by attachment.[90] A judgment for the recovery or delivery of the possession of land may be enforced by order of possession.[91] A judgment for the recovery of any property other than land or money may be enforced in three ways: (a) by order for delivery of the property; (b) by order of attachment; and (c) by order of sequestration.[92]

Of particular practical relevance in relation to contempt of court is the rule that a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by order of attachment or by committal.[93] As regards companies, the position is as follows. Any judgment or order against a company wilfully disobeyed may, by leave of the Court, be enforced by sequestration against the corporate property, by attachment against the directors or other officers of the company, or by order of sequestration against their property.[94]

(i) *Sequestration*

Sequestration "was and is a process of contempt."[95] It is a drastic remedy designed to coerce rather than punish.[96] Thus in *Con-Mech Ltd v Amalgamated Union of Engineering Workers*,[97] Sir John Donaldson, P said:

> "A sequestration order is quite different from a fine. If someone is fined the money is lost to him forever. If his assets are sequestered the money remains his but he cannot use it. The money stays in the sequestrator's possession until the court orders what shall be done with it. The man can come to the court at any time and ask for the money to returned to him, but if he does so the court will require some explanation of his conduct."

The Rules contain four bases of entitlement to sequestration. These are:

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88 Order 42, rule 8.
89 *Id*, rule 3.
90 *Id*, rule 4.
91 *Id*, rule 5.
92 *Id*, rule 6.
93 *Id*, rule 7.
94 *Id*, rule 32.
95 *Pratt v Inman*, 43 Ch D 175, at 179 (*per* Chitty J, 1889).
96 Cf *Borrie & Lowe*, 429, *Miller*, 447.
97 [1973] ICR 620, at 627.

(i) judgments for the recovery by or payment to any person of money;[98]

(ii) judgments for the payment of money into Court;[99]

(iii) judgments for the recovery of any property other than land or money;[100]

(iv) judgments or orders against a company which are wilfully disobeyed.[101]

Order 43, rule 2 provides as follows:

> "Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order from the Court for that purpose, to issue an order of sequestration ..., against the estate and effects of such disobedient person."

Any person thus entitled to issue an order of sequestration must, before doing so, apply to the Master to approve one or more sequestrators, and obtain directions as to his or their security and accounting.[102] On a certificate[103] from the Master of the approval of the nominee or nominees, the order may issue directed to the sequestrator or sequestrators.[104] One sequestrator only is named in the order, unless the Court otherwise directs.[105]

The prescribed[106] Form of order of sequestration, addressed to the sequestrator or sequestrators, gives him or them:

> "full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the [defendant], and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements and real estate, but also all his goods, chattels, and personal estates whatsoever ...."

The sequestrator or sequestrators must, under command, thus acquire all the defendant's real and personal estates, and keep them under sequestration until the defendant does what he was ordered to and clears his contempt, and the

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98 Order 42 rule 3.
99 *Id*, rule 4.
100 *Id*, rule 6.
101 *Id*, rule 32.
102 Order 43, rule 3.
103 This certificate must be filed in the Central Office: *Id*, rule 3.
104 *Id*.
105 *Id*.
106 Form No. 17 in Appendix F, Part II, of the Rules.

High Court makes "other order to the contrary".[107]

It seems clear that Order 32, rule 2 is limited to the four bases of entitlement to sequestration already mentioned. As we have seen, Order 42, rule 7 expressly limits the modes of enforcement for judgments requiring a person "to do any act other than the payment of money, or to abstain from doing anything", to attachment and committal. Moreover, the phrase "to pay money into Court or to do any other act in a limited time" in Order 43, rule 2, while, on one interpretation being capable of a wide meaning, must be read in the light of the *ejusdem generis* rule, so as to limit such other acts to those already identified.

What is striking about the Irish Rules, in contrast to the position in England,[108] is that[109] the entitlement to issue a writ of sequestration is not conditional on obtaining any order from the Court for that purpose.[110] The Master's role is not to grant leave to issue the writ but merely to approve of the sequestrator or sequestrators, and give directions as to his or their security, and accounting.[111]

We have already noted that a judgment or order against a *company*, which is "wilfully disobeyed", may, *by leave of the Court*, be enforced by (*inter alia*) sequestration against the corporate property. Here, mere breach of the judgment or order will not suffice: the disobedience has to be wilful. In England (prior[112] to abandonment of the wilfulness requirement), "[t]here were differing views as to what the word 'wilful' meant and indeed in one case it was held that no contempt at all was committed since the order had not been contumaciously disregarded. ...."[113]

As we have seen, the range of property which the sequestrators may take and "get into [their] hands" is impressively broad; but there are some limits. Property of which the defendant merely is a trustee does not come within its scope,[114] nor a fund in court which is liable to solicitor's lien in another suit,[115] nor choses in action which are not alienable - such as a pension where alienation is prohibited by statute.[116]

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107 *Id.*

108 See *Borrie & Lowe*, 429, *Miller*, 447.

109 Subject to an exception in relation to companies, which we mention in detail presently.

110 Cf Order 43, rule 2.

111 Cf *id*, rule 3.

112 Under former Order 42, rule 31.

113 *Borrie & Lowe*, 439.

114 *Id*, 434, citing 17 *Halsbury* para 511 (4th ed).

115 *Id*, citing *Munt v Munt*, 2 Sw and Tr 661 (1862).

116 *Id*, citing *Birch v Birch*, 8 PD 163 (1883) and *Lucan v Harris*, 18 QBD 127 (1886).

The sequestrators do not acquire a charge over the property they seize. In *Re Pollard, ex p Pollard,*[117] Romer LC said:

> "When the sequestration issues and the sequestrators seize under it property of the debtor, what result follows? I need scarcely point out that the seizure by the sequestrators does not convert the property seized into the property of the creditor. The next question is: Does the mere seizure by the sequestrators give the creditor a charge upon each part of the property of the debtor, which has been seized? The answer must be: Clearly it does not. It does nothing of the kind. In order that the creditor should obtain a special charge upon some specific part of the property seized under the writ, he must go further, and must obtain some order giving him a special right to or charge on the specific part of the property."

As we have already noted, where sequestrators get property into their hands they are required to "detain and keep [it]"[118] until the defendant does what he ought and clears his contempt, and the High Court makes "other order to the contrary".[119] There appear, however, to be some circumstances in which the sequestrators' powers extend beyond detainer. In *Hipkin v Hipkin,*[120] the court considered itself entitled to authorise sequestrators to sell freehold land where the contemnor had already agreed to convey it; and it appears that the court may, on application, authorise the sale of personal property.[121]

(ii) *Attachment and Committal*

Borrie & Lowe[122] state:

> "Formerly, courts of common law and Chancery proceeded summarily in cases of criminal contempt either by attachment or by committal. The main difference between the processes lay in the means of execution: in the case of an attachment the person is seized by the sheriff's officer acting under a writ of attachment issued by leave of the court, but in the case of a committal the process was less formal and more direct, the offender being seized by the tipstaff acting under the orders of the judge.[123] In *R v Lambeth County Court Judge and Jonas,*[124] Wills J commented that there was no practical difference between a

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117 [1903] 2 KB 41, at 47. As to the position of third parties see *Borrie & Lowe*, 431-432; *Miller*, 449-451; *Bucknell v Bucknell*, [1969] 2 All ER 998, *Eckman v Midland Bank*, [1973] 1 All ER 609.

118 Form No. 17 in Appendix F, Part II of the *Rules of the Superior Courts 1986.*

119 *Id.*

120 [1962] 2 All ER 155.

121 *Borrie & Lowe*, 434.

122 *Id.*

123 *Borrie & Lowe* citing *Oswald*, 3rd ed, 1911, pp23-32 and *The Annual Practice 1966*, pp1071-73.

124 36 WR 475 (1887).

committal and an attachment: 'One was enforced by the tipstaff of the Court, and the other by the Sheriff. That is all the distinction, and it comes to little if anything'.

However, it must be remembered that while either remedy was available in cases of criminal contempt, this was not true in cases of civil contempt where there were a number of technical rules determining which remedy was available in which circumstances. In these cases the applicant chose his remedy at his peril and a wrong choice was fatal to the action."[125]

Order 44 of the *Rules of the Superior Courts 1986* sets out the procedural requirements relating to attachment and committal. An order of attachment directs that the person against whom the order is directed is to be brought before the Court to answer the contempt in respect of which the order is issued.[126] The order is directed to the Commissioner and members of the Garda Siochana, reciting the High Court adjudication that the defendant should be attached on the ground that he was in default in a specified manner, and commanding them to attach the alleged contemnor so as to have him before the High Court; there to answer for the contempt which by reason of such default it is alleged he has committed against the High Court, as well as such other matters as shall then and there be charged against him, and further to perform and abide such order as the High Court shall make on his behalf...."[127]

An order for committal directs that, upon his arrest, the person against whom the order is directed is to be lodged in prison until he purge his contempt and is discharged pursuant to further order of the court.[128] The order is directed to the Commissioner and members of the Garda Siochana. It recites that the contemnor has been adjudged guilty of contempt of the High Court for specified default and that he stand committed to prison for this contempt[129]; it then commands them to arrest the contemnor and lodge him in a named prison, there to be detained until he purge his contempt and is discharged pursuant to further order of the High Court.[130]

As a general rule, no order of attachment or committal may be issued except by leave of the Court to be applied for by motion on notice to the party against whom the attachment or committal is to be directed.[131] The two

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125 Citing *Kemp v Kemp*, Times, 26 November 1957, and *The Annual Practice 1966*, pp1071-73.

126 Order 44, rule 1.

127 Form 11 in Appendix F, Part II of the Rules.

128 Order 44, rule 2.

129 Form No. 12 in Appendix F, Part II.

130 *Id.* The Form of Order of Committal of Judgment Debtors (No. 13), is somewhat different. This is considered further below.

131 Order 44, rule 3.

exceptions[132] are committal for contempt in the face of the Court and committal after a person has been brought before the Court on his arrest where an order of attachment was directed against him.[133] In the latter case, the Court before which the person is brought on his arrest need not necessarily commit him to prison for his contempt: if it does so, it may specify a definite period in the order or the duration may be until he purges his contempt and is discharged by further order of the Court, but it may alternatively discharge him on such terms and conditions as to costs or otherwise as it thinks fit.[134]

Verbal differences between the injunction order and Notice of Motion will not vitiate the application for committal if they are of no account. Thus, in *Gore-Booth v Gore-Booth*,[135] the Supreme Court unanimously[136] rejected the contention by the defendant that a significant difference could be drawn between "obstructing or hindering" the injunction and "obstructing or interfering with" the Notice of Motion.

A person against whom an order of committal is directed may apply to the Court to discharge the order.[137] This application is by motion on notice to the party at whose instance the order of committal was made.[138] Where on the hearing of that motion the Court discharges the order of committal, the Court may do so on such terms and conditions as to costs or otherwise as it thinks fit.[139]

The court may make an order of attachment where the application is for an order of committal, and *vice versa*.[140]

(iii) *Disobeying order to pay money into court*

Save in cases where it relates to a payment in the nature of a debt,[141] a judgement or order requiring a person to pay money into court does not fall within the scope of sections 5 or 6 of the *Debtors Act (Ireland) 1872*; thus the normal remedies of attachment and sequestration are available.[142] An example of such an order is one for security for costs.[143]

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132 *Id.*
133 *Id*, rule 4.
134 *Id.*
135 96 ILTR 32 (Sup Ct, 1956).
136 Cf *id*, at 38, 41.
137 Order 44, rule 5.
138 *Id.*
139 *Id.*
140 *Id*, rule 6.
141 As to which at *Farrant v Farrant*, [1957] P 188 (PDA Div, Sachs J, 1956).
142 *Rules of the Superior Courts 1986*, Order 42, rule 4. See also *Bomie & Lowe* 410-411, *Bates v Bates*, 14 PD 17 (1888).
143 *Bates v Bates*, *supra*.

(iv) ***Disobeying a judgment or order for possession of land or delivery of goods within specified time***

Where a person is directed by a judgment or order to deliver up or transfer any property real or personal to another, that other is not obliged to make any demand for it and the person thus directed is bound to obey the judgment or order on being duly served with it.[144]

A judgment for the delivery of the possession of land may be enforced by order of possession.[145] This order, replacing the former writ of possession,[146] is one of the Court bearing the day of issue and authenticated in like manner as an originating summons.[147] The prescribed form[148] of the order commands the Sheriff or County Registrar to enter the lands and premises and "without delay" to cause the person named in the order to have possession of them.

Where a person fails to obey a judgment or order requiring him or her to deliver up possession of any lands to another, that other, without any order for that purpose, is entitled to sue out an order of possession on filing an affidavit showing due service of the judgment or order, and that it has not been obeyed.[149] The mode of proving service of all notices under *The Land Law (Ireland) Act 1887* and the dates of service is by affidavit.[150]

On any judgment or order for the recovery of any land and mesne profits, arrears of rent, double rent, damages or costs, there may be either one order or separate orders of execution for the recovery of possession and for the mesne profits, arrears of rent, damages or costs at the election of the successful party.[151]

On every order of possession issued before the expiration of the period of redemption in any action for the recovery for non-payment of rent for a holding to which the Land Law Acts apply, there must be a statement of the amounts payable in respect of rent and cost for redemption; and if at any time before execution the defendant pays the sheriff these amounts, the sheriff must stay the execution.[152] A similar rule applies to orders of possession in actions for the recovery for non-payment of rent of land to which the Land Law Acts do not apply.[153]

A judgment for the recovery of any property other than land may be enforced by (a) order for delivery of the property (b) order of attachment and (c) order

144 Order 42, rule 1.
145 *Id*, rule 5.
146 Order 47, rule 1.
147 *Id*.
148 Forms Nos. 5 to 7 in Appendix F, Part II.
149 Order 47, rule 2.
150 *Id*, rule 4.
151 *Id*, rule 7.
152 *Id*, rule 8.
153 *Id*, rule 9.

of sequestration.[154] Where the third option is preferred, the Court, on the application of the plaintiff, may order that execution is to issue for the delivery of the property, without giving the defendant the option of retaining the property, or paying the value assessed, if any, and that, if the property cannot be found, and unless the Court orders otherwise, the sheriff is to distrain the defendant by all his lands and chattels, in the sheriff's bailiwick, until the defendant delivers the property; or, at the option of the plaintiff, that the sheriff cause to be made of the defendant's goods the assessed value, if any, of the property.[155]

(v) ***Disobedience of orders for interrogatories, or for discovery, or inspection of documents***

As we have seen, a party who fails to comply with an order to answer interrogatories, or for discovery or inspection of documents is guilty of contempt and liable for attachment.[156] Moreover, he is also, if a plaintiff, liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, "and the party interrogating may apply to the Court for an order to that effect, and an order may be made accordingly". (It may be presumed that this draconian power will not be exercised too prodigally: such a course would scarcely be consistent with the dictates of the Constitution).

Service of an order for interrogatories or discovery or inspection made against any party on his solicitor is sufficient service to found an application for an attachment for disobedience to the order; but a party against whom the application for attachment is made may show in answer that he has had no notice or knowledge of the order.[157] A solicitor guilty of neglecting without reasonable excuse to give notice to his client of having been served with such an order in respect of the client is liable to attachment.[158]

Non-parties ordered to answer interrogatories or to make discovery or permit inspection of documents are also liable to attachment.[159]

It has been stated that "[b]efore a person can be guilty of contempt for not producing documents pursuant to a court order, it must be proved beyond all reasonable doubt that the defendant, at the time that the order is made, has

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154 Order 42, rule 6.

155 Order 48, rule 1. See further *McMahon & Binchy*, 531-533, *General & Finance Facilities Ltd v Cooks Cars (Romford) Ltd*, [1963] 1 WLR 644, at 651 (*per* Diplock LJ), *Juhlinn-Dannfelt v Crash Repairs Pty Ltd*, [1969] QWN 1 (Hoare J, 1967), *Waterford Corporation v O'Toole*, High Ct, Finlay J, 9 November 1979 (1969-271 Sp) *Webb v Ireland*, [1988] ILRM 565 (High Ct, Blayney J 1986 rev'd on other grds by Sup Ct, 1987).

156 Order 31, rule 21.

157 *Id*, rule 22.

158 *Id*.

159 *Id*, rule 29.

possession of the documents, so that he is able to produce them".[160]

In this context it is worth noting the rule that any person wilfully disobeying any order requesting his attendance for the purpose of being examined or producing any document is deemed guilty of contempt of Court, and may be dealt with accordingly.[161] Moreover parties and witnesses summoned to attend before the Master of the High Court are bound to attend and are liable to process of contempt in like manner as in the case of disobedience to any order of the Court.[162] The Master's powers include those of requiring the production of documents, taking affidavits and examining parties and witnesses either by interrogatories or *viva voce*.[163]

(vi) *Disobeying orders of habeas corpus or related orders*

As we have seen, if a person to whom an order of *habeas corpus* is directed disobeys the order, application may be made, on an affidavit of service and disobedience, for an attachment for contempt.[164] Similarly the failure to comply with an order for *mandamus*, prohibition or *certiorari* also constitutes contempt.[165]

(vii) *Enforcement of the payment of a sum of money*

Although it amounts technically to a contempt to disobey a judgment or order for the payment of a sum of money,[166] it has not been possible for the plaintiff normally to obtain an order for committal on this basis since the enactment of the *Debtors Act (Ireland) 1872*. Section 5 of that Act sets down the general principle that, subject to the exceptions mentioned below, "no person [is to] be arrested or imprisoned for making default in payment of a debt[167] ...."

Section 5 sets out six exceptions to the rule of non-imprisonment. These are:

1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract;

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160 *Borrie & Lowe*, 414, citing *Re Bramblevale Ltd*, [1970] Ch 128, and adding: "cf *Re Rossminster Ltd and Tucker* (1980) Times, 23 May".

161 Order 39, rule 7.

162 Order 63, rule 8.

163 *Id.* See also the *Bankruptcy Act 1988*, sections 24, 123 and 128, the *Charities Act 1961*, section 42(1) the *Ombudsman Act 1980*, section 7, the *Companies (Amendment) Act 1990*, section 8(5) and the *Companies Act 1990*, sections 10(5), 18, 19(6) and 126.

164 Order 84, rule 12. See further *In re Earle*, [1938] IR 485 (Sup Ct, 1937), *Egan v Macready*, [1921] 1 IR 265 (O'Connor, MR).

165 See *Borrie & Lowe*, 417, *Wade*, 630, *R v Poplar Borough Council (No. 2)*, [1922] 1 KB 95, *R v Worcester Corporation*, 68 JP 130 (1903), *R v Leicester Union*, [1899] 2 QB 632. As to *quo warranto*, see *Power v Lucas*, IR 11 CL 44 (QB, 1876).

166 *Leavis v Leavis*, [1921] P299. See *Borrie & Lowe*, 456.

167 Thus section 5 does not extend "to orders to deliver bills or cheques or to deposits or to hand over bonds": *Borrie & Lowe*, 456-457, citing *Linwood v Andrews*, 31 Sol J 410 (1887) and *Dibgy v Turner*, [1873] WN 65.

2. Default in payment of any sum recoverable summarily before a justice or justices of the peace;

3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control;

4. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order;

5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy or insolvency is authorised to make an order;

6. Default in payment of sums in respect of the payment of which orders are in this Act authorised to be made

The powers exercisable under section 5 are considered by the courts to be of a penal rather than a remedial nature[168]: in *Middleton v Chichester*,[169] Lord Hatherley LC observed that "in every case there is something of the character of delinquency pointed out". In the same case, Lord Hatherley said:

> "The exceptions are all of a character which indicates that the Legislature wished merely to limit the term of imprisonment in regard to certain debts which were not simple debts, contracted in the ordinary intercourse between man and man, where credit is given by one person to another, but were debts the incurring of which was in some degree worthy of being visited with punishment."[170]

It is necessary that the order of committal under section 5 should state on its face which of the excepted cases is applicable.[171]

A proviso to section 4 states that no person is to be imprisoned in any case excepted from the operation of the section for a period of longer than a year.

Section 6 of the Act empowers "any court" to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due to him in pursuance of any order or judgment of that or any other competent court. The first proviso to the section is that jurisdiction to commit, in the case of

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168 *Bomie & Lowe*, 450 (citations omitted).

169 6 Ch App 152, at 157 (1871).

170 *Id*. at 156.

171 *In re Byrne*, 6 LR Ir 455 (QB Div. 1880).

any court other than "the superior courts of law and equity", is only to be exercised subject to a number of restrictions as to jurisdiction.

The second proviso to the section is to the effect that this jurisdiction is to be exercised only where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses and neglects, to pay the same.

Several other miscellaneous features of section 6 may be noted.

Proof of the means of the person making default may be given in such manner as the court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules.

Any jurisdiction by the section given to the superior courts may be exercised by a judge sitting in chambers, or otherwise, in the prescribed manner.

For the purposes of the section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary the order.

Persons committed under the section by a superior court may be committed to the prison in which they would have been confined if arrested on a writ of *capias ad satisfaciendum*, and every order of committal by a superior court is, subject to the prescribed rules, to be issued, obeyed, and executed in the like manner as such writ.

No imprisonment under the section is to operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place.

Any person imprisoned under the section is to be discharged out of custody upon a certificate, signed in the prescribed manner, to the effect that he has satisfied the debt or instalment of a debt in respect of which he was imprisoned, together with the prescribed costs (if any).

The *Rules of the Superior Courts 1986* contain several provisions relating to the 1872 Act. The Court, in making an order for committal to prison under section 6, may either make that imprisonment determinable on payment of the whole sum in respect of which the person to be imprisoned is in default, together with such costs as it thinks fit, or may order the debt to be paid by such instalments as it thinks fit and make the imprisonment determinable on payment of such costs and such instalments as it thinks fit; and in either of

these cases the Court may direct payment of a sum in gross in lieu of taxed costs.[172]

Orders of committal under the Act are to be in one of the prescribed forms.[173] Two copies of each order are to be delivered to the Commissioner of the Garda Siochana, endorsed with particulars as to the address and description of the party against whom the orders are sought.[174]

The member of the Garda Siochana executing the order of committal must "forthwith" after the arrest indorse on each copy of the order the date of the arrest and leave one copy with the Governor of the prison where the debtor is lodged and within two days return the other copy of the order to the solicitor of the person prosecuting the judgment or order (or the person himself if he acts in person).[175]

On payment of the sum or sums in that behalf mentioned in the order of committal, and the costs or gross sum in lieu of costs, made payable by the order, the person committed is entitled to a certificate of payment,[176] signed by the solicitor of the person prosecuting the judgment or order (or, if the person is acting in person, signed by him and attested by a solicitor or peace commissioner).[177]

Order 44, rule 13 provides as follows:

> "No application made under the said section 6 nor any order made thereon, shall in any manner vary or suspend any of the remedies which the person prosecuting the judgment or order which has been disobeyed would, if no such application had been made, have been entitled to against the property of the person disobeying the said judgment or order; but the person prosecuting such judgment or order may proceed to avail himself of such remedies without any regard to such application or to any order made thereon, except so far as he may, by such last mentioned order, be expressly restrained from availing himself of such remedies."

This reflects the provision in section 6 to the effect that no imprisonment under the section is to operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods or chattels of the person imprisoned, in the

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172 Order 44, rule 9.

173 Forms Nos 13 and 14 in Appendix F, Part II. These forms refer to committal to prison for a term not to exceed one year from the date of arrest. The maximum period under section 6 is six weeks (or until payment of the sum due). Section 5 provides for imprisonment for up to a year.

174 Order 44, rule 10.

175 *Id*, rule 11.

176 In the prescribed form: Form No. 15 in Appendix F, Part II.

177 Order 44, rule 12.

same manner as if that imprisonment had not taken place. (A similar, more concise provision is also contained in section 5 with regard to persons imprisoned under that section).

Finally, in this context, Order 44, Rule 14 provides as follows:

> "In case any order is made under the said section 6 for payment of a sum of money by instalments, and the person imprisoned shall, after his discharge from prison, neglect or refuse to pay the subsequent instalments or any of them, the person prosecuting the judgment or order in respect of which the said instalments were ordered to be paid, shall in addition to his remedies against the property of the person making default, be entitled to apply for orders of committal from time to time for non-payment of any one or more of such subsequent instalments."

Section 8 of the 1872 Act should also be noted. It provides that sequestration against the property of a debtor who is not liable to be arrested or imprisoned after the commencement of the Act may, after the commencement of the Act, be issued by any court of equity in the same manner as if such debtor had been actually arrested.

The 1872 Act is only part of the story of enforcement of judgments. The *Enforcement of Court Orders Act 1926*, Part II, as amended *by the Enforcement of Court Orders Act 1940*, sets out a scheme for the examination of a debtor's means, and for the making and enforcement of instalment orders. The maximum period of imprisonment for failure to pay these instalment orders, through "wilful refusal" or "culpable neglect", is three months. Immediate release is possible on the payment of the outstanding amount due on the instalments order plus costs. Periodical maintenance orders may similarly be enforced, under section 8 of the *Enforcement of Court Orders Act 1940*, supplemented by the *Family Law (Maintenance of Spouses and Children) Act 1976*, and the *Judicial Separation and Family Law Reform Act 1989*, which enables an elaborate machinery of attachment of earnings to apply.

The Distinction between Civil and Criminal Contempt

We must now consider the troublesome question of the distinction between civil and criminal contempt. Our courts have sought to articulate this distinction more than once. Thus, in *Keegan v de Burca*,[178] O Dalaigh, CJ stated in the Supreme Court:

> "The distinction between civil and criminal contempt is not new law. Criminal contempt consists in behaviour calculated to prejudice the due course of justice, such as contempt *in facie curiae*, words written or

178 [1973] IR 223, at 222.

spoken or acts calculated to prejudice the due course of justice or disobedience to a writ of *habeas corpus* by the person to whom it is directed - to give but some examples of this class of contempt. Civil contempt usually arises where there is a disobedience to an order of the court by a party to the proceedings and in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made. Criminal contempt is a common-law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, that is to say, without statutory limit. Its object is punitive.[179] Civil contempt, on the other hand, is not punitive in its object but coercive in its purpose of compelling the party committed to comply with the order of the court, and the period of committal would be until such time as the order is complied with or until it is waived by the party for whose benefit the order was made."

And in *The State (Commins) v McRann*,[180] Finlay P said:

> "The major distinction which has been established over a long period and by a long series of authority between criminal and civil contempt of court appears to be that the wrong of criminal contempt is the complement of the right of the court to protect its own dignity, independence and procedures and that, accordingly, in such cases, where a court imposes sentences of imprisonment its intention is primarily punitive. Furthermore, in such cases of criminal contempt the court moves of its own volition, or may do so at any time.
>
> In civil contempt, on the other hand, a court only moves at the instance of the party whose rights are being infringed and who has, in the first instance, obtained from the court the order which he seeks to have enforced. It is clear that in such cases the purpose of the imposition of imprisonment is primarily coercive; for that reason it must of necessity be in the form of an indefinite imprisonment which may be terminated either when the court, upon application by the person imprisoned, is satisfied that he is prepared to abide by its order and that the coercion has been effective or when the party seeking to enforce the order shall for any reason waive his rights and agree, or consent, to the release of the imprisoned party."

Thus, we see certain factors emerging clearly. The primary purpose of civil contempt proceedings is coercive, whereas for criminal contempt the primary purpose is punitive; moreover in civil contempt proceedings the court moves only at the instance of the party whose rights have been infringed whereas no similar inhibition applies in respect of criminal contempt.

The problem with this analysis is that there are some cases classically

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179 Citing *In re Haughey*, [1971] IR 217.

180 [1977] IR 78, at 89 (High Ct, Finlay P, 1976).

characterised as civil contempt where the court's intervention can not credibly be perceived as serving a coercive function. For example, a person ordered not to destroy a document may do so nonetheless; coercion thereafter will be utterly ineffective, since the document can never be restored, but punishment may seem desirable. Conversely there are some instances of criminal contempt where the appropriate - or, at all events, *an* appropriate - judicial response might appear to be of coercive rather than a punitive nature. For example, the refusal by a witness to answer a relevant question where no privilege arises is characterised as a criminal contempt *in facie curiae,* for which only a sentence of determinate duration is permissible.[181] It is easy to sympathise with McLoughlin J's dissent on this matter in *Keegan v de Burca.*[182]

The courts have struggled with articulating clear principles in this area. In *Re Freston,*[183] in 1883, a solicitor had been ordered by a court to deliver up certain deeds and documents and to pay £10 with certain costs. He delivered the deeds and documents, but no money. An order of attachment for contempt was made against him, the attachment not to issue if he paid the money. He then paid the £10 but not the costs; and was arrested under the writ of attachment while on his way to a court on professional business. He applied for a discharge on the basis of privilege from arrest when going to or coming from court.[184] This argument depended on his contempt being civil rather than criminal.

The Queen's Bench Division held that it was criminal in nature. Fry LJ sought to draw an important distinction as follows:

> "It is plain that, where attachment is mere process, privilege exists: where it is punitive or disciplinary, the privilege does not exist .... The attachment was something more than process; it was punitive or disciplinary, for the Court was proceeding against its own officer. Further, if the attachment was mere process, Freston could obtain his discharge, *ex debito justitiae*, on showing that he had performed what was required by the Master's order; I do not think he could have done so in the present case: the Court would have had a jurisdiction to exercise its discretion, and to punish him further. There was therefore no privilege."[185]

This distinction found favour in the Irish Court of Appeal's decision in *AG v Kissane.*[186] Porter MR observed that it was:

> "founded upon common sense; a great deal of the business in the

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181 *Keegan v de Burca* [1973] IR 223 (Sup Ct, 1972) (majority view: O Dalaigh CJ and Walsh J, McLoughlin J dissenting).

182 *Supra,* at 236.

183 11 QBD 545 (1883).

184 Cf *Borrie & Lowe*, 365.

185 11 QBD, at 557.

186 32 LR Ir 220 (CA, 1893).

Chancery Division has no other ultimate sanction than the process of attachment. For instance, in the case of a defaulting trustee the judgment of the Court ordering the lodgment of money can often only be carried out in this way. In such a case it is a civil not a criminal remedy; for the adjudication of contempt on which it is founded concerns not the general administration of justice, but the rights of the parties who are before the Court: it is not 'punitive and disciplinary' so much as executive."[187]

In *Kissane's* case the Court held that the refusal by an RIC County Inspector to provide proper protection for a sheriff in the execution of a writ of *fieri facias* in proceedings brought by the Attorney General against an individual for charges due under the Drainage Acts constituted a criminal rather than civil contempt.

Porter MR analysed the issue as follows:

"The question still remains in each particular case whether an order for attachment is a civil or criminal matter. In the present case the notice of motion was entitled in the action, and the order was also so entitled: that is, they were entitled in a civil matter; but the question is, has this order for attachment been made in a civil or in a criminal matter? First, it is to be observed, the application is not brought forward by any party to the action of the *Attorney General v Kissane*; nor is it an application against any party to that action: it is made by the sheriff against an officer of the Constabulary. Possibly neither plaintiff nor defendant has any concern in its result. For all that I at present know, the plaintiff's demand may have been paid. It seems plain, therefore, that in its essence this is not a machinery for enforcing execution of a writ of the Queen's Bench Division at all. Suppose that there was sent forward by the sheriff a reasonable requisition for assistance in executing a writ against a judgment debtor, and that the assistance was refused by a person lawfully bound to render it, without lawful justification or excuse, would it be any answer to say that the debt was notwithstanding afterwards paid, or that afterwards the sheriff had been able to levy without the assistance? Would that be any answer to an application such as was made in the present case to the Queen's Bench Division, founded not alone on the jurisdiction possessed by the Court to enforce its own orders, but also on the duty of the subject to aid the sheriff on lawful occasion? In my opinion it would not. Or would it be any answer, after an unreasonable refusal, to aid the sheriff, to show that the person requested did after refusal, and might eventually, give assistance on another occasion? In my opinion this circumstance would afford no answer except in mitigation of punishment. I therefore think that in its essence and substance this application and the order made thereon cannot be treated as being a proceeding between the parties to

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187 *Id*, at 261, See also *id*, at 274 (*per* Palles CB) and at 276 (*per* Fitzgibbon LJ).

the action, or as being only a step taken to enforce any right for which the action was brought."[188]

The question immediately arising from this analysis is whether proceedings initiated by one of the parties to litigation impugning the County Inspector's inactivity should be characterised as civil or criminal. Nothing said by the Master of the Rolls would foreclose the possibility of their being characterised as criminal, though of course the notion of such a party's being motivated by zeal for the public rather than his own welfare[189] is quite unconvincing. Perhaps it can be said that in such circumstances the damage to the public welfare is no less real because it happens to be protected by a litigation with an interest of his own.

Palles LCB's analysis leans towards a metaphysical rather than a realist portrayal of the matter at stake:

> "[T]he jurisdiction of the Queen's Bench Division, which was appealed to by the motion of the sheriff, was the jurisdiction of the Court to vindicate its own authority, and ... whether that vindication is to be accomplished by punishing libels on the Court itself, or by punishing observations upon the subject matter to be tried, or by punishing those who obstruct or interfere with, or contrary to duty refuse to order, the due execution of the process of the Court (without the ability to execute which a Court of Justice cannot exist), the application is in substance the same. All such acts are obstructions to the course of justice, and all of them are dealt with by the Court in the exercise of a criminal, though summary, jurisdiction.
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> For these reasons, I am of opinion that, although the cause of *The Attorney-General v Kissane* is a civil one, the notice of motion by the sheriff was not a proceeding in that cause, but was the initiation of a criminal matter, and that the order appealed from, although entitled in the cause, was, in law, made not in the cause, but in that criminal matter."[190]

In *Smith v Molloy*,[191] Palles LCB clarified his approach, making it plain that, in at least some circumstances, a person could be guilty of criminal contempt, at the suit of the other party in litigation, for failing to obey a court order. The plaintiff had issued a writ of ejectment against the defendant for the recovery of certain lands. Judgment was in favour of the plaintiff and a writ of possession was lodged with the sheriff who handed over possession to the plaintiff. Subsequently the defendant forcibly regained possession, and he was

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188 *Id*, at 263-264. See also *id*, at 277 (*per* Fitzgibbon LJ).

189 Cf the defamation case of *Coleman v Keanes Ltd*, [1946] Ir Jur Rep 5, criticised by *McDonald*, 149-150.

190 *Id*, at 275-276.

191 39 ILTR 221 (KB Div; Palles LCB, Johnson and Boyd JJ, 1905).

attached for contempt. The question later arose as to the nature of the defendant's contempt.

Palles LCB, delivering the judgment of the Court, said:

> "Now, it may be that there are some attachments still that are issued out of Equity Divisions for the purpose of enforcing injunctions that may possibly be deemed to be within this class, as being nothing more than ancillary to injunctions, and as injunctions are mere process they also are mere process. But that case does not touch the present case, for such attachments are merely ancillary to civil proceedings between the parties. Passing over the judgments of the English Court of Appeal in several reported cases,[192] which are contradictory, and by which I therefore do not feel myself bound, I adopt the rule laid down by Fitzgibbon LJ in *Attorney-General v Kissane*,[193] in which, referring to the words of Fry LJ, in *Re Freston*,[194] he says: 'I adopt his distinction between the cases where attachment is mere process and where it is punitive and disciplinary; and, in my opinion, no clearer case could exist than the present case, in which the attachment is punitive and disciplinary. I view this case as one in which the Court itself was concerned, as a case between the Court and the defendant. The process of the Court has been set at naught, and what it has ordered to be done has been undone. If an attachment directed against a member of the public who has set the Court at naught in a criminal matter, then *a fortiori* such is the case when it is directed against the very defendant who not only refuses to aid the Court, but renders of no effect the judgment of the Court which has been executed. I now refer to the judgment of Wilmot CJ, in *Rex v Almon*,[195] from which it clearly appears that this proceeding of attachment for contempt is as much a criminal matter as a case of indictment on information. He there draws the distinction between the various jurisdictions in these matters in the Common Law Courts, pointing out, first, the cases where there is a jury and a finding by that jury, and, secondly, the cases where there is no jury, but where the Court itself has been outraged; and the adjudication by the Court of a person in contempt is treated by him as being the same as a verdict by a jury in a criminal proceeding. Therefore I hold, on the nature of the old criminal jurisdiction of this Court to enforce obedience to its own orders and to punish as criminal all unlawful interference with these writs, that this man is in custody in a matter of criminal nature under an undoubtedly good warrant ..."[196]

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192 These included *O'Shea v O'Shea*, 15 PD 59, *Ex parte Smith*, 3 H&N 227, *Queen v Barnado*, 23 QBD 308, *Housin v Barrow*, 6 TR 122, *Hooper v Lane*, 6 H of L Cas 443, *Hall v Roche*, 8 TR 187, *Barrett v Price*, 9 Bingham 566, *Semayne's Case*, Cro Eliz 908, *Rex v Fowler*, 1 Ld Raym 586.

193 32 LR Ir 220 (CA, 1893).

194 11 QBD 557.

195 Wilmot's Judg and Op, 234.

196 39 ILTR, at 223.

CHAPTER 7: JURISDICTION

It is clear that the High Court has full jurisdiction to deal with contempt, whether criminal or civil,[1] and whether that contempt is contempt of the High Court, Circuit Court or District Court. In *AG v O'Ryan and Boyd*[2] the first defendant unsuccessfully contended that the High Court had no jurisdiction to act in respect of a contempt of the Circuit Court. He contended that the principle underlying *R v Davies*[3] was that the King's Bench Division "was the *custos morum* of the Kingdom, whose peculiar function it was to exercise superintendence over the inferior courts. The other Divisions of the High Court had no such function".[4] Moreover, under section 48 of the *Courts of Justice Act 1924*, the Circuit Court had general jurisdiction to be exercised locally in civil cases both at law and in equity subject only to the limitations imposed by that section and to the express exclusions contained in section 56. Subject to these limitations it had, within its locality, all the jurisdiction of the High Court. He referred to the Supreme Court decision of *Sligo Corporation v Gilbride*,[5] where Kennedy CJ had rejected a *dictum* of Johnston J in *Argue and Walker v Henry*[6] to the effect that the equity jurisdiction of the Circuit Court provided by section 48 of the 1924 Act was that of "the old equity jurisdiction of the County Court ... subject to the modifications set out in that section". Johnston J's dictum, the Chief Justice had noted, was in conflict with the views expressed by the Supreme Court in at least one earlier

1 Cf Article 34.3.1° of the Constitution.
2 [1946] IR 70 (High Ct, Maguire P, Gavan Duffy and Haugh JJ, 1945).
3 [1906] 1 KB 32.
4 [1946] IR, at 78.
5 [1929] IR 351, at 361 (Sup Ct).
6 [1926] IR 99, at 199.

case, *Connor v O'Brien*,[7] and might be taken as overruled by the later *dicta* of the Supreme Court in *Hosie v Lawless*.[8] Kennedy CJ had gone on to say:

> "The opinion has often been expressed in this Court, and no doubt has ever been indicated on the matter, that the Courts of Justice Act, 1924, has set up an entirely new Court in the Circuit Court, and that that Court is not the old County Court continued with extended jurisdiction. The Act declares (section 48) that the Circuit Court shall have the jurisdiction stated in that section in civil cases, and supplements that provision by the transfer (by section 51) of the jurisdiction formerly vested in, or capable of being exercised by, Recorders, County Court Judges, and Chairmen and Courts of Quarter Sessions. In my opinion the Act, by section 48, devolves on the Circuit Court general jurisdiction to be exercised locally in civil cases both at law and in equity, subject only to the limits imposed by that section and to the express exclusions contained in section 56. The last-mentioned section affords remarkable confirmation of this view of the Act. If the contention put forward by the plaintiff Corporation here were correct, it would have been quite unnecessary to insert this provision excluding subject-matters which were never within the County Court jurisdiction,

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7 [1925] 2 IR 24 (Sup Ct, 1924), where Kennedy CJ had stated (at 28):

> "The Courts of Justice Act, 1924, has given us in a single statute a complete scheme of Courts, comprising four separate but co-related units, which are to exercise the judicial power of, and administer justice in, the Saorstat. By virtue of the Constitution, the High Court of Justice is invested with universal original jurisdiction, but power was given to the Legislature to set up Courts of local and limited jurisdiction (excepting, however, certain constitutional questions, the original jurisdiction in which belongs exclusively to the High Court). The Legislature, acting under this authority, set up the Circuit Court of Justice and the District Court of Justice to exercise locally throughout the country carefully defined jurisdictions. The policy of the Act is unmistakable. It is that the great bulk of the ordinary litigation not involving very heavy financial consequences and of the criminal business of the country shall be dealt with and disposed of in the local venue. This is something quite different from the position of the old County Courts. In the case of the Circuit Court it is made clear that the parties are not to be prejudiced either as to mode of trial, whether with or without juries, or as to the resulting relief, whether principal or ancillary, by reason of the forum being the Circuit Court rather than the High Court. See particularly, for example, sections 47, 57 to 60 inclusive, and 94 to 96 inclusive. The trial of an action in the Circuit Court is to differ from the trial of a similar action in the High Court only in venue and in the outside limit of jurisdiction in relation to the particular class of cause of action."

8 [1927] IR 464 (Sup Ct), where Kennedy CJ had stated (at 472):

> "I think the Judge below approached this case without realising that by the Courts of Justice Act entirely new Courts were established, as I pointed out in *Connor v O'Brien*. He approached it from the point of view of a continuance of the former County courts with an extended jurisdiction, which is to misread both the Courts of Justice Act and the Constitution of the Saorstat, and to confuse the interpretation of this Act, which established a complete system of Courts."

and could not therefore be within any mere quantitative extension of that jurisdiction."[9]

The Chief Justice had gone on to express[10] the opinion that:

> "the new Courts of local and limited jurisdiction established by the Courts of Justice Act under the powers conferred by Article 64 of the Constitution are not subject to the restrictions imposed by the Civil Bill Act or the County Officers and Courts Act upon the County Courts whose jurisdiction has been transferred to them. The only limitations upon the jurisdiction of the Circuit Court are those expressed or implied in the provisions of the Courts of Justice Act, and, subject to those limitations, the Circuit Court has within its locality all the jurisdiction of the High Court. In particular, section 57 confers on the Circuit Judges 'powers of attachment, injunction, garnishee, interpleader, *and* all powers' (not, be it observed, 'all *other* powers') 'ancillary to any jurisdiction vested in, transferred to, or exercisable by them'. The former County Courts, whose jurisdiction has been transferred to the Circuit Courts by section 51, already possessed power to grant injunctions, to make orders for attachment and for interpleader - 40 and 41 Vict c 56, sect 33(1), section 34, sect 44; 14 & 15 Vict c 57, sect 150 - so far as the same were ancillary only to the jurisdiction possessed by them, and therefore the earlier portion of section 57 of the Courts of Justice Act was otiose unless it was intended to confer upon Circuit Judges some jurisdiction in these matters which was new or additional to that transferred by section 51, as possessed by the former Recorders, County Court of Judges, and Chairmen and Courts of Quarter Sessions."

Counsel for the plaintiff had contended that the High Court had full jurisdiction under Article 34.3.1° to deal with a contempt of the Circuit Court. The Circuit Court was a Court of inferior jurisdiction subject to the corrective and protective jurisdiction of the High Court. He invoked in support the Chief Justice's statement in *The State (Hunt) v Judge of Midland Circuit*[11] that:

> "[a] superintending and corrective jurisdiction over Courts of inferior jurisdiction and the Judges thereof is part of the sovereign function of the judicial power conferred by the Constitution upon the Courts of Justice set up by it. It is also part of the jurisdiction transferred by section 17 of the Courts of Justice Act, 1924, from the High Court of the former Supreme Court of Judicature, to which it had been transferred by sections 21 and 36 of the Judicature Act (Ireland), 1877, from the former Court of King's Bench and Court of Chancery, deriving originally, under the theory of the English system, from the authority of the King in his own Court of King's Bench."

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9 [1929] IR at 361.
10 *Id*, at 367-368.
11 [1934] IR 196, at 210 (Sup Ct, 1933).

Counsel for the plaintiff had gone on to argue that the power of attachment conferred on the Circuit Court by section 57 of the 1924 Act was only ancillary to the jurisdiction conferred or transferred and could be exercised by the Circuit Court judge only when he had seisin of the case.

The Court dealt with these arguments summarily. Maguire P merely declared that the members of the Court were satisfied that they had "jurisdiction to deal with contempt of court where the Circuit Court is scandalised".[12] Gavan Duffy J disposed of the issue by invoking Article 34.3.1° and expressing the view that the High Court "has full jurisdiction if willing in its discretion to exercise it",[13] under this provision.

Two years later, in *AG v Connolly*,[14] Gavan Duffy P (as he had become) referred with approval to *O'Ryan and Boyd*.[15] In *Connolly* the defendant argued that the High Court has no power to exercise jurisdiction in respect of an alleged contempt of scandalising the Special Criminal Court. Gavan Duffy P, rejecting this contention, said:

> "One of the proper functions of the High Court is the important and necessary power of giving effective protection to inferior courts against constructive contempt. I have no doubt that the Court of King's Bench before the Treaty must, on the English decisions, have held that it had that power, had the jurisdiction been challenged, and the High Court established in 1924 assumed in *Attorney-General v Cooke*,[16] and in *In re O'Neill*,[17] that it had the same power. And this Court, overruling all argument to the contrary, decided that it had that power in *Attorney-General v O'Ryan and Boyd*.[18] The Constitution (Art 34 s1.1°) - reproducing the plan of Art 64 of the former Constitution - invests this Court with full original jurisdiction in, and power to determine all matters and questions, civil or criminal; that is the impressive and comprehensive jurisdiction which it is our duty to maintain; see here again Art 58 of the Constitution on the preservation of the existing jurisdiction.."[19]

Thus, whether or not the High Court is claiming to protect an inferior court, it has a soundly-based constitutional entitlement to exercise jurisdiction in respect of contempts in any court. Where does that leave the Circuit Court and District Court? Does the fact that the High Court has jurisdiction in respect of contempts of the Circuit and District Court impliedly remove any jurisdiction that they might have independently? It seems that it does not.

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12 [1946] IR, at 82.
13 *Id*, at 86.
14 [1947] IR 213 (High Ct, Gavan Duffy P, Maguire and Davitt JJ).
15 *Supra*.
16 58 ILTR 157.
17 [1932] IR 548.
18 *Supra*.
19 [1947] IR, at 222-223.

Thus the question as to the respective contempt jurisdictions of these courts must be separately considered.

At common law the position was not entirely clear. *Miller* states that "jurisdiction to punish for constructive or indirect contempts committed out of court is vested solely in the *superior* as opposed to inferior courts".[20] As regards *in facie* contempts, however, the summary contempt jurisdiction appears to be available for all courts of record whether superior or inferior.[21] Both the Circuit Court and District Court are courts of record; they appear clearly to have summary contempt powers in respect of *in facie* contempts. As to constructive or indirect contempts, it may be argued, albeit tentatively, on the basis of *O'Ryan and Boyd*[22] and the decisions cited by counsel therein, that (i) the Circuit Court is a superior court of record, and (ii) whether or not it may be so characterised, it has since its establishment sufficient statutory authority to exercise a full contempt jurisdiction. If this argument is not acceptable, a second line thought may be pursued. *Borrie & Lowe's* analysis extends the contempt power more widely than *Miller's*. They state:

> "Whether *all* courts of record are vested with an inherent contempt jurisdiction has still to be directly tested. Although the general presumption of the caselaw is that they are, it might be possible to argue either that the jurisdiction is confined to the 'common law courts' or that, precedent apart, the inherent contempt jurisdiction vests only in superior courts. In other words doubts may be raised as to whether the simple statutory designation that a body is a court of record automatically means that a contempt jurisdiction is thereby vested. It is submitted that in absence of any other explanation statutory courts of record should be regarded as having an inherent contempt jurisdiction unless the statute expressly declares to the contrary."[23]

In this context it may be noted that, in *AG v O'Kelly*,[24] Sullivan P said:

> "The High Court contemplated in ... Article [64 of the 1922 Constitution] would obviously be a Court of Record[25]; and, as

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20 *Miller*, 62. In *AG v O'Kelly*, [1928] 308, at 320 (Sup Ct), Meredith J stated that the power to commit for contempt (without a jury) "is the birthright of every Superior Court of Record". Hanna J took a broader view. He considered it "necessary that every Court, no matter how established, should have the power to commit for contempt". Sullivan P's remarks quoted in the text, *infra*, are in accord with Hanna J's view. In *The State (DPP v Walsh*, [1981] IR 412, at 426 (Sup Ct), O'Higgins CJ expressed the view that the Courts of First Instance and the Supreme Court have a constitutional mandate to try summarily all forms of criminal contempt.

21 *Miller*, 57.

22 *Supra.*

23 *Borrie & Lowe*, 315 (footnote references omitted).

24 [1928] IR 308, at 318 (High Ct, Sullivan P, Meredith and Hanna JJ) (emphasis added).

25 Citing *McDermott v British Guiana Justices*, LR 2 PC 341 (1868).

jurisdiction to attack for contempt *is inherent in every Court of Record,*[26] such jurisdiction would vest in the High Court when established unless clearly and expressly negatived."

If *all* courts of record have a contempt jurisdiction, even in respect of constructive or indirect contempts, then the District Court, being a Court of Record, would share this jurisdiction, rather than being confined in *in facie* contempts.

Some further support for the broad view favoured by *Borrie & Lowe* may perhaps be gleaned from *In re M'Aleece*[27] in 1873, where it was held that "the Court of Assize sitting under a Commission of *Oyer and Terminer* is a Superior Court; and ... a commitment by it for contempt may be general and the particular circumstances need not be set out in the warrant".[28] Counsel in support of this proposition had stated it to be:

> "settled that the Superior Courts can commit for contempt upon a general warrant, without setting forth the nature of the contempt; but that Inferior Courts must state facts showing that there was a contempt."[29]

The case appears to proceed therefore on the basis that inferior courts did indeed have jurisdiction over contempt cases. Since, however, it did not have to address the scope of that jurisdiction (the Court with whose warrant it had to deal being held to be a superior court) it would seem mistaken to read a great deal on the issue into this case.

The *Rules of the Circuit Court 1950* contain wide-ranging provisions as to contempt of court, primarily in the area of civil contempt. Order 33, rule 4 provides that a judgment requiring any person to do any act other than the payment of moneys, or to abstain from doing anything may be enforced by an execution order by way of attachment or committal.[30] The rules relating to attachment and committal are set out in Order 36. Order 21, rule 6 deals with failure to comply with a witness summons, without lawful excuse: the Court, if satisfied that a person has been summoned to attend or give evidence or produce documents, and that his reasonable expenses have been tendered him, may attach him for contempt, or may impose a fine not

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26 Citing Wilmot CJ's opinion in *R v Almon*, Wilm 243 (1765), Blackburn J's judgment in *Skipworth's Case*, LR 9 QB 230 (1873) and Quain J's judgment in *R v Lefroy*, LR 8 QB 134, at 139 (1873).

27 IR 7 CL 146 (QB (Cr Side, 1873)).

28 *Id*, at 151 (*per* Whiteside CJ).

29 *Id*, at 147.

30 Any judgment or order against a *corporation* which is "wilfully disobeyed" may, by leave of the Judge, be enforced by an execution order by way of attachment or committal against the direction or other officers of the corporation, or any of them: Order 33, rule 5. As to supplementary powers of the Court in relation to the enforcement of mandatory orders and injunctions, see Order 33, rule 26.

exceeding £10, with one month's imprisonment in default of payment.

An express power to commit for *in facie* contempt is conferred on the District Court by section 9 of the *Petty Sessions (Ireland) Act 1851:*

> "And if any person shall wilfully insult any Justice or Justices so sitting in any such Court or place, or shall commit any other contempt of any such Court, it shall be lawful for such Justice or Justices by any verbal order either to direct such person to be removed from such Court or place, or to be taken into custody, at any time before the rising of such Court by warrant to commit such person to gaol for any period not exceeding seven days, or to fine such person in any sum not exceeding two pounds".

In *Ex parte Tanner, MP,*[31] it was held that this statutory power had not diminished the power of the magistrates to hold to good behaviour in the case of contemptuous words. Palles CB said:

> "As to that argument I shall only state my view of the ordinary rule of construction of statutes. If you have a jurisdiction or privilege attached to a court, a corporation, or individual, you cannot, as a general rule, repeal or take away that by an affirmative statute which gives it an additional right, because the two things can exist together. You are bound to show either an express repeal, or a repeal by implication, and a repeal by implication, speaking generally, arises only from inconsistency of legislation. There is nothing inconsistent between an express statutable power to punish for contempt, by sending to prison for seven days, and a power to prevent a repetition of that offence, by holding to good behaviour. My opinion is that both powers exist".[32]

It is useful to record what *Woods* has to say on the power of the District Court in relation to civil contempt:

> "The question of whether or not the District Court possesses an inherent jurisdiction to compel compliance with its orders in civil cases by way of attachment and committal of an unwilling party in contempt of its orders (as in the case of orders made by the High and Circuit Courts) remains unresolved. The negative view may be stated thus: the District Court, unlike the other courts, does not possess an inherent jurisdiction to compel compliance with its orders in civil cases in the absence of a statutory provision setting out its powers in case of such non-compliance. The only power to commit for contempt vested in the District Court is set out in section 9 of the Petty Sessions (Ir) Act, 1851, and deals with contempt committed in the face of the Court.

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31 *Judgments of the Superior Courts (Ireland)* 343 (Ex Div. 1889).

32 *Id.* at 346.

The positive view is that if a Court is empowered to make an order which is intended to be binding on the parties to the action it must have power to compel compliance with the terms of any order which it makes, otherwise the administration of justice will be brought into disrepute. In the absence of some reasonable alternative course to secure compliance with the terms of the order a committal order may have to be made to vindicate the authority of the Court. Furthermore, whatever justification there may have been for the view that the District Court must rely on statute for the exercise of its every power, the proposition in now unsustainable since the District Court was constituted a court of record (see s.13 of the Courts Act, 1971) and, in this regard, has the same status as the Circuit Court (see section 21 of the Courts (Suppl Prov) Act, 1961). Accordingly, the argument goes, the District Court does possess an inherent jurisdiction to commit for contempt of its civil orders which are made within jurisdiction and intended to be binding on the parties, and in respect of which no other reasonable means of enforcement is available and this inherent jurisdiction is not inhibited by the absence of rules of procedure for attachment and committal".[33]

As regards appeals, it seems that there is a right of appeal in civil and criminal contempt from the District Court to the Circuit Court, from the Circuit Court to the High Court and from the High Court to the Supreme Court, respectively. It appears that the Court of Criminal Appeal has no function in the matter of criminal contempt save in cases where a prosecution has been brought by indictment or in appeals from the Special Criminal Court.[34] In the light of *The State (DPP) v Walsh*,[35] it may at least be queried whether the bifurcated process envisaged as constitutionally mandatory involves sufficient jury participation to render the case eligible for appeal to the Court of Criminal Appeal rather than to the Supreme Court directly.

Finally, as regards initiation of proceedings, this may be done by the Director of Public Prosecutions where criminal contempt is in issue.[36] It is also possible for a party affected, or likely to be affected, by an alleged criminal contempt, to initiate proceedings. This occurs frequently in cases where the *sub judice* rule has allegedly been broken. It will be recalled that in *In re MacArthur*,[37] where Mr MacArthur initiated proceedings for alleged breaches of the *sub judice* rule, Costello J adjourned the application with liberty to re-enter until the Director of Public Prosecutions might indicate what steps he proposed to take in the light of an investigation which he had caused to be

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33 J Woods, *District Court Practitioner - Remedies*, 52 (1987). See also *Clune v District Justice Clifford*, [1981] ILRM 17 (High Ct, Gannon J).

34 Cf the *Courts (Supplemental Provisions) Act 1961*, section 12, see also *In re O'Kelly*, 108 ILTR 97 (CCA, 1973). As to the former limitation on appeals, see *AG v Kissane*, 32 LR Ir 220 (CA, 1893).

35 *Supra.*

36 See J Casey, *The Office of the Attorney General in Ireland*, 119-120 (1980).

37 [1983] ILRM 355 (High Ct, Costello J, 1982).

carried out into media coverage relating to Mr MacArthur. Costello J was of the view that Mr MacArthur had made out a *prima facie* case that the publication of a photograph of him constituted a contempt; but Costello J felt that he could not and should not then make a conditional order of attachment. He said:

> "Heretofore, in this country and in England applications in relation to criminal contempt in connection with pending criminal trials have been made by one or other of the law officers and presently the matter is being considered by the Director of Public Prosecutions. I think it is undesirable when the Director of Public Prosecutions is investigating possible contempts of court for an *ex parte* application to be brought by an accused himself pending the outcome of the Director's investigations."[38]

The Court has power, on its own motion, to originate proceedings for criminal contempt. In *In re the Youghal Election Petition*,[39] in 1869 a barrister was reported in a newspaper as having made a speech imputing gross judicial misconduct to a judge before whom an election petition was tried, as well as to the Court of Common Pleas, on a case stated by that judge. The publication "having casually come to the knowledge of the members of the Court", they considered the language a contempt, and directed the barrister to attend to answer for his alleged contempt.

One objection made on behalf of the barrister was that the Court could not of its own motion, in the absence of a complainant, originate proceedings, or take any action in respect of any contempt, however gross, unless committed in the presence of the Court. On behalf of the Court, Monahan CJ said:

> "We cannot accept this doctrine; we are of opinion that, if a contempt of Court has been committed by any one, whether in the presence of the Court or not, the Court has jurisdiction to originate proceedings to punish such contempt."[40]

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38 *Id*, at 358.
39 IR 3 CL 537 (CP, 1869).
40 *Id*, at 550.

CHAPTER 8: THE RESPECTIVE ROLES OF JUDGE AND JURY

In this Chapter we examine the present law relating to the respective roles of judge and jury in contempt hearings. As will become immediately plain, the subject is a difficult one, raising complex constitutional issues, some of which have yet to be fully addressed by the courts. The leading decision is that of the Supreme Court in *The State (DPP) v Walsh*.[1] The best way of considering this case and its further implications is to note first some important earlier decisions on the subject.

Precursors to *Walsh*

The question of the right to jury trial in proceedings for contempt arose under the 1922 Constitution. Article 72 provided that:

> "[n]o person shall be tried on any criminal charge without a jury save in the case of charges in respect of minor offences triable by law before a Court of Summary Jurisdiction and in the case of charges for offences against military law triable by Court Martial or other Military Tribunal."

In *AG v O'Kelly*,[2] the High Court rejected the contention that, in a case of alleged criminal contempt, trial by jury was automatically required. Sullivan P and Hanna J conceded that a literal construction of Article 72 supported this contention, but took the view that it was proper to interpret that Article in the light of the other provisions of the Constitution. Article 64 contemplated the establishment of the High Court as a court of record, to which the power of attachment for contempt would inhere "unless clearly and

1 [1981] IR 412 (Sup Ct).
2 [1928] IR 308 (High Ct).

expressly negatived".[3] Moreover, Article 73, which provided for the continuation, with full force and effect, of the laws in force before 1922, subject to their being consistent with the Constitution, carried forward the summary judicial power of attachment for contempt, since Article 72 was confined in its operation "to trials of criminal charges by ordinary criminal process".[4]

Counsel for Mr O'Kelly had argued that the historic power to attach for contempt no longer applied, for two reasons: first, that it was a prerogative power derived from the British Crown on the presumed presence in Court of the King, which was inconsistent with the Preamble and Article 2 of the Constitution, and, secondly, that it was inconsistent with the Constitution that the courts established by it "should have any tradition that they commenced to operate without any inherent or implied powers by long usage, or derived from the well of the common law".[5]

Only Hanna J dealt with these arguments. As to the first, he thought that "the answer ... is that it does not very much matter in the exercise of the power whence it is derived if the court in fact has it".[6] This succinct disposition of the issue must now be seen in the light of later judicial decisions on the extent to which the prerogative power of the British Crown survived, not merely the enactment of the Constitution of Saorstat Eireann, but also that of the Constitution of Ireland. If indeed the inherent jurisdiction of the High Court to attach for contempt was exclusively part of the royal prerogative, it might be that it did not so survive.[7]

Hanna J disposed of Mr O'Kelly's second argument by referring to section 17 of the *Courts of Justice Act 1924*, which described the High Court as a Superior Court of Record. He went on to say that:

> "[i]t is necessary that every Court, no matter how established, should have the power to commit for contempt. The Courts of Dail Eireann established under the decree of the first Dail (June 29th, 1920) claimed this power. In my view, whether we are the grantees of the powers of

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3 *Id*, at 318 (*per* Sullivan, P). See also *id*, at 331 (*per* Hanna J).

4 *Id*, at 318 (*per* Sullivan, P). See also *id*, at 332 (*per* Hanna J):

> "The proper subject-matter of ... Article [72] as to trial by jury is the body of substantive criminal law, similar to that which exists in every civilised country, of specified offences with specified punishments."

5 *Id*, at 331 (*per* Hanna, J).

6 *Id*.

7 See *Byrne v Ireland* [1972] IR 241, *Webb v Ireland* [1988] IR 353. See further R Byrne and W Binchy, *Annual Review of Irish Law* 1987, 104-107 (1988), Kelly, *Hidden Treasure on the Constitution* (1988) Dublin ULJ 1; Constitutional Interpretation: Gwynn Morgan, *Three Cautionary Tales*, *id*, 24. (While the question lies largely outside the scope of this Consultation Paper, it should be noted that the unanimous view in *Webb* that the royal prerogative ceased to exist in any form in Irish law after the enactment of the Constitution of Saorstat Eireann is severely criticised by Professor Kelly).

the former Courts in this country through the operation of the statutory provisions[8] referred to, or are the descendants of the Dail courts, or were wholly created from the deliberations of our own Legislature, we are fully armed with this most essential power."[9]

This argument is less than fully convincing. It is scarcely true that it "is necessary that every Court, no matter how established, should have the power to commit for contempt". It may indeed be necessary for contempt of court to be punished but that does not mean either that that court should have the power to punish contempt or that the court which has the power of punishment should act as judge and jury.

A requirement that criminal proceedings for contempt be initiated by the Attorney General (or, today, the Director of Public Prosecutions) and brought before a jury in the way any other criminal prosecution is treated would not be self-evidently misconceived.

Hanna J's partial reliance on the experience of the Dail courts, should scarcely encourage the belief that he actually seriously entertained the view that the court structure prescribed by the 1922 Constitution was in any respect referable to the Dail Courts.

It is worth recording Meredith J's summary disposition of the constitutional issue:

> "The jurisdiction is, in fact, as wide as the requirements of the case - the protection of the Court in the administration of justice. It need not be further or otherwise defined. Also, it is unnecessary to show that it was transferred to, or expressly conferred upon, this Court, for it is the birthright of every Superior Court of Record."[10]

The notion of attachment for contempt, without jury trial, as being the "birthright" of such Courts is hard to defend. As has been mentioned, a requirement of jury trial is scarcely self-evidently misconceived. Moreover, Meredith J's failure even to address, and explain away, Article 72 makes his analysis unconvincing.

In *Re Earle*,[11] the Supreme Court endorsed the High Court decision in *O'Kelly* with some professed enthusiasm, but on a basis that raises a difficulty. In *Re Earle*, the appellant had failed to comply with the terms of an order of *habeas corpus* and had been sentenced to a term of imprisonment for her contempt. Her assertion that she ought to have had a trial by jury met with no favour.

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8 In fact Hanna, J had referred only to section 17 of the 1924 Act.
9 [1928] IR at 331.
10 *Id*, at 320.
11 [1938] IR 485 (Sup Ct, 1937).

Fitzgibbon J referred to *O'Kelly* and observed:

> "That decision is not binding upon this Court, but, having read the judgments with care...., I am quite satisfied to accept and adopt the reasons given by the Judges of the High Court for affirming the existence of the jurisdiction notwithstanding the provisions of Art. 72. If there be any ground of distinction between the facts of that case and those of the present one, it appears to me that there is more justification for the existence and exercise of a summary power to punish an offender who is guilty of open obstruction to and interference with the execution of the orders of the Court than in the case of one whose offence is that of defaming a Judge or the administration of justice itself, as the former offence actually stops for the time being the machinery of the Courts in the execution of the law, which could proceed without interruption pending the trial of a defamer.
>
> The objection that imprisonment under an order of attachment or committal for contempt of Court, made by a Court of Judge without the intervention of a jury, is repugnant to the Constitution therefore fails, in my opinion ...."[12]

Murnaghan J said of Article 72 that its purpose:

> "was to secure trial by jury to persons to be tried on any criminal charge, and, unless the Constitution should be amended in this respect, this right to trial by jury could not be taken away. The Article necessarily, however, made exceptions in the cases specified - minor offences triable before Courts of Summary Jurisdiction and offences against military law. The question, therefore, is this: Does a Court which commits a person for contempt try that person on a criminal charge within the meaning of Art. 72? I am of opinion clearly that it does not. Committal for contempt of Court is an essential portion of the jurisdiction of the Court so that its orders may not be rendered ineffective, and it is a misuse of language to say that the court which commits for contempt tries a person upon a criminal charge. It is true that certain forms of contempt of court may amount to crimes and be the subject-matter of indictment. If these contempts are proceeded against in this way they must be tried before a jury. But the High Court uses the process of committal to make its orders effective, and in so doing it is not conducting a trial upon a criminal charge. It was not the intention of Art. 72 of the Constitution that the Court should be powerless to execute its own orders, and that its only remedy should be to send forward disobedient citizens for trial by indictment before Judge and jury. The High Court had previously decided in *Attorney General v O'Kelly*, that Art. 72 of the Constitution did not prohibit the Court from making orders for committal for contempt of court, a

12 *Id*, at 494.

decision which in my opinion is quite correct."[13]

The effect of *Earle* thus was to provide a rationale for the court's draconian committal powers in *civil* contempt but it might be argued that it also undermined the rationale for such powers in cases of criminal contempt.

In *AG v Connolly*,[14] the issue arose yet again, this being the first case decided under the new Constitution. Counsel for the defendant, who asserted a right to trial by jury in a case of alleged scandalising of the court, concentrated on the change in the structure of the new provisions for criminal trials: Article 38.1 of the 1937 Constitution provides that no person is to be tried on any criminal charge "save in due course of law" - a phrase different from that appearing in Article 72 of the 1922 Constitution. Gavan Duffy P considered that this change of structure did:

> "not meet the difficulty ... that, if counsel for the defendant are right, the High Court of Justice is now shorn of a necessary jurisdiction enjoyed by its predecessors and that that jurisdiction is abrogated, not because the Constitution declares that this court shall not enjoy as ample a jurisdiction as its predecessors, but because the Constitution makes no exception preserving this old jurisdiction to its new High Court, when making comprehensive declarations to secure trial by jury on a criminal charge, except in specified particular classes of cases. Mr Justice Sullivan considered the nature, origin and purpose of the jurisdiction and showed that a motion for attachment had not been regarded as a criminal trial; he cited high authority against the literal interpretation of a law, where it did not correspond with the most probable intent; and concluded that the jurisdiction must have been vested in the High Court, in view of its status under the Constitution, unless clearly and expressly negatived. That was a remarkable judgment; it has stood for nearly twenty years; and I think the unanimous decision is a precedent concerning this Court for the construction of the new Constitution, in the absence of some cogent reason for distinguishing it and making it irrelevant where the same question of construction is raised again. I find no sufficient ground in the revised provisions as to criminal trials for rejecting the reasoning in its application to our Constitution, and it is significant that Article 58, s1 of our Constitution expressly continues the jurisdiction of the former High Court, until the law determines otherwise."[15]

Gavan Duffy P went on to reject the argument that *O'Kelly* could be distinguished on the basis that, in *Connolly*, the High Court was claiming to protect an inferior court (the Special Criminal Court):

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13 *Id*, at 502-203.

14 [1947] IR 213 (High Ct. Gavan Duffy P, Maguire and Davitt, JJ).

15 *Id*, at 221-222.

"The judgments of 1928, so far as they relied on the need for power in the High Court to protect itself, were directed to another aspect of the problem, but the value of that decision here lies in its assertion of the principle of construction that prevents general directions for regular and special criminal courts from being used to deprive the High Court by implication of one of its proper functions and the whole Court held that a motion for attachment could not have been intended to fall within a guarantee for trial by jury, which had in view a criminal trial in the ordinary acceptation of that term. One of the proper functions of the High Court is the important and necessary power of giving effective protection to inferior courts against constructive contempt. I have no doubt that the Court of King's Bench before the Treaty must, on the English decisions, have held that it had that power, had the jurisdiction been challenged, and the High Court in 1924 assumed in *AG v Cooke*[16] and in *Re O'Neill*,[17] that it had the same power. And this Court, overruling an argument to the contrary, decided that it had that power in *AG v O'Ryan and Boyd*.[18] The Constitution (Article 34.s3, 1°) - reproducing the plan of Article 64 of the former Constitution - invests this Court with full original jurisdiction in, and power to determine all matters and questions, civil or criminal; that is the impressive and comprehensive jurisdiction which it is our duty to maintain; see here again Article 58 of the Constitution on the preservation of existing jurisdiction."[19]

In *Re Haughey*,[20] the matter again arose. In the High Court, Henchy J expressly declined to decide whether jury trial was necessary in respect of the types of offence created by section 3(4) of the *Committee of Public Accounts (Privilege and Procedure) Act 1970*. In the Supreme Court, O Dalaigh CJ (for the Court) said:

"Counsel for the Attorney General has argued .... that the sub-section can, constitutionally, allow a summary trial of the charge in question here as a case of contempt of court. Under the Constitution of the Irish Free State in *Attorney General v O'Kelly*[21] and under the Constitution of Ireland in *Attorney General v Connolly*,[22] the High Court tried charges of contempt of court without a jury, i.e. summarily. Neither case was a case of *ex facie* contempt, or so close thereto as to amount to an interference with a pending or current trial. This Court is not now called upon to consider whether *O'Kelly's Case* and *Connolly's Case* were correctly decided; for the purpose of the Attorney-General's submission the Court accepts that they were. It is enough

16 58 ILTR 157.
17 [1932] IR 548.
18 [1946] IR 70.
19 [1947] IR, at 222-223.
20 [1971] IR 217, at 228.
21 *Supra*.
22 *Supra*.

for this Court now to say that these two cases cannot assist the Attorney General's submission. The High Court in the present case was not dealing with a charge of contempt of court. The impugned sub-section does not purport to make the offence here in question 'contempt of court'; it does no more than direct that the offence, which is an ordinary criminal offence, shall be punished in like manner as if the offender has been guilty of contempt of court, that is to say, it defines the punishment for the offence by reference to the punishment for contempt of the High Court. Moreover, it would not be competent for the Oireachtas to declare contempt of a committee of the Oireachtas to be contempt of the High Court. This is an equation that could not be made under the doctrine of the tripartite separation of the powers of government. The reasoning in *O'Kelly's Case* and in *Connolly's Case* does not support the Attorney General's submission but, on the contrary, it is inimical to it. The exception which the High Court (under Article 72 of the Constitution of the Irish Free State) in *O'Kelly's Case* and (under Article 38 of the Constitution of Ireland) in *Connolly's Case* engrafted on the injunction for trial by jury is based upon the inherent jurisdiction of the High Court to ensure the administration of justice without obstruction. That is to say, the exception finds its source and justification in another article of the Constitution: Article 64 in the Constitution of the Irish Free State and Article 34 in the Constitution of Ireland. Neither *O'Kelly's Case* nor *Connolly's Case* makes any exception in respect of the trial of ordinary criminal offences which are not minor offences."[23]

The Chief Justice identified a further barrier to the trial in the High Court without a jury of the offence alleged to have been committed in the case before the court. By the provisions of Article 38, s2 of the Constitution, the trial of minor offences without a jury was restricted to courts of summary jurisdiction. It was true that the High Court possessed a universal jurisdiction in matters civil and criminal, but that did not make it a court of summary jurisdiction within the provisions of Article 38, s2:

> "A court of summary jurisdiction within the meaning of that section is one whose criminal jurisdiction to try and to convict is restricted to the trial of minor offences. The term 'court of summary jurisdiction' was well known prior to the enactment of the Constitution; the expression appeared in almost identical words in the Constitution of Saorstat Eireann and, prior to that, in s13 of the Interpretation Act, 1889. Under our law that jurisdiction is exercised only by the District Court. In accordance with the provisions of s5 of Article 38, the jurisdiction of the High Court to try criminal offences is a jurisdiction to try them only with a jury."[24]

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23 [1971] IR. at 252-253.

24 *Id.* at 254.

In *Keegan v de Burca*,[25] the defendant had been given a sentence of imprisonment of indefinite duration for refusing to answer a question put to her in a civil action for an injunction, in which she was a defendant. The Supreme Court, by a majority,[26] held that, since this conduct amounted to *in facie* contempt, it should have been punished by a sentence of definite duration. O Dalaigh CJ noted as other examples of criminal contempt "words written or spoken or acts calculated to prejudice the due course of justice or disobedience to a writ of habeas corpus by the person to whom it is directed ...".[27] He went on to observe that it was:

> "unnecessary in the present case to deal with the question of when a person accused of criminal contempt shall be tried by jury pursuant to Article 38, s5, of the Constitution. The present case is one in which the defendant stood accused of criminal contempt *in facie curiae* and could be dealt with summarily by the court. The other examples of criminal contempt which I have already given are also within the category of those which may be tried summarily. It is unnecessary to explore those categories of criminal contempt which would not be triable summarily and, as this Court said in *Haughey's Case*, it is not necessary to consider whether *Attorney General v O'Kelly* and *Attorney General v Connolly* were decided correctly."[28]

In *McEnroe v Leonard*,[29] Parke J held that a jury trial was required for cases of alleged civil contempt in failing to obey a court order, as such conduct amounted to a crime. He accepted that there were differences as between civil and criminal contempt, so far as the object, nature and duration of the penalties were concerned but considered that "for the purposes of the present case, these distinctions do not appear material, because, although the object of the punishment and the nature of the punishment which may be imposed may differ, punishment by way of deprivation of liberty may be imposed and therefore the result from the defendant's point of view is much the same: namely, a period of imprisonment".

Parke J noted that, in his dissenting judgment in *Keegan v de Burca*,[30] McLoughlin J had not differed from his brethren on any point of principle relevant to *McEnroe v Leonard*, and had said:

> "An acceptable definition of crime at common law is that it is an act or default which is an offence against the public or an act or default which is contrary to the order, peace and well-being of society."

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25 [1973] IR 223 (Sup Ct, 1972).
26 O Dalaigh CJ and Walsh J; McLoughlin J dissenting.
27 [1973] IR, at 227.
28 *Id*. at 227-228.
29 Unreported, High Ct, Parke J, [illegible] December 1975 (1974-4186P).
30 [1973] IR 223, at 235.

Parke J commented:

> "Whatever about being an offence against the public, it seems to me that failing to obey an order of the Court is clearly within the second part of the definition."

He derived support from the decision of the English Court of Appeal in *Comet Products (UK) Ltd v Hawkex Plastics Ltd*,[31] whose reasoning seemed to him "entirely consistent" with McLoughlin J's decision.

Parke J went on to analyse the issue as follows:

> "It is well settled that the state of mind of the defendant is of prime importance. Inadvertence or mistake in failing to obey an order is not contempt. There must be a wilful or otherwise unexercisable contempt.
>
> It appears, that to sustain a charge of contempt, two things must be established: (1) an overt act, namely failure to obey the order, and (2) *mens rea*, in the sense that no lawful or innocent reason can be advanced for such disobedience. If these are established, the defendant may be sentenced to an indeterminate, or indeed, indefinite term of imprisonment.
>
> I am therefore of opinion that failure to obey a Court order is a crime. It is not a 'minor offence' within Article 38.2 of the Constitution. I am therefore of opinion that the determination of the issue as to whether or not a person is guilty of such contempt comes within Article 38.5 of the Consitution and must be determined by a jury."

In *The State (Commins) v McRann*,[32] Finlay P rejected the argument that an accusation of contempt in failing to obey an order of the Circuit Court was a criminal charge in respect of a non-minor offence which should have been tried with a jury. Finlay P declined to follow *McEnroe v Leonard*,[33] primarily on the basis that he was not satisfied that the issues arising in *McRann* had been fully argued in the earlier case. The decision of *Comet Products (UK) Ltd v Hawkex Plastics Ltd*,[34] on which Parke J had relied, at least to the extent of Lord Denning MR's judgment, was that proceedings for the committal of a person to prison for civil contempt were in the nature of criminal proceedings and that, accordingly, a person charged with contempt could not be compelled to answer interrogatories, or to give evidence against his will, so as to incriminate himself. Finlay P noted that "[n]o direct question arose in that case as to the right of a person against whom civil contempt was alleged to trial by a jury: nor was any suggestion made that such a right

31 [1971] 2 QB 67 (CA).
32 [1977] IR 78 (High Ct, Finlay P, 1976).
33 *Supra*.
34 *Supra*.

existed in English Law".[35]

Moreover, Finlay P considered that McLoughlin J's definition had to be read in the light of the decision of the majority of the Supreme Court, who appeared "clearly to have endorsed the long standing procedure by which a person alleged to be guilty of civil contempt (in the sense of disobedience of an order of the court committed by an act or omission outside the court) should be dealt with summarily by the court itself".[36]

Turning to the substantive issue, the President reviewed the earlier decisions on the right to a jury trial. He considered that the reasoning of the Court in *O'Kelly*[37] "appl[ied] in principle equally to what is known and described as civil contempt".[38] Moreover, Article 72 of the 1922 Constitution was "identical in effect (though not in words)"[39] to the right provided by Article 38 of the 1937 Constitution, and there was a similar identity as between Article 64 of the 1922 Constitution and Article 34 of the Constitution.

After noting that in *Re Earle*[40] the Supreme Court had endorsed *O'Kelly's*[41] *rationale*, the President referred to *Connolly*,[42] where under the 1937 Constitution, the High Court had taken the same view. All of these were extremely persuasive precedents; but there was, in the President's view, an additional reason why it would be incorrect to interpret Article 38 as depriving the courts of their long established jurisdiction to punish in a summary manner contempts of *all* kinds:

> "The rights of a person to be tried on a criminal charge, as provided by Article 38, s5, of the Constitution of 1937 are guaranteed in terms which are, for all practical purposes, identical to the terms of Article 30 of the Constitution. If the contention made on behalf of the prosecutor were correct then, on the present state of the law it seems to me that, in the event of a court's order having been disobeyed or in the event of a court suffering contempt in its face (for in this context I cannot distinguish between civil and criminal contempt nor between contempt in the face of and outside a court), such court must rely upon the intervention of the Attorney General (or of the Director of Public Prosecutions) to present an indictment and try before a jury the person who is alleged to have been guilty of such contempt. If that interpretation of the provisions of Article 30 and Article 38 of the Constitution is correct, then it seems to me that to construe Article 38 as depriving the Courts of their right to enforce their own orders is to

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35 [1977] IR, at 84.
36 *Id*, at 85.
37 *Supra*.
38 [1977] IR, at 86.
39 *Id*.
40 *Supra*.
41 *Supra*.
42 *Supra*.

deny the fundamental tripartite division of powers which underlies the entire Constitution. In my opinion, it is not fanciful to suppose that a situation could arise in which the Court was obliged to restrain directly the commission of an act by the Executive, or by an agent of the executive, so as to preserve the right of an individual. If the contention made on behalf of the prosecutor were valid, then by non-activity on the part of a servant of the Executive (the Attorney General or the Director of Public Prosecutions) the Executive could paralyse the capacity of the Courts to enforce their will. Such a consequence would not only be grave but, in my view, would be a vital infringement of the independence of the Courts as guaranteed by the fundamental principle of the tripartite division of power."[43]

For these reasons Finlay P concluded that the inherent jurisdiction of the courts to deal summarily with contempt, "at least as enjoyed by courts of record",[44] had not been in any way altered or diminished by the provisions of the 1937 Constitution, and that Article 38 had to be interpreted as qualified by the provisions of Article 34.

In *The State (H) v Daly*,[45] in a judgment delivered the same day as *McRann*, Finlay P applied *McRann's ratio* on the question whether an accusation of civil contempt in disobeying an order of the Circuit Court required trial by jury. In *Daly*, the matter was appealed to the Supreme Court. There, O'Higgins CJ (Henchy and Parke[46] JJ concurring) disposed of the matter in a single sentence:

"I agree with [Finlay P's] conclusion and with the reasons for it which are set out in th[at] decision...."[47]

The *Walsh* Decision

In *The State (DPP) v Walsh*,[48] the defendants, members of an association called the Association for Legal Justice, issued a press statement criticising the judges of the Special Criminal Court for its alleged lack of judicial independence and for having "so abused the rules of evidence as to make the court akin to a sentencing tribunal". These comments, which arose out of a trial of Marie and Noel Murray for the capital murder of a Garda, were published in the Irish Times in the course of a news item which was attributed to its political correspondent. The Director of Public Prosecutions applied *ex parte* to the President of the High Court for orders of attachment or committal and sequestration for contempt of the Special Criminal Court to

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43 [1977] IR, at 88.
44 *Id.*
45 [1977] IR 90 (Sup Ct, aff'g High Ct, Finlay P 1976).
46 Parke J's concurrence is of particular interest in view of how Finlay P had dealt with Parke J's analysis of the issue in *McEnroe v Leonard*, *supra*.
47 [1977] IR, at 98.
48 [1981] IR 412 (Sup Ct).

be directed to the newspaper, its editor, the political correspondent and to members of the association. The first three respondents gave an explanation of their involvement in the publication and apologised therefor. The President made no order against these respondents and adjourned the further hearing of the application of the DPP for the attachment of the remaining respondents. At the further hearing, Counsel for the fourth and fifth respondents submitted that the President lacked jurisdiction, in the absence of a jury, to try the respondents' upon criminal charges of contempt of court. The President tried this issue as a preliminary issue and rejected the respondents' claim to be entitled to trial by jury. The Supreme Court unanimously disallowed the respondents' appeal.

It appears from the judgments delivered in the Supreme Court that the fourth and fifth respondents did not put in issue any of the facts on which the application for committal or attachment was based. They also accepted that the statement which they admitted making, if untrue and baseless, amounted to a criminal contempt. They argued however that, as such, it amounted to a crime of such seriousness as not to qualify for summary trial under article 38.2 of the Constitution. They conceded that a summary jurisdiction existed in respect of criminal contempt committed *in facie curiae*, as well as in respect of such constructive contempt as had the effect of impeding, threatening, or endangering a fair trial of pending proceedings. In respect of such contempt, they said that the courts were bound to act quickly in the interests of justice and this requirement for urgent action was the source and basis of a summary jurisdiction. They submitted, however, that no such considerations applied to contempt by scandalising the court.

While the court was unanimously of the view that, at least in a case such as the instant case where no issue of fact remained to be resolved, the High Court had an inherent power, as found in *O'Kelly*[49] and *Connolly*[50], to dispose summarily of the offence of scandalising the court, they differed in their reasons.

Henchy J (with whom Griffin and Kenny JJ agreed) rejected the rationale on which *O'Kelly* and *Connolly* were based. He drew attention to the fact that in the former case, Sullivan P, in rejecting a literal construction of Article 72, had cited a canon of construction laid down by the Court of Exchequer in *Stradling v Morgan*[51] as follows:

> "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to

49 *Supra.*
50 *Supra.*
51 1 Plowd 199.

permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which has consonant to reason and good discretion."

Sullivan P, having cited this passage, had added:

> "I am therefore entitled to consider the other articles of the Constitution in order to arrive at the interpretation of Article 72."[52]

Sullivan P's citation of the passage from *Stradling v Morgan* was part of a longer citation from a later decision of *Cox v Hakes*[53], in which the House of Lords had held that no appeal lay by the Crown against an order of *Habeas Corpus* issuing from the Queen's Bench. Although the relevant provisions of the *Judicature Act 1873* enabled appeals to be heard from "any judgment or order", the House of Lords considered that the application of the maxim *generalia specialibus non derogant*, i.e. that specific procedures should not be taken to be altered by general words, meant that the well established procedures in relation to *Habeas Corpus* were not intended by Parliament to be affected by the general provision in the *Judicature Act*. In reaching that conclusion, Lord Halsbury LC drew on the passage in *Stradling v Morgan*, which laid down a more general principle of statutory construction and one which is not confined to the maxim *generalia specialibus non derogant*.

Henchy J, however, somewhat surprisingly treated the citation of this passage as fatal to the ratio of Sullivan P's judgment. The learned judge arrived at this conclusion because the Supreme Court in the *State (Browne) v Feran*[54] had rejected the approach of the House of Lords in *Cox v Hakes* when considering whether under the Constitution of Saorstat Eireann and subsequently under the Constitution of Ireland an appeal lay against the granting of an order of *Habeas Corpus* by the High Court. The Supreme Court (reversing the decision of the former Supreme Court to a different effect in *The State (Burke) v Lennon*)[55]held that the maxim *generalia specialibus non derogant* was not an appropriate canon of construction when the provisions of the Constitution, in contrast to a Statute, fell to be interpreted. Henchy J also quoted the observation of Walsh J in *Browne* to the effect that:

> "In the construction of a Constitution words, which in their ordinary

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52 [1928] IR, at 317.
53 15 AC 506.
54 [1967] IR 147.
55 [1940] IR 136.

meaning import inclusion or exclusion, cannot be given a meaning other than their ordinary literal meaning save where the authority for so doing can be found within the Constitution itself."[56]

Applying this literal approach, by which he considered himself bound, Henchy J concluded that, since criminal contempt was clearly a criminal offence, and, in the circumstances of the instant case, if proved, would undoubtedly be a major such offence, the respondents were *prima facie* entitled to a trial by jury. He went on to hold, however, that the constitutional guarantee of a trial *with a jury* posited a particular mode of trial in which controverted issues of fact would be determined by the jury but questions of law would be for the court to resolve. Accordingly, where there were what he described as "live and real issues of fact" to be determined (such as whether the accused committed the act alleged), the accused had a *prima facie* right to have those issues of fact determined by a jury. But he also considered that, in cases of criminal contempt, the question whether those facts amounted to the contempt of court charged must be deemed to be a question of law to be decided by the judge. The statement in *Browne* that the literal construction of a constitutional provision could be modified by some other provision of the Constitution applied, in his view, not merely to the express provisions of the Constitution but also to those provisions which have to be imported by necessary implication. To allow a jury to determine not merely the issues of fact but also whether in law they amounted to the offence charged would, in the case of criminal contempt, be seriously at variance, in the view of Henchy J, with the express constitutional guarantee of the independence of judges and the implied requirement that fundamental fairness of procedures should be observed. In what would seem to be the central passage of his judgment, he continued as follows:

> "A jury has an unqualified and unreviewable power (as distinct from a right) to render a verdict of not guilty in the case which they have jurisdiction to try: see Devlin on *Trial by Jury* (1965) ed p87. Thus, if the question whether a particular act of alleged contempt, which was plainly a criminal contempt and inimical to basic fairness of procedures, had to be decided by a jury, the jury, by a perverse verdict of not guilty, could set at nought the constitutional guarantee that basic fairness of procedures will be observed and could at the same time undermine the independence of the judiciary. The committal to the arbitrament of laymen of the question whether the conduct complained of amounted to a criminal contempt is singularly unsuitable for a jury because of the varying standards and values that juries would be apt to apply; because such a question (being a question of the minimum standards of behaviour necessary for the due administration of justice in the courts) calls for an answer which cannot be given in the laconic and uninformative verdict of untrained and inexperienced laymen; because by their verdict the jury may put a wrongful acquittal beyond correction;

56 [1967] IR, at 159.

because such an incorrigible acquittal may leave a contemned judge in a state of odium and rejection in the minds of the public, to the detriment of his independence: and, finally, because such verdicts may have to be allowed to stand although they condone breaches of the requirement of fundamental fairness of procedures.

"The ultimate responsibility for the setting, and the application, of the standards necessary for the due administration of justice must rest with the judges. They cannot abdicate that responsibility, which is what they would be doing if they allowed juries of laymen to say whether the conduct proved or admitted amounted to criminal contempt. It may be said that it is short of the ideal that a judge may sit in judgment on a matter in which he, or a colleague, may be personally involved, Nevertheless, in such matters, judges have to be trusted, for it is they and they alone who are constitutionally qualified to maintain necessary constitutional standards ...."[57]

Henchy J accepted that these observations were *obiter*, since no disputed issue of fact arose in the instant case. He added that, if jury trials were held to be a permissible or proper mode of trying the factual issues of some major contempt charges, it should be held to be the correct mode of trying such issues in all major contempt charges. He said that any other approach would be arbitrary and discriminatory and hence not consistent with the equality before the law guaranteed by Article 40, s1.

O'Higgins CJ (with whom Parke J agreed) adopted a different approach. On one matter, however, he was in clear agreement with Henchy J: the concession by the respondents notwithstanding, no distinction could be drawn between different forms of criminal contempt so far as a right to trial by jury was concerned. He also accepted that, if Article 38.5 stood alone, the express requirement that "no person shall be tried on any criminal charge without a jury" would inevitably entitle all persons accused of any such charge (unless it were a minor offence) to trial by jury. However, in common with Sullivan P it would seem, the Chief Justice was of the view that Article 38 s5 could not be considered thus in isolation. He went on:

"[Article 38.5] must be construed and considered as part of the Constitution and it should be given, if possible, a meaning and an application which does not lead to conflict with other articles and which conforms with the Constitution's general scheme."[58]

Since, under Article 30.3, all major criminal offences must be prosecuted in the name of the people and at the suit of the Attorney General or some other authorised person (i.e. under the present law the DPP) O'Higgins CJ concluded that, if criminal contempt was embraced by the provisions of Article

57 [1981] IR, at 438-440.
58 *Id*, at 425.

38.5, it followed inevitably that, in all cases of major contempt, the question as to whether the crime was prosecuted would depend on the decision of the DPP. This, in his view, was at variance with Article 34 providing that justice should be administered in courts established by law by judges appointed in the manner provided by the Constitution and also providing for the establishment of the High Court invested with full original jurisdiction and power to determine all matters and questions whether of law or fact, civil or criminal. These provisions were sufficiently extensive, he said, to authorise the courts to take any action necessary for the due administration of justice, including, where necessary, the power to try summarily those accused of interfering in any manner with the administration of justice.

The Chief Justice considered that his conclusions were reinforced by two further considerations. The first was the guarantee of judicial independence, which, as we have seen, also weighed heavily with Henchy J. The Chief Justice considered that this guarantee could not be honoured if judges had to seek assistance from other authorities where they were being attacked or derided in the discharge of their functions or court proceedings were being obstructed in some other way. He went on:

> "[I]mplicit in the guarantee ... of independence to judges in the discharge of their judicial functions is a recognition that such judges must be free and independent to act summarily, if necessary, to protect their judicial proceedings against criminal acts which are designed to interfere with the course of justice."[59]

The second consideration was:

> "the conditions which existed when the Constitution was enacted and ... what was well established and well known to be involved in the administration of justice by the courts. [He referred to the decision in *O'Kelly* and went on] .... That this jurisdiction was exercised fully and freely in the courts of Saorstat Eireann cannot be doubted. Therefore, I find no difficulty in concluding that when in the Constitution the people conferred the judicial power of Government on the judiciary and gave the duty of administering justice to judges, and established a High Court with full original jurisdiction in all matters civil and criminal, it was intended that these courts and judges should have and exercise precisely the same powers in relation to criminal contempt that had hitherto been exercised by similar courts in Saorstat Eireann."[60]

The Chief Justice, while differing from Henchy J who had held that the alleged contemnor had a *prima facie* right to trial with a jury, went on to say:

> "I do not doubt that there may be circumstances, the preventative action

59 *Id*, at 427.
60 *Id.*

> in the nature of attachment having commenced, where the High Court in its discretion might prefer, and the Director of Public Prosecutions might be willing, to have particular charges of contempt tried by a jury. That might occur where issues of fact arise, where a conflict of evidence appears, where those charged disclaim responsibility for what was said, written or done, or where the issue was not the fact that a contempt was committed but whether the correct person or persons had been charged with its commission. In my view, however, the words, comment or conduct which are likely to interfere with or prejudice proceedings at hearing or pending, the question whether witnesses have been suborned or threatened, or whether juries have been bribed or intimidated, or whether a court has been held up to public odium, are all matters solely for the detached and objective decision of a judge in the administration of justice."[61]

Henchy J and O'Higgins CJ thus express different views as to the position that would arise in a case of contempt where issues of fact were in controversy. The former, speaking for the majority, considered that the contemnor had a constitutional right to have such issues determined by a jury; the latter appears to have taken the view that no such constitutional right existed since Article 38.5 had no application to such charges, although the High Court might prefer in particular cases, as a matter of discretion, to have such issues tried with a jury. Since these conflicting observations are *obiter*, the law is clearly in a state of some uncertainty.

It may respectfully be questioned at the outset whether Henchy J is correct in the view that the reasoning of Sullivan P in *O'Kelly* is fatally undermined by the decision of the Supreme Court in *Browne*. The latter decision undoubtedly established that *Cox v Hakes*, to the extent that it held that no appeal lay from the granting of *Habeas Corpus*, was no longer a precedent to be followed in Ireland. As had already been noted, however, Sullivan P, in citing from *Cox v Hakes*, was not concerned with the narrower issue of the application of the maxim *generalis specialibus non derogant*, but rather the citation in more modern times by the House of Lords of the ancient principle in *Stradling v Morgan*. That is a principle, as we have seen, of more general import, i.e. that the letter of a statute need not be adhered to if the intent of the legislature, gathered from the Act as a whole, the mischief with which it was intended to cope and any other relevant external circumstances, indicate that the literal approach should not, in the particular case, be followed. It would seem that this is an even more cogent consideration when the Constitution itself, as distinct from a statute, is under consideration. In the words of Henchy J himself, dissenting in *DPP v O'Shea*,[62] decided less than two years after *Walsh*:

> "Any single constitutional right or power is but a component in an

61 *Id*, at 428.
62 [1982] IR 384, at 426.

ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that 'the letter killeth, but the spirit giveth life'. No single constitutional provision ... may be isolated and construed with undeviating literalness."

As we have seen, Henchy J in *Walsh* indicated other cogent constitutional considerations which, on his view rendered trial by jury inappropriate in a case of scandalising where there were no controverted issues of fact. Given the admitted power of a jury to record a perverse verdict of acquittal, the result in a case such as *Walsh* could mean that, although the libel on the court was *ex hypothesi* unsustainable, the court would be condemned to spend the rest of its existence under the stigma of being unfit to perform any judicial function. The capacity of juries to record perverse verdicts in what might be called mainstream or substantive criminal offences means that, in such cases, injustice may be caused, in a broad sense to society as a whole, but in a particular sense to the victim of the crime. One of the features which distinguishes the crime of scandalising the court is that, were the jury to arrive at a perverse verdict, the victim would be the judicial system itself and not merely the individual judge or judges who are members of the tribunal.

It cannot be said, however, that allotting a bifurcated role to the judge and jury in the manner proposed by Henchy J is an entirely satisfactory resolution of the conflict between the *prima facie* constitutional right of the contemnor to a trial by jury and the countervailing considerations just mentioned. A jury trial in which the issue of guilt or innocence was ultimately determined by the judge would seem to lack an essential feature of the concept of trial by jury under our law. Henchy J's judgment seems implicitly to acknowledge this when he speaks of the jury as having "an unqualified and unreviewable power (as distinct from a right) to render a verdict of not guilty in any case which they have jurisdiction to try". Again, in *O'Shea*, Henchy J defined the constitutional right to trial by jury as

> "a right to the evolved and evolving common law trial by jury, that is to say, a trial before a judge and jury in which the judge would preside, ensure that all conditions necessary for a fair and proper trial of that nature are complied with, decide all matters deemed to be matters of law, and direct the jury as to the legal principles and rules they are to observe and apply; and in which the jury, constituted in a manner calculated to ensure the achievement of the proper exercise of their functions, would be the arbiters, under the governance of the judge, of all disputed issues of fact *and, in particular, the issue of guilt or innocence*."[63]

63 *Id*, at 431 (emphasis added).

O'Higgins CJ's robust view that contempt of court, in all its forms, is simply outside the mainstream of the substantive criminal law results, on the whole, in a tidier picture. It is somewhat surprising, however, that neither the Chief Justice nor Henchy J seemed to consider relevant in any way the provisions of Article 50 of the Constitution which provides that:

> "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstat Eireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by an enactment of the Oireachtas."

Sullivan P in *O'Kelly* had cited the corresponding Article in the Constitution of Saorstat Eireann (Article 73) and had observed

> "It is admitted that 'the laws in force in the Irish Free State at the date of the coming into operation of the Constitution' recognise the existence of the jurisdiction to attach for contempt of court. The qualification contained in the introductory words, 'subject to this Constitution and the extent to which they are not inconsistent therewith', admittedly refers us *(inter alia)* to Article 72 [the equivalent Article in the Constitution conferring the right to trial by jury]. But, reading Articles 72 and 73 in conjunction with Article 64, I am of opinion that Article 72 was not intended to, and does not, affect the jurisdiction of the High Court to deal summarily with cases of contempt and that its operation is confined to trials of criminal charges by ordinary criminal process."[64]

The intention of the framers of the Constitution may not be in every case a suitable guide to construction of its provisions, but when the Courts are concerned with the actual legal structures it put in place - as distinct from the manner in which fundamental rights are, from time to time, to be judicially delineated and enforced - it is of paramount importance. This, again, was recognised by Henchy J in *O'Shea* where, disagreeing with the majority opinion in that case that an appeal lay from an acquittal by a jury in the Central Criminal Court, he cited with approval the view of Kenny J in the *People v Lynch* that such a proposition:

> "would result in a far-reaching change in our law which, I am convinced, those who enacted the Constitution never contemplated and which is not in accordance with prior Irish authority."[65]

While in the present case far reaching changes are not in issue, it may be argued that the intention of those enacting the Constitution, gathered from

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64 [1928] IR, at 318.

65 [1982] IR 64, at

all the Articles, would more probably have been simply to continue in being the powers of the Superior Courts to punish contempt in a summary manner while reserving the constitutional right of trial by jury to offences forming part of the substantive criminal law.

This view would, of course, accommodate the view of O'Higgins CJ that, in certain circumstances, the court might, in its discretion, direct that a particular issue be tried by a jury. It may be, however, that O'Higgins CJ has confined somewhat narrowly the circumstances in which a court might consider it appropriate to direct such an issue to be tried. It would seem that the Chief Justice would not consider a trial by jury appropriate when questions arose as to whether witnesses had been suborned or threatened or juries bribed or intimidated. Yet these would seem to be peculiarly cases in which issues of fact, clearly within the competence of a jury, would arise.

It will be seen that the present law cannot be stated with certainty. It can be said, however, on the authority of *Walsh*, that the Superior Courts retain their inherent power to punish criminal contempt of court summarily, whatever form it takes. The observations of O'Higgins CJ and Henchy J as to whether the alleged contemnor has *prima facie* a constitutional right to resolution by a jury of any contested issue of fact are *obiter*. While the views of Henchy J represented those of the majority, it is thought that those of O'Higgins CJ are, for the reasons already stated, more likely to be applied should the question arise for resolution in the future.

We are concerned at this stage with ascertaining the present state of the law. We defer to a later part of this Consultation Paper our consideration of the question of policy which arises as to whether there should be a role for juries in cases of criminal contempt and, if so, the extent of that role.

CHAPTER 9: CONTEMPT IN RELATION TO TRIBUNALS

We now must consider the law of contempt in relation to tribunals.[1]

The starting point is section 1 of the *Tribunals of Enquiry (Evidence) Act 1921*, which provided as follows:

> "(1) Where it has been resolved (whether before or after the commencement of this Act) by both Houses of Parliament that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance, and in pursuance of the Resolution a tribunal is appointed for the purpose either by His Majesty or a Secretary of State, the instrument by which the tribunal is appointed or any instrument supplemental thereto may provide that this Act shall apply, and in such case the tribunal shall have all such powers, rights, and privileges as are vested in the High Court, or in Scotland the Court of Session, or a judge of either such court, on the occasion of an action in respect of the following matters:-
>
> (a) The enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;
>
> (b) The compelling the production of documents;
>
> (c) Subject to rules of court, the issuing of a commission or request to examine witnesses abroad;

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1 See generally *Borrie & Lowe*, ch 12.

and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.

(2) If any person -

(a) on being duly summoned as a witness before a tribunal makes default in attending; or

(b) being in attendance as a witness refuses to take an oath legally required by the tribunal to be taken, or to produce any document in his power or control legally required by the tribunal to be produced by him, or to answer any question to which the tribunal may legally require an answer; or

(c) does any other thing which would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court;

the chairman of the tribunal may certify the offence of that person under his hand to the High Court, or in Scotland the Court of Session, and the court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.

(3) A witness before any such tribunal shall be entitled to the same immunities and privileges as if he were a witness before the High Court..."

As we shall presently see, Section 1(2) has been substantially amended by the substitution of an entirely new provision.[2] It is, however, useful to examine the scope of the subsection as originally drafted. The precise scope of section 1(2)(c) is uncertain. The narrow view is to apply the *ejusdem generis* principle and interpret the provision, in the context of paragraphs (a) and (b), as connoting only other contempts committed *in facie curiae*. The broad view, favoured by *Borrie & Lowe*, is that "the language of the subsection is so wide that Parliament must have intended it to encompass all types of contempt".[3]

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2 Cf the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, section 3.

3 *Borrie & Lowe*, 381. The Salmon Committee on the Law of Contempt as it Affects Tribunals of Enquiry took the same view in its Report: Cmnd 4078, para 12 (1969).

The broad view would of course capture cases of contempt by publication; it would also extend to other contempts such as interference with the witnesses or attempts to bribe members of the tribunal.[4]

The effect of section 1(2) was that the High Court, and not the Tribunal, inquired into the alleged offence and conducted a full trial into the question of the person charged. Whether this procedure ensured its consistency with the Constitution[5] is a matter we shall address below.

The 1921 Act, as originally drafted, was used as a model in a number of Irish statutes. Section 19(2) of the *Solicitors Act 1954* (repealed by the *Solicitors (Amendment) Act 1960*) and section 15(2) of the *Solicitors (Amendment) Act 1960* were clearly thus inspired. Section 15 provides as follows:

> "(1) The Disciplinary Committee shall, for the purposes of any inquiry held by them under section 7 of this Act or the consideration of an application under section 9 of this Act, or the taking of further evidence under paragraph (b) of subsection (1) of section 8 of this Act, have the powers, rights and privileges, vested in the High Court or a judge thereof on the hearing of an action, in respect of -
>
> (a) the enforcement of the attendance of witnesses and their examination on oath or otherwise, and
>
> (b) the compelling of the production of documents,
>
> and a summons signed by a member of the Disciplinary Committee may be substituted for and shall be equivalent to any formal procedure capable of being issued in an action for enforcing the attendance of witnesses and compelling the production of documents.
>
> (2) Where -
>
> (a) a person on being duly summoned to attend before the Disciplinary Committee makes default in attending, or
>
> (b) a person, being in attendance as a witness before the Disciplinary Committee, refuses to take an oath lawfully required by the Disciplinary Committee to be taken, or to produce any document in his power or control lawfully required by the Disciplinary committee to be produced by him or to answer any question to which

4 *Borrie and Lowe*, 381, 386. See also *Halsbury*, vol 9 para 48.
5 Cf *In re Haughey*, [1971] IR 217, at 250-251 (Sup Ct).

the Disciplinary Committee may lawfully require an answer, or

(c) a person, being in attendance before the Disciplinary Committee, does anything which, if the Disciplinary Committee were a court of law having power to commit for contempt, would be contempt of court,

the offence of that person may, by certificate, signed by two members of the Disciplinary committee, be certified to the High Court and the High Court may thereupon inquire into the alleged offence and, after hearing any witnesses who may be produced against or on behalf of the person charged with the offence and any statements that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he has been guilty of contempt of the High Court.

(3) A witness before the Disciplinary committee shall be entitled to the same immunities and privileges as if he were a witness before the High Court."

In *Re Haughey*,[6] the Supreme Court had to deal with a differently drafted process. The appellant challenged the constitutional validity of section 3(4) of the *Committee of Public Accounts (Privilege and Procedure) Act 1970*, under which he had been convicted by the High Court and sentenced to six months imprisonment for refusing to answer questions put to him as a witness by the Committee. Section 3(4) provided as follows:

"If any person -

(a) on being duly summoned as a witness before the committee makes default in attending, or

(b) being in attendance as a witness before the committee refuses to take an oath or to make an affirmation when legally required by the committee to do so, or to produce any document in his power or control legally required by the committee to be produced by him or to answer any question to which the committee may legally require an answer, or

(c) fails or refuses to send to the committee any document in his power or control legally required by the committee to be sent to it by the person, or

(d) does anything which would, if the committee were a court of justice having power to commit for contempt of court, be

6 [1971] IR 217 (Sup Ct, rev'g High Ct).

contempt of such court,

the committee may certify the offence of that person under the hand of the chairman of the committee to the High Court and the High Court may, after such inquiry as it thinks proper to make, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the High Court."

During argument in the Supreme Court, three possible constructions of this provision were canvassed:

(i) it purported to authorise the committee to try and convict, and thereupon send the offender forward to the High Court for punishment;

(ii) it merely authorised the committee to complain to the High Court and, thereupon, it was for the High Court to try summarily and, if it should convict, to punish the offender;

(iii) it merely authorised the committee to complain to the High Court and, thereupon, it was for the High Court either summarily or on indictment before a jury, to try and, if it should convict, to punish the offender.

The Supreme Court pointed to "significant differences"[7] between section 3(4) of the 1970 Act and section 1(2) of the 1921 Act. Whereas section 1(2) referred to an inquiry into "the alleged offence and spoke of hearing any witness produced against or on behalf of the person charged with the offence", as well as containing further references to the rights of the defendant which were "spelt out with care",[8] these features were absent from section 3(4), which stated "baldly"[9] that "the committee may certify the offence of that person ... to the High Court and the High Court may, after such inquiry ... punish ...." The committee appeared to have thought that the subsection authorised it to try and convict and thereupon to send the offender forward to the High Court for punishment.

This interpretation, in the view of the Supreme Court, would lead to the constitutional invalidity of the provision:

"If one examines the impugned sub-section in the light of the ordinary canons of construction, the committee's view ... has much to support it. The sub-section seems to say precisely what the committee interpreted it as saying. If that view is the correct view, then the sub-section has authorised the committee to try and convict a witness of a criminal offence. But the trial of a criminal offence is an exercise of judicial power and is a function of the Courts, not of a committee of

7 *Id*, at 249 (*per* O Dalaigh CJ, delivering the judgment of the Court).
8 *Id*.
9 *Id*.

the Legislature. Article 34 of the Constitution provides that justice shall be administered in courts established by law by judges appointed in the manner prescribed by the Constitution. The Committee of Public Accounts is not a court and its members are not judges. The Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of government - legislative, executive and judicial - as appears from an examination of Articles 6, 15, 28 and 34; and a statute that conferred on a committee of the Legislature a power to try a criminal offence would be repugnant to the Constitution and invalid, and a conviction by such committee, and any sentence pursuant thereto, could not stand. Moreover, under the Constitution the Courts cannot be used as appendages or auxiliaries to enforce the purported convictions of other tribunals. The Constitution vests the judicial power of government solely in the Courts and reserves exclusively to the Courts the power to try persons on criminal charges. Trial, conviction and sentence are indivisible parts of the exercise of this power.[10]"[11]

The Court did not apply the ordinary canons of interpretation, however, since the case was one in which the constitutional validity of an Act of the Oireachtas was in issue. Applying the well-established principles of constitutional construction,[12] the Court considered it its duty to treat the committee's certificate, not as a *certificate* of conviction, but as merely a step preliminary to the commencement of the trial of a criminal offence in the High Court.

The appellant's attack on the constitutional validity of the sub-section, applying the second of the three possible interpretations, was that the offence in question was not a minor offence and that accordingly he should have been tried by a jury in accordance with Article 38.5. The court agreed:

> "Trial by jury of non-minor offences is mandatory, it is not simply a right to be adopted or waived at the option of the accused. It follows that the sub-section, on the basis of the second construction which would authorise summary trial in the High Court, would offend against the constitution no less than it does on the basis of the first construction: the first construction infringes Article 34 and the second infringes Article 38."[13]

The decision of *AG v O'Kelly*[14] and *AG v Connolly*[15] did not assist the Attorney-General's argument that summary trial of the charge in question was

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10 Citing *Deaton v AG*, [1963] IR 170.

11 [1971] IR, at 249-250.

12 *NUR v Sullivan*, [1947] IR 77, *McDonald v Bord na gCon*, [1965] IR 217, *East Donegal Co-operative v AG*, [1970] IR 317. See generally Hogan, *Constitutional Interpretation*, in F Litton ed, *The Constitution of Ireland 1937-1987*, 35 Administration No.4, p173 (1988).

13 [1971] IR, at 252.

14 [1928] IR 308.

15 [1947] IR 213.

permissible, even if the Court were to hold that these cases had been correctly decided (a matter on which it took no position):

> "The High Court in the present case was not dealing with a charge of contempt of court. The impugned sub-section does not purport to make the offence here in question 'contempt of court'; it does no more than direct that the offence, which is an ordinary criminal offence, shall be punished in like manner as if the offender has been guilty of contempt of court, that is to say, it defines the punishment for the offence by reference to the punishment for contempt of the High Court. Moreover, it would not be competent for the Oireachtas to declare contempt of a committee of the Oireachtas to be contempt of the High Court. This is an equation that could not be made under the doctrine of the tripartite separation of the powers of government. The reasoning in *O'Kelly's Case* and in *Connolly's Case* does not support the Attorney General's submission but, on the contrary, it is inimical to it. The exception which the High Court (under Article 72 of the Constitution of the Irish Free State) in *O'Kelly's Case* and (under Article 38 of the Constitution of Ireland) in *Connolly's Case* engrafted on the injunction for trial by jury is based upon the inherent jurisdiction of the High Court to ensure the administration of justice without obstruction. That is to say, the exception finds its source and justification in another article of the Constitution: Article 64 in the Constitution of the Irish Free State and Article 34 in the Constitution of Ireland. Neither *O'Kelly's Case* nor *Connolly's Case* makes any exception in respect of the trial of ordinary criminal offences which are not minor offences."[16]

The Supreme Court went on to identify what it considered to be "yet another barrier"[17] to the trial in the High Court without a jury of the alleged offence:

> "By the provisions of Article 38, s2, of the Constitution the trial of minor offences without a jury is restricted to courts of summary jurisdiction. It is true that the High Court possesses a universal jurisdiction in matters, civil and criminal, but that does not make it a court of summary jurisdiction within the provisions of s2 of Article 38. A court of summary jurisdiction within the meaning of that section is one whose criminal jurisdiction to try and to convict is restricted to the trial of minor offences. The term 'court of summary jurisdiction' was well known prior to the enactment of the Constitution; the expression appeared in almost identical words in the Constitution of Saorstat Eireann and, prior to that, in s13 of the Interpretation Act, 1889. Under our law that jurisdiction is exercised only by the District Court. In accordance with the provisions of s5 of Article 38, the jurisdiction of the High Court to try criminal offences is a jurisdiction to try them

16 [1971] IR, at 253.
17 *Id.*

only with a jury."[18]

Finally, the Court rejected the third possible construction of section 3(4) on the basis that it did violence to the plain meaning of the words:

> "It is, in the opinion of this Court, beyond the reach of the presumption of constitutionality to read into the simple inquiry formula of the sub-section an intention to authorise trial by jury. The statute in this case created an offence which was not prohibited by the common law. It indicated a particular manner of proceeding against the alleged offender by express reference to contempt of court in terms which clearly indicated a summary manner of disposal of the trial and of the offender, if convicted; and the procedure thus indicated clearly excludes that of indictment. This interpretation is reinforced by the express provision that the charge is laid by the certificate of the chairman of the Committee."[19]

Even if the sub-section were to be given the third interpretation, it would still be invalid:

> "The sub-section, in the supposed meaning, would then authorise trial either summarily or on indictment. But for the sub-section to authorise summary trial (i.e., a mode of trial suitable for a minor offence) and upon conviction to authorise punishment by a penalty only appropriate to a non-minor offence would offend grossly against the substance of the guarantee contained in Article 38. So much then of the sub-section as authorised summary trial would be struck down, and authority to try by jury is all of the sub-section that would remain in force. But Mr Haughey was tried summarily."[20]

The Court accordingly held that section 3(4) was invalid.

The effect of this decision was to cast a considerable constitutional shadow over para 12(4) of the Second Schedule to the *Price's Act 1958,* section 3(2) of the *Minerals Development Act 1940*, para 6(4) of the First Schedule to the *Restrictive Trade Practices Act 1953*, and section 8(4) of the *Land Act 1965*, all of which were drafted on the same lines as section 3(4). Section 3(2) of the 1940 Act has since been repealed[21] and replaced by a provision[22] making it an offence (punishable on summary conviction by a fine of up to £500 or imprisonment for up to six months or both) to engage in conduct of the type falling within the remit of the repealed provision. The 1953 Act was repealed by the *Restrictive Practices Act 1972*; it also replaces the doubtful strategy of

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18 *Id*, at 253-254.
19 *Id*, at 254.
20 *Id*, at 255.
21 *Minerals Development Act 1979*, section 11(1) and Schedule.
22 *Id*, section 5.

certification in the mode adopted by para 6(4) by provision for a summary offence.[23]

In the wake of *Haughey*, the Oireachtas enacted the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979.* The Minister of State at the Department of Justice, Mr David Andrews, at Second Stage in the Seanad, noted that the Supreme Court decision in that case:

> "did not, of course, deal directly with the 1921 Act; it was concerned with the Committee of Public Accounts of Dail Eireann (Privilege and Procedure) Act 1970. However, part of the Act followed in certain material respects part of the 1921 Act and this leads to the conclusion that the 'flaw' the Supreme Court held to exist in the 1970 Act also exists in the Act of 1921.
>
> The provision to which I am referring is in section 1, subsection 2 of the Act of 1921. It purports to enable the chairman of a tribunal to 'certify' to the High Court the offence of any person who did any one of a number of things such as refusing to attend as a witness. The High Court was then empowered to punish the person as if he had been guilty of contempt of that court.
>
> What the Supreme Court held in the 1971 decision was that the offence of contempt of the High Court was not a minor offence and, therefore, there had to be a right to trial by jury as the Constitution provides. The inference, therefore, is that the law must either allow trial by jury or else make the offence a minor offence with penalties restricted accordingly".[24]

In the light of the subsequent Supreme Court decision in *The State (DPP) v Walsh,*[25] this rationale has been significantly subverted.

Section 3 of the 1979 Act substitutes the following subsections for section 1(2) of the 1921 Act:

> "(2) If a person -
>
> (a) on being duly summoned as a witness before a tribunal, without just cause or excuse disobeys the summons, or
>
> (b) being in attendance as a witness refuses to take an oath or to make an affirmation when legally required by the tribunal to do so, or to produce any documents (which word shall be construed in this subsection and in

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23 First Schedule, para 7(4).
24 91 Seanad Debs, col 43 (14 February 1979).
25 [1981] IR 412.

subsection (1) of this section as including things) in his power or control legally required by the tribunal to be produced by him, or to answer any questions to which the tribunal may legally require an answer, or

(c) wilfully gives evidence to a tribunal which is material to the inquiry to which the tribunal relates and which he knows to be false or does not believe to be true, or

(d) by act or omission, obstructs or hinders the tribunal in the performance of its functions, or

(e) fails, neglects or refuses to comply with the provisions of an order made by the tribunal, or

(f) does or omits to do any thing and if such doing or omission would, if the tribunal had been the High Court, have been contempt of that Court,

the person shall be guilty of an offence.

(2A) (a) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine not exceeding £10,000 or, at the discretion of the court, to imprisonment for a term not exceeding 2 years or to both such fine and such imprisonment.

(b) A justice of the District Court shall have jurisdiction to try summarily an offence under this section if -

(i) the justice is of opinion that the facts proved or alleged against a defendant charged with such an offence constitute a minor offence fit to be tried summarily,

(ii) the Director of Public Prosecutions consents, and

(iii) the defendant (on being informed by the justice of his right to be tried by a jury) does not object to being tried summarily,

and, upon conviction under this paragraph, the said defendant shall be liable to a fine not exceeding £500 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months or to both such fine and such imprisonment.

(c) Section 13 of the Criminal Procedure Act, 1967 shall apply in relation to an offence under this section as if, in lieu of the penalties specified in subsection (3) of that section there were specified therein the penalties provided for by paragraph (b) of this subsection, and the reference in subsection (2)(a) of that section to the penalties provided for in subsection (3) of that section shall be construed accordingly."

Two other provisions in the 1979 Act may also be briefly noted before we comment on the revised section 1(2). Section 4 provides that:

> "A tribunal may make such orders as it considers necessary for the purposes of its functions, and it shall have, in relation to their making, all such powers, rights and privileges as are vested in the High Court or a judge of that Court in respect of the making of orders."

And section 5 provides:

> "A statement or admission made by a person before a tribunal or when being examined in pursuance of a commission or request issued under subsection (1) of section 1 of the Principal Act shall not be admissible as evidence against that person in any criminal proceedings (other than proceedings in relation to an offence under subsection (2)(c) (inserted by this Act) of that section) and subsection (3) of that section shall be construed and have effect accordingly."

What is striking about the revised section 1(2) is that it provides for an offence which is part of the mainstream of the criminal repertoire rather than a hybrid in which the tribunal was given a role intruding on the judicial sphere. As regards the specific defaults, the new paragraph (a) is the same in substance as the old; similarly paragraph (b). However, new paragraphs (c) to (e) have no direct counterparts in the original subsection. Paragraph (c) prohibits the giving of evidence known or believed to be false. Paragraph (d) prohibits the obstruction or hindering of the tribunal in the performance of its functions, "by act or omission". This would clearly catch the equivalent of *in facie* contempt, such as throwing a book at the tribunal chairman; but it seems capable of capturing out-of-tribunal conduct, such as publishing material which thus hinders the tribunal. Paragraph (e), in making it an offence to fail, neglect or refuse to comply with an order of the tribunal, is equally capable of a narrow interpretation, covering *in facie* disobedience, or a broader range of disobedience, such as disobeying a specific order not to publish certain material.

New paragraph (f) is equivalent to the old paragraph (c). It renders criminal the doing or failure to do "any other thing" which would have been contempt of the High Court if the tribunal had been the High Court. The constructive and referential nature of this definition presents difficulty on two fronts.

First, in view of the breadth of paragraphs (c) to (e), coupled with the specific defaults prescribed by paragraphs (a) and (b), it is not easy to see what range of conduct is left to fall within the scope of paragraph (f); perhaps the logic of this dilemma is to construe paragraphs (c) to (e) somewhat more narrowly than their potential maximum range of reference. Secondly, and more importantly, whereas it is of course possible to envisage conduct which is capable of falling within the scope of paragraph (f), there is an objection in principle (as well as in logic) to rendering criminal conduct in relation to a body that is not a court by reference to norms which are appropriate only to conduct respecting a court. Tribunals of inquiry perform functions which in very many ways have parallels with the work of the High Court, but there are differences. Section 1(1) of the 1921 Act recognises this since it confers on tribunals only the powers vested in the High Court on *three* matters: enforcing the attendance of witnesses and examining them on oath, compelling the production of documents, and issuing a commission or request to examine witnesses abroad.

The statutory provision relating to the Ombudsman creates some uncertainty. The *Ombudsman Act 1980* is largely modelled on Britain's *Parliamentary Commissioner Act 1967*. Section 9(1) of the 1967 Act provides in part as follows:

> "(1) If any person without lawful excuse obstructs the Commissioner or any officer of the Commissioner in the performance of his functions under this Act, or is guilty of any act or omission in relation to an investigation under this Act which, if that investigation were a proceeding in the Court, would constitute contempt of court, the Commissioner may certify the offence to the Court.
>
> (2) Where an offence is certified under this section, the court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, deal with him in any manner in which the Court would deal with him if he had committed the like offence in relation to the Court."

Section 7 of the 1980 Act provides in subsection (3) that:

> "[A] person shall not by act or omission obstruct or hinder the Ombudsman in the performance of his functions or do any other thing which would, if the Ombudsman were a court having power to commit for contempt of court, be contempt of such court."

There is no provision in the 1980 Act, either in section 7 or elsewhere, for certification of the offence to any court. Nor is any offence created. It is not clear how it was envisaged that the provision would be enforced, except

perhaps by some form of civil proceeding.

Under section 41(1) of the *Employment Equality Act 1977* the Equal Employment Equality Agency has wide-ranging powers to obtain information and documents and to summon witnesses. Section 42 of the Act renders it an offence to frustrate these powers. It provides as follows:

> "(1) If a person -
>
> (a) fails or refused to supply to the Agency information required by it and specified in a notice under section 41(1) or to produce or send to the Agency any document in his power or control and required by the Agency in such a notice to be produced by him,
>
> (b) on being duly summoned as a witness before the Agency fails or refuses to attend,
>
> (c) being in attendance as a witness before the Agency refuses to take an oath or to make an affirmation when legally required by the Agency to do so or to answer any question to which the Agency may legally require an answer, or
>
> (d) does anything which would, if the Agency were a court of justice having power to commit for contempt of court, be contempt of such court,
>
> he shall be guilty of an offence and shall be liable, on summary conviction, to a fine not exceeding £100 or, on conviction on indictment, to a fine not exceeding £1,000, and where the offence is one referred to in paragraphs (a) to (c) of this subsection the court by which he is so convicted may direct him to comply with the paragraph in question.
>
> (2) If a person to whom a notice under section 41(1) has been delivered alters, suppresses, conceals or destroys a document specified in the notice or makes a false statement when supplying to the Agency information specified in the notice, he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £100."

Section 38 of the *Dentists Act 1985* is also worth noting. It provides in part as follows:

> "(6) The Fitness to Practise Committee shall, for the purposes of an inquiry held under *subsection (3)* of this section, have the powers, rights and privileges vested in the High Court or a

judge thereof on the hearing of an action in respect of -

(a) the enforcement of the attendance of witnesses and their 35 examination on oath or otherwise, and

(b) the compelling of the production of documents,

and a summons signed by the chairman of the Fitness to Practise Committee or such other member of that Committee as may be authorised by it for that purpose may be substituted for and shall be equivalent to any formal procedure capable of being issued in an action for forcing the attendance of witnesses and compelling the production of documents.

(7) Where -

(a) a person on being duly summoned to attend before the Fitness to Practise Committee makes default in attending, or

(b) a person, being in attendance as a witness before the Fitness to Practise Committee, refuses to take an oath lawfully required by that Committee to be taken, or to produce any document in his power or control lawfully required by that Committee to be produced by him or to answer any question to which that Committee may lawfully require an answer, or

(c) a person, being in attendance before the Fitness to Practise Committee does anything which, if that Committee were a court of law having power to commit for contempt, would be contempt of court,

such person shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000.

(8) A witness before the Fitness to Practise Committee shall be entitled to the same immunities and privileges as if he were a witness before the High Court."

Similar provisions are contained in section 38 of the *Nurses Act 1985.*

Section 8 of the *Protection of Employers (Employers' Insolvency) Act 1984* empowers the Minister for Labour to require certain information and documents. The refusal or wilful neglect to provide such information or produce such documents, or the knowing or reckless making of a false statement in purported compliance with this requirement is a summary offence

with a maximum fine of £500.[26]

Other statutes providing for a summary offence rather than a certification procedure include section 86 of the *Local Government Act 1941*, section 82 of the *Local Government (Planning and Development) Act 1963*, section 76 of the *Housing Act 1966* and section 75 of the *Health Act 1970.*

The history of the corresponding provisions in the *Companies Acts 1963* and *1990* is more perplexing. Inspectors appointed by the Minister for Industry and Commerce to investigate the affairs of a company were empowered under s168(3) of the 1963 Act to certify a refusal to attend or answer questions to the High Court which could then punish the offender as if he had been guilty of contempt of court, the provisions being virtually identical in their terms with s1 of the 1921 Tribunals Act. Presumably because of the doubts as to the constitutionality of the position raised by *Haughey's* case, the section was repealed by the 1982 Act and replaced by a provision along the same lines as s3 of the 1979 Tribunals Act. Somewhat remarkably, however, in the *Companies Act 1990* this provision in turn has been repealed and the doubtful strategy of certification restored. This is presumably on the assumption that the investigation forms part of the administration of justice, since, in contrast to the former procedure, the investigation is ordered and the inspectors appointed by the High Court. This seems highly dubious: the actual conduct of the investigation - which does not resolve any issue or affect any person's legal rights - would not appear to form part of the administration of justice in the sense in which that expression is used in the relevant articles of the Constitution as judicially construed. It would have been safer to adhere to the procedure under the 1982 Act.

26 Section 15(2)-(4).

CHAPTER 10: REFORM PROPOSALS IN RELATION TO CONTEMPT IN THE FACE OF THE COURT

In this chapter, we consider whether there should be any offence of contempt in the face of the court and, if so, how best it should be formulated. First we examine the case in defence of the status quo; we then consider the case in favour of abolition. We come to the tentative conclusion that the present offence should be retained. We also consider what offence might be substituted for the present offence if, contrary to our tentative recommendation, it was abolished. We then go on to consider whether, assuming the offence is retained, it could with advantage be reformulated in any way.

Defence of the Status Quo

The arguments in defence of the status quo may be dealt with under the following three headings:

1. *The adequacy of the present operation of the law.*

2. *The need for flexibility of definition.*

3. *The inherent jurisdiction of superior courts.*

1. *The adequacy of the present operation of the law*

It may be argued that, whatever theoretical objections can be made against the existing law of *in facie* contempt, it works very satisfactorily in practice. We are aware of no recorded case, at least since the foundation of the State, in which any Irish Judge has been criticised for making use of this jurisdiction in an unfair or overbearing manner. On the contrary, it seems more probable that Irish courts have, on the whole, exercised remarkable forbearance in the face of disorderly conduct taking many forms and have consistently sought to

avoid sending people to gaol unnecessarily. The subject has generated no complaints of which we are aware, whether by way of appeal or by way of public controversy. On the information at present available to us there is not the slightest indication that there is anything wrong with the way in which the law operates.

It may, of course, be said that an indefensible law is no less indefensible because it is applied with patience and humanity. Our legal system should be based on defensible principles. If the *in facie* contempt procedure offends against basic principles of specificity and due process, for example, it is not saved, on this view, by the sensitive attempts of judges to mitigate the unjust consequences flowing from these inherent defects. But this is to assume that the present law is in fact so vitiated, a question which remains to be addressed.

It should also be noted that, if it be the case, as on present information it clearly is, that the law is presenting no problems of any sort in practice, the requirement that any alternative procedure should pass the test of practical effectiveness is even more persuasive.

2. *The need for flexibility of definition*

It may be argued that the definition of *in facie* contempt must be broad and to some degree uncertain in its potential scope because of the manifold and unpredictable ways whereby the administration of justice may be interfered with. Provided there is a guarantee that the courts will use their *in facie* contempt power sparingly, the flexibility of the offence is a virtue which should not be carelessly sacrificed.

A further argument in defence of flexibility of definition is that a more precise definition "would then be abused by people who knew to a nicety how far they could go before offending. A defendant might be able to use tactics that would at common law amount to contempt of court".[1]

We are doubtful as to the merits of this latter argument. The idea that an offence should lack specificity so that would-be offenders will refrain from conduct that may not be unlawful out of uncertainty as to where the line of criminal responsibility is drawn seems to us a pragmatic and unjust one. There may be a view underlying the argument that it would be unpalatable to render criminal in express terms conduct not actually criminal but shrouded by the disguise provided by a flexible formula. If this view underlies the argument, we have no hesitation in rejecting it. This, of course, leaves intact the argument already advanced that a definition at once precise and exhaustive is simply not practicable.

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1 Chesterman, *Improper Behaviour in Court*, (1984). Professor Chesterman rejects this argument: *id*, para 30.

3. *The inherent jurisdiction of Superior Courts*

The *in facie* contempt power of the Superior Courts may be considered to be one aspect of a "limitless jurisdiction the retention of which is essential if a court is to remain a court".[2] As Jacob[3] has observed:

> "The essential character of a Superior Court of Law necessarily involves that it would be invested with the power to maintain its authority and to prevent its process being obstructed and abused. Such a process is intrinsic in a Superior Court; it is its very life blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a Superior Court of Law is that which enables it to fulfil itself as a court of law".

Similarly Keith Mason QC has stated:

> "Faced with the limitless ways in which the due administration of justice can be delayed, impeded or frustrated, judges have responded with a vast armoury of remedies claimed to be part of their inherent jurisdiction. This unwritten source of power is said to arise from the very nature of a court. The inherent jurisdiction has positive and negative aspects, depending on whether judicial powers are being invoked to facilitate the proper conduct of legal proceedings or to overcome practices or devices which tend to delay, impede or frustrate judicial functioning. The mere fact some statute or rule of court enables a court to deal with the particular problem in a particular way will not usually exclude inherent powers to deal with it in other ways. Indeed, this jurisdiction may be asserted even though the conduct complained of may be in literal complaince with some statute or rule of court.
>
> "The concept resists analysis in view of judicial claims to exercise the jurisdiction wherever necessary for the administration of justice. Its uibiquitous nature precludes any exhaustive enumeration of the powers which are thus exercised by the courts".[4]

An argument to the contrary would be that *in facie* contempt proceedings are justifiable, not in their own right, *a priori*, but on account of the function they serve, which is to assist in the efficient and orderly administration of justice. If this function could be achieved as effectively by other means, it might be questionable whether *in facie* contempt proceedings should be retained as an aspect of the inherent jurisdiction of the court.

At the base of this question is the prior issue of whether the inherent power

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2 *Id*, para 28.
3 Jacob, *The Inherent Jurisdiction of the Court*, [1970] Current L Problems 23, at 27.
4 Mason, *The Inherent Jurisdiction of the Court*, 57 Austr LJ 449, at 449 (1983).

of the court is or is not *purposive.* If it is *purposive* - the purpose being to ensure the independence of the judiciary,[5] the proper and full discharge of their constitutional functions,[6] and the protection of the administration of justice[7] -there would be no grounds for complaint about the abolition of *in facie* contempt if - but only if - those goals could be fully achieved by another method. If, however, the notion of the inherent jurisdiction of the court envisages the exercise of judicial power *without purpose*, there would be no good reason for retaining it in our law.

The former interpretation of the notion of the inherent jurisdiction of the court is clearly preferable. A good example of its application in practice is the Canadian case of *Re Hawkins Habeas Corpus Application*[8], where the defendant, in disregard of warnings, refused to stand when the magistrates came into the courtroom. In holding that this amounted to contempt, Branca J said:

> "It would be useless and serve no advantageous purpose for the court to delve into the origin of the custom or procedure of people in court standing when the presiding judicial officer is ushered into court. It is sufficient for the purposes of this case to state that the public has been educated so to do and had done so since time immemorial. The custom or practice seems to be an inseparable attribute to the court procedure and a mark of veneration or respect on the part of the public towards a court and when the court officer, in ushering into court the presiding judicial officer, addresses the words 'order in court', the public rises almost instinctively as a token of its esteem and respect to the court, which court through the instrumentality of the presiding judicial officer represents Her Majesty as the fountain of justice.
>
> "Obedience to the orders of the court or its officers is necessary for the proper administration of justice in a dignified and orderly manner, and it is in the interests of every member of society that such orders should be obeyed and respected in order that the dignity of the court may be maintained and that justice should be administered in the highest tradition which characterises the dispensation in a British court of law.
>
> "The persistent and deliberate conduct on the part of the applicant in refusing to stand, even after being specifically advised that he should do so, is a refusal to obey the lawful request of a court of law and a gesture on his part by way of conduct that can only be characterised as a marked insult to the court, which tended to limit the authority of the court be persistent disobedience.

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5 Cf Article 35 2 of the Constitution.

6 Cf *The State (DPP) v Walsh*, [1981] IR 412, at 439-441 (Sup Ct, per Henchy J).

7 Cf *id.*

8 53 WWR 406 (BC Sup Ct Chambers, BrancaJ, 1965).

> "I consider the learned magistrate to be perfectly and fully justified legally in taking the action which he did. I find it to have been necessary procedure to preserve order in the court over which he presided".

The point worth noting here is that a judge, while in a position bearing some similarity to that of a superior officer in the defence forces and while capable of invoking an inherent jurisdiction far wider and more discretionary than the powers of an officer, is nonetheless subject to a clear requirement that the exercise of its powers must have a purposive rationale. So, a judge who ordered persons in court to stand, sit or kneel for no reason other than the satisfaction of exercising his or her powers would not be entitled to invoke the *in facie* contempt procedure against those brave souls who declined thus to indulge the judge.

Thus, it might be said that the argument in favour of the status quo, based on the notion of the inherent jurisdiction of the court, is not of itself a sufficient justification for retaining the offence, if alternative means of preserving the dignity, integrity and efficiency of the judicial process were available. The essential arguments for retaining the present system are, accordingly, those already advanced, i.e. (a) that it operates in practice perfectly satisfactorily and (b) that to attempt to replace it with a more precisely defined offence would merely run the risk of omitting conduct which should be treated as criminal contempt but which might slip through the net of even the most exhaustive statutory definition.

The Case for Abolition

We now must consider the case for abolition of the offence of *in facie* contempt. Four arguments may be considered:

1. that the offence is unconstitutionally lacking in conceptual clarity;
2. that it involves a confusion of goals, so far as it seeks to punish conduct in the face of the court which constitutes scandalising the court;
3. that it offends against basic principles of constitutional and natural justice;
4. that other legal responses can adequately deal with the mischief.

1. ***Lack of clarity***

It has already been pointed out that the offence of *in facie* contempt may take many forms and hence, it may be urged, it is so impecise and uncertain in its scope as to be both inherently unfair and constitutionally objectionable. The flexibility thus conferred on judges to punish what they consider they ought to punish may make it more difficult for persons contemplating conduct to

know whether it will fall foul of the judge.

As against this, it may be argued that the history of the offence gives little support to the view that it is so imprecise and uncertain in its scope as to make life unreasonably difficult for potential offenders. If the criminal law were to insist on exhaustive and specific definition of every crime, then much conduct which, in the interests of the common good, should undoubtedly be treated as criminal, would escape entirely. Offences such as conspiracy and the creation of public nuisances or public mischief, which can encompass a vast range of human conduct, would have to be expelled from the criminal law.

It may be said that the observations of Henchy J in *Walsh*, already referred to, to the effect that juries are constitutionally ill-equipped to determine what conduct constitutes contempt, lends force to the case for abolition of the offence now under consideration, on the ground that it is far too uncertain. Those remarks were, of course, directed at a different form of contempt, i.e. scandalising the court. However, even if they were relevant to the offence now under consideration, it must be borne in mind that Henchy J was at pains to stress that the resolution of any disputed issues of fact was perfectly within the competence of the jury. What he questioned was the competence of the jury to prescribe legal standards in the particular area of contempt of court. This, of course, was not to suggest that the conduct would be necessarily difficult to identify, but rather that the task was one more appropriate to a judge without a jury, since it involved the setting of minimum standards for the due administration of justice.

2. *Confusion of goals*

The present law of *in facie* contempt may be criticised for confusing two separate goals: preventing disruption in court proceedings and preserving the administration of justice from scandalous criticism. Both goals are no doubt worthwhile ones but they bear no necessary connection. To treat them as one merely because certain disruptive acts of scandalising the court occur in a court can lead to an inappropriate conflation of principles, with a real risk of injustice to defendants.

Of course, a single act can constitute both a disruption and an act of scandalising: for example, a litigant or lawyer who insists on shouting that the Judge is "in the pay of the plaintiff" is guilty of contempt from both standpoints. But it is also obviously true that an act which takes place in Court may be disruptive without being scandalous, or, conversely, that it may be scandalous without involving any aspect of disruption. If, for example, counsel, in modulated tones, makes a short submission, in which he does not persist, that "Your Lordship is so corrupt as not to be fit to determine this case", no doubt he is guilty of seriously scandalising the court, but the disruptive element is less plain.

There is no *a priori* reason why *in facie* contempt and scandalising should be treated identically: there are plausible arguments in favour of providing for jury trial in the latter but not the former case, and the questions of *mens rea* and defences (such as justification and fair comment) may require different solutions in either case. To characterise as an *in facie* contempt scandalous conduct which is not disruptive, merely because it occurs in a court, may result in a quite inappropriate disposition of the case. To the extent that a defendant may thus be deprived of a defence which would have been available to him had he been proceeded against in proceedings for scandalising, there is a clear risk of injustice to him, for no social benefit, and certainly for no compelling reason in principle or policy.

Where a defendant's conduct consists of scandalising together with an element of disruption, there is of course less objection to proceeding against him on the basis that this constitutes *in facie* contempt. But it would be mistaken to ignore the dangers in this course. There may often be cases where the essential element in the case is that of scandalising and where no real disruption to the proceedings occurs. In such instances to characterise the case as *in facie* contempt may result, albeit to a lesser degree, in injustice to some defendants.

One kind of case where a problem of this nature may arise is where a defendant has political or jurisprudential objections to the legitimacy of the court or of the particular proceedings. He may, for example, not recognise the authority of the court, and may, by his conduct or by express statement, communicate this attitude to the court. This may in certain circumstances amount to scandalising the court. It may sometimes disrupt proceedings and on that account constitute *in facie* contempt.[9] But in some instances its essence will be that of scandalising with little or no disruption. Is such a defendant to be treated to the full rigours of *in facie* contempt proceedings?[10] Such a solution may be criticised as unjust in the same way as treating a lawyer's allegedly scandalous, non-disruptive statement to the judge as *in facie* contempt.

It may be said in reply to these arguments that there appears to be no reason under the existing law why remarks by an advocate or witness which are scandalous, but non-disruptive, should necessarily be dealt with in a summary manner by the court. In some cases, it may be possible for the judge to allow the trial to proceed, leaving it to the DPP to prosecute the offender for scandalising the court if he considered that appropriate. Where, however, a

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9 As we have seen, the court has several strategies apart from contempt proceedings to deal with such conduct. Nevertheless these are without prejudice to contempt proceedings.

10 Of course, judicial discretion and common sense may mitigate the potential difficulties. Cf *O'Hair v Wright*, [1971] SASR 436, at 441 (*per* Mitchell J):

> "I would not wish to think that an anarchist could not safely appear before the court and receive a hearing, even though he chose to say that he had no belief whatsoever in law and order."

jury is present, a trial judge might well take the view that the effect of the remarks could be such as to render any verdict by the jury unsafe. In that event, he would probably take the course of discharging the jury leaving it again to the DPP to institute proceedings. It is, in short, not a necessary feature of *in facie* contempt that it results in the summary conviction of persons who might more properly be prosecuted for scandalising the court.

3. Breach of basic principles of constitutional and natural justice

The present law of *in facie* contempt may be criticised for imposing on the judge such an accumulation of conflicting responsibilities that the result is to deny to the defendant the protection of several principles of constitutional and natural justice. These responsibilities[11] include the following. First there is the task of "policing" the courtroom. As the Law Reform Commission of Australia observe:

> "Although the presiding judge may not physically remove a disruptive person from the courtroom, the order to a police officer or court attendant to do this comes from the bench and uniformly obeyed. The judge's position in this regard is akin to that of a superior police officer in charge of a squad of police controlling the behaviour of members of the public in a public place."[12]

Secondly, the judge acts as complainant. Thirdly, the judge acts as prosecutor in deciding whether to invoke his contempt powers or to treat the matter less severely, by warning the offender, for example. (In electing to follow this latter course, the judge's role is again akin to that of a police officer - though here an officer of relatively junior rank on the beat rather than one in charge of a squad of police). Fourthly, the judge acts as chief prosecution witness,[13] relying on what he believes he has seen or heard. Fifthly, "[i]f the evidence of other witnesses is needed to substantiate a charge of contempt in the face of the court, the judge acts as prosecuting counsel in examining those witnesses".[14] Sixthly, the judge combines the roles of judge and juror in determining the factual and legal issues of criminal liability for *in facie* contempt. Finally, the judge has the task of imposing a sentence on a person whom he has convicted of contempt. The features led the Law Reform Commission of Australia to comment that these powers of presiding judges, taken in combination, "have a peremptory and authoritarian quality similar to those of school teachers or parents dealing with young children. It is 'summary' discipline in the fullest sense of the word."[15]

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11 See the Law Reform Commission of Australia's *Report on Contempt of Court*, para 92.

12 *Id.*

13 Save in cases where the alleged contempt occurred outside his sight or hearing - in the precincts of the court, for example.

14 Law Reform Commission of Australia's *Report on Contempt of Court*, para 92.

15 *Id.*

This combination of several responsibilities in one person causes two main difficulties. The first relates to bias: how can the victim and prosecutor also be the judge? To allow this appears to offend against the *nemo iudex in causa sua* principle.[16] Secondly there is a problem with the presumption of innocence. As Murphy J said in *Keeley v Brooking*,[17]

> "[t]he requirement to show cause is not mere form, for the accused is required to meet, not a case which is presented against him by evidence given at his trial, but a case which exists in the mind of the judge at the commencement of the trial, although it may be explained ... by reference to various matters which form the basis of the judge's opinion. This can only mean that the tribunal commences, not with a presumption of innocence, but with a presumption of guilt. Such procedures are not easily reconcilable with fundamental principles of justice."

A third, less central, difficulty may be mentioned. A person accused of *in facie* contempt is not able to confront and cross-examine the judge,[18] who may be the only, and will certainly be the most important, witness against him.

4. *Adequacy of other legal responses*

It may be argued that the other legal responses to conduct amounting to *in facie* contempt, in their totality, adequately protect judges, courts and the administration of justice in general, without the need for contempt proceedings. It is worth recalling how widely they range. They include warning the offender, adjournment of the proceedings, clearing the court, physical restraint, including the use of handcuffs,[19] and, in appropriate cases, prosecuting the offender for a specific offence, such as assault, malicious damage or one of the public order offences.[20] Moreover, it should not be forgotten that the victims of such conduct may well have an action in tort for such wrongs as assault, battery, false imprisonment, the intentional, reckless or negligent infliction of emotional suffering, negligence, trespass to chattels

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16 See *Hogan & Morgan*, 246 ff. It may also be argued that the *audi alteram partem* principle (cf *id*, 258 ff) is compromised, in view of the inability of the defendant to cross-examine the judge.

17 143 Comm L R 162, at 186 (1979), quoted by the Law Reform Commission of Australia in their Report, *supra*, para 93.

18 Cf the Law Reform Commission of Australia's *Report on Contempt of Court*, para 93.

19 See Munday, *Handcuffing the Defendant*, 140 New LJ 47 (1990).

20 A man who hurled a microphone at Windle DJ on 7 May 1991 in protest against the length of a sentence of imprisonment was later charged with assault and malicious damage. In proceedings on 16th May 1991, before Kirby DJ, the man pleaded guilty and was sentenced to four months' imprisonment. Kirby DJ, when sentencing the defendant, said that "probably the most important aspect in this democracy of Ireland is that the law and the courts must be respected by every person, and court order must also be respected". See *Irish Times*, 18 May 1991, p4.

or defamation (subject to the defence of privilege).[21]

Our Tentative Conclusion

Having considered the competing arguments, *we have come to the tentative conclusion that the case in favour of retaining the present offence of in facie contempt is the stronger one and we so tentatively recommend. If, however, the contrary view were to be adopted and in facie contempt were no longer to be part of our law, questions would arise as to how cases of disruption of proceedings and of insults directed to the judge should be dealt with.*

Were the offence of in facie contempt to be abolished, we would recommend that it should be replaced by an offence of disrupting judicial proceedings.

As regards mens rea, we consider that intention or recklessness should be requisites. We do not consider it desirable to include in the definition of the offence any reference to the likely or intended effect of the disruption on the administration of justice. In our view, this would complicate the offence unnecessarily, especially in relation to *mens rea*. Omission of this requirement seems to present no difficulty, since it is surely beyond argument that disruption of proceedings should not be permitted, without having to engage in an individuated enquiry in every case to assess the likely effect on the administration of justice. Prosecutorial discretion will ensure that trivial cases will not clog the courts.

A more troublesome question is presented by insulting behaviour in court which does not disrupt the proceedings. Of course many insults will have a disruptive effect - shouts, throwing objects, even removing one's clothes. These present no difficulty in principle[22] as they can be dealt with as disruptive conduct falling within the scope of the offence we have just proposed.

The real issue of principle relates to insulting behaviour which is not disruptive. Naturally the judge who is the victim of such conduct is entitled to take some steps to ensure its non-recurrence: he can, for example, warn the transgressor or ask him to withdraw the insulting statement.[23] But it is another matter to make such conduct criminal.

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21 See *McMahon & Binchy*, 643-646, *Kennedy v Hilliard*, 10 ICLR 195 (1859), *In re Haughey*, [1971] IR 217, at 264-265 (Sup Ct, *per* O Dalaigh CJ).

22 In practice, there may be problems. If the law were to provide (as we tentatively propose below) that disruption were to be the sole criterion by criminal responsibility, there would be likely to be an understandable tendency for judges to perceive insulting behaviour as invariably having a disruptive element. While often it will indeed have this element, it will not always do so. In such circumstances, it is to be hoped that the Director of Public Prosecutions will adopt a narrow view of the scope of the offence.

23 The refusal to withdraw might reasonably be considered to constitute a disruption, bringing the conduct within the scope of the proposed criminal sanction.

The Law Reform Commission of Australia drew back from proposing this. They argued as follows:

> "[We ... recommend] that the fact that things said or done in a courtroom are disrespectful or insulting, or constitute an affront to the authority of the court in question or of courts generally, should not of itself be enough to attract criminal liability. Instead, liability under the principles of contempt in the face of the court should be substantially replaced by a statutory offence drawn in terms of 'substantial disruption' of a hearing. The policy, adopted by many judges, of ignoring words or acts which are offensive without being disruptive, or at most reprimanding the person responsible or expelling him or her from the court, should, in effect, be incorporated into the law. This does not mean that insulting or offensive words or acts would never attract liability. If persisted in, they will most likely result in substantial disruption. It would be impossible, for instance, for a court to continue with a hearing if a participant or a spectator removed his or her clothes in court, or walked around the courtroom directing unseemly gestures at the judge. In determining whether disruption has occurred, due regard should be had to the fact that courts cannot transact their business unless they can proceed in a calm and orderly manner, free from significant distraction. Underlying this general approach is a belief that criminal penalties are usually not an appropriate mechanism for attempting to maintain the dignity of a public institution such as a court, where nothing else but dignity is at stake. This is particularly pertinent to the courtroom situation, where remarks or conduct which may appear to offend judicial dignity may often spring from misunderstanding or from strong emotions generated by the importance of proceedings for the litigants and other participants concerned."[24]

If the arguments which have hitherto weighed with us in favour of retaining the present offence of in facie contempt were not to prevail, then we would favour the approach indicated in this passage. Whether the present law is retained or the suggested new offences substituted, the object will remain the same and it is emphatically not the preservation of the personal dignity of judges but rather the orderly and efficient administration of justice. On this view, the only conduct which would require subsequent prosecution would be that which actually disrupted the proceedings and it is unlikely in the extreme that removing the sanction in the case of an insult to the judge would lead to an increase in seriously disruptive conduct.

If there is to be an offence of disruption of judicial proceedings, the question arises as to whether it should swallow up all specific manifestations of disruption, such as juror misconduct - not turning up or turning up intoxicated, for example - witness misconduct - not answering questions, for example - or miscellaneous other forms of misconduct, such as the improper

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24 Law Reform Commission of Australia's *Report on Contempt of Court*, para 115.

use of sound recorders. *In our view, it would be better for the proposed legislation, while containing the generic offence, to deal with these cases in specific terms*, since this would have the effect of clarifying what exactly is permitted and what is not on these important matters. It would also control the potential range of variability of jury verdicts on these questions; to approach them solely from the generic standard of disruptiveness might lead to argument in each prosecution as to the general legitimacy of the conduct in question. *The generic offence of disrupting proceedings should be capable of being charged in conjunction with these specific offences without risk of the prosecution failing for duplicity.*[25]

As regards these specific offences, so far as jurors are concerned, the question arises as to whether there should be any extension to the offences prescribed in the Juries Act 1976. These seem to us sufficiently extensive, and we have no proposals for new specific offences in relation to jurors. As regards witness misconduct, we discuss below the question whether the failure to answer a question on the basis of some journalistic confidence should be exempt from sanction. Our tentative conclusion is that it should not; in the present context this can be dealt with by the legislation prescribing a specific offence of failing to answer questions in circumstances co-extensive with the existing law of criminal contempt. As regards non-attendance at court by a witness or a legal representative, we consider that this should best be dealt with by a specific offence rendering such absence criminal if there is no reasonable excuse. (We examine this in more detail below). Finally, it should be noted that we also address below the question of the use of sound recorders in court. *Again anticipating matters, we here note that the legislation can prescribe a specific offence for failing to comply with the requirements laid down by the court as to the use of sound recorders.*

Possible Modifications if* In Facie *Contempt is Retained

On the assumption that the present offence of *in facie* contempt is retained, we now examine the possible reforms which might be introduced in the present procedure. The may be summarised as follows:

1. Excluding from the scope of *in facie* contempt conduct which may be dealt with by other legal procedures;

2. Excluding insulting, non-disruptive conduct from the scope of *in facie* contempt;

3. Abolishing or modifying the summary procedure;

25 The legislation can ensure this result in any one of several ways, such as incorporating the specific offences as modes of committing the generic offence of disruption, with liberty for the jury to convict a person charged with one or more of these modes or by inclusion of a residual non-specific category of disruption.

4. Limiting the physical scope of *in facie* contempt.

5. Making absence from court no longer constitute *in facie* contempt.

1. *Excluding conduct which may be dealt with by other criminal proceedings*

Under this option, *in facie* contempt should be invoked only where other criminal proceedings are unavailable. The following passage from the Law Reform Commission of Canada's analysis encapsulates that option well:

> ".... [T]he offence of misbehaving in court must not be used as a substitute for other offences or proceedings. If, for example, a witness tries to hit a judge, the proper charge is one of assault, not misbehaving in court. Misbehaving in court should remain a means of controlling conduct for which there is no remedy. It should be used only as a last resort, when all other means of restoring order (such as warnings or expulsions) have been exhausted."[26]

The difficulty with limiting contempt in this way is that its area of operation would be residual and patchy; the level of uncertainty of definition would be emphasised in that all the obvious cases - assault, battery, and so on - would be removed from the scope of the offence. Moreover, it would seem clear that this option would be viable only on the hypothesis that it would be exercisable as a summary procedure by the offended judge.[27] We have already mentioned the difficulties with this type of procedure, so far as constitutional and natural justice are concerned. *We therefore do not recommend an exclusion of conduct which may be dealt with by other criminal proceedings.*

2. *Excluding insulting, non-disruptive conduct from the scope of <u>in facie</u> contempt*

We need not here say a great deal about this option since we have already addressed its merits when considering the scope of the proposed new criminal offence to replace *in facie* contempt. No doubt the arguments for excluding insulting, non-disruptive conduct advanced in that context would in theory be equally valid in the present context. However, there are coercive practical reasons for rejecting such a change in the present context. It is one thing to abolish the existing offence and replace it with a new offence which need not preserve all the elements of the existing offence. It is quite another to abolish in isolation and as a separate "reform" the present rule of law that insulting behaviour, even if not disruptive, constitutes a contempt of court. Simply to provide that insulting behaviour in court is no longer to be punishable by the criminal law seems an impractical, unnecessary and unwise recommendation.

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26 WP 20, p22. See also the Law Reform Commission of Canada's *Report on Contempt of Court*, p22 (1982).

27 Cf *id*, pp22-23.

3. *Abolishing or modifying the summary procedure*

We now must consider whether the summary procedure in *in facie* contempt proceedings should be retained.

Two principal arguments have been formulated in defence of the summary procedure.[28] The first rests on its *necessity* as a deterrent to disorderly behaviour in court and as a protection for the administration of justice. The second is to the effect that the *overt* nature of the offence renders it appropriate to be dealt with summarily.

(a) *The Necessity Rationale*

The necessity rationale, widely supported in the cases,[29] is put by the Law Reform Commission of Canada as follows:

> "First, the judge must remain in full control of the hearing. If it is interrupted by misbehaviour in the courtroom, he must take steps to restore order as quickly and effectively as possible. The time factor is crucial: dragging out the contempt proceedings would mean a lengthy interruption to the main proceedings, thereby paralysing the court for a time, and indirectly impeding the speed and efficiency with which justice is administered.
>
> Secondly, the judge's power to control the court proceedings would be weakened if contempt proceedings were heard by another court. The second court would have to hear evidence about the act, with the judge before whom the disruption had taken place as principal witness. And should the accused again misbehave in court, the contempt case itself would have to be referred to still another court, and so on. The administration of justice could be brought to a complete standstill.
>
> Accordingly, to ensure the effective administration of justice, the presiding judge must remain in control of the proceedings. He must therefore be able to use the classical summary procedure for cases of misbehaving in court."[30]

The first part of this argument has been criticised as involving a *non sequitur.*

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28 See Chesterman, *Improper Behaviour in Court*, para 47 (1984), Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 Yale LJ 39 (1978), Hanger, *Comment, The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 Wm & My L Rev 553 (1987), Braswell, *Comment: The Role of Due Process in Summary Contempt Proceedings*, 68 Iowa L Rev 177 (1988), Sax, *Counsel and Contempt: A Suggestion that the Summary Power be Eliminated*, 18 Duquesne L Rev 289 ('980), Beard, Comment, *The Judge as Prosecutor and Jury: Right to a Jury Trial in Criminal Contempt Proceedings*, 4 So U L Rev 72 (1977).

29 E.g. *Brown v Putnam*, 6 ALR 307, at 308 (1975).

30 WP pp23-24. See also the Law Reform Commission of Canada's *Report on Contempt of Court*, p23 (1982).

Thus Professor Chesterman observes in respect of judicial statements on the same lines as the Commission's analysis, that they:

> "[do not] establish why it is that the need for speedy *treatment* necessitates summary *trial*, let alone *punishment*. True it is that interruption to a trial frequently demands that some immediate *action* be taken. But the leap from the need to take immediate action to avert, if possible, disruption or further disruption of the proceedings to the need to be able to immediately try and punish the offender is not clear. One can instance many processes, the disruption of which demands immediate action, which do not have as a protection the power to instantly send the offender to prison - e.g. university lectures, surgical procedures, procedures before Tribunals, church services. What is it about court proceedings that demands that they be protected by this extreme power? It is arguable that the answer is that a residue of the original notion of the court as personification of the Sovereign, with a consequent justification for instant retribution, is present."[31]

Two comments may be made on this criticism. First, whether the power reflects to any extent the notion of the court as the "personification of the sovereign" is irrelevant, if its existence is necessary for the reasons given by the Law Reform Commission of Canada. Consistently with our approach to the arguments in favour of retaining contempt of court based on its being part of the inherent jurisdiction of the court, we are not particularly concerned with its historical origin but rather with whether it is required to ensure the effective administration of justice. Second, the examples chosen by Professor Chesterman of processes not afforded this protection hardly add weight to his argument. Unruly behaviour by a student in a lecture room or classroom for example is undesirable, but is not of the same order of seriousness as the same behaviour in a courtroom.

The second argument advanced by the Commission may be criticised on the ground that it attaches more importance to the preservation of the judge's dignity than to the liberty and fundamental rights of the person accused of *in facie* contempt. It is again necessary to remind oneself at the outset that the object is not the preservation of the personal dignity of the judicial officer concerned but rather the effective administration of justice. Bearing that in mind and giving all possible weight to the rights of the accused person, there is, as the Commission points out, an almost insoluble problem in requiring the proceedings to be heard by another court.

It could, however, be said that the objection to the judge's having to give evidence in separate proceedings is not soundly based. There is perhaps no fundamental objection in principle to a judge's doing just this. It might be that in any event in practice the judge would be most unlikely to be called to give evidence by the prosecution since normally t .ere will be court officials,

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31 Chesterman, *Improper Behaviour in Court*, para 48 (1984).

gardai or others in court who will also have witnessed the alleged disruption. On this view, in the small residual number of cases where the judge's evidence is crucial, it is essential that it should be given and tested by cross-examination rather than be assumed to be correct, subject to whatever the defendant may say to dislodge the perceptions of the judge. Consistently with this approach, one could adopt the proposal of the Law Reform Commission of Australia that the judge should be eligible to give evidence only with leave of the court hearing the case against the defendant.

It is, of course, no answer to this argument that it is in some sense undignified for the judge to have to give evidence in subsequent proceedings. It may indeed be that the traditional reluctance of courts to require judges to give evidence in subsequent cases has no clearly defined rational basis, save perhaps a belief that the essential value of the adjudicating function is emasculated if the judge has to become a witness in subsequent proceedings.

The more persuasive aspect of the Commission's second argument is the possibility that the alleged contemnor will disrupt the second proceedings in the knowledge that that tribunal also will be helpless to deal immediately with the contempt and will be obliged to allow yet another tribunal attempt to deal with a person who is endeavouring to bring the whole process to a standstill. This inescapable problem will arise, whether or not the judge is called as a witness in the subsequent proceedings.

(b) *The Overtness Rationale*

The overtness rationale seeks to justify the summary procedure on the basis that the judge will have actually witnessed the contemptuous act and that thus the normal difficulties with proof in criminal trials do not arise. As was said in the United States Supreme Court decision of *Cooke v United States*,[32] in 1925, "there is no need of evidence or assistance of a counsel before punishment, because the court has seen the offence".

The approach has been criticised on a number of grounds. First, "[n]umerous experiments ... have demonstrated that individuals often misperceive even simple occurrences".[33] Secondly, the atmosphere in court can be stressful and thus reduce capacity to perceive complex events.[34] Thirdly, age can reduce perceptual capacity.[35] Fourthly, as was recognised in the United States

32 267 US 517, at 534 (1925).

33 Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 Yale LJ 39, at 49-50 (1978), citing Chenowith, *Police Training Investigates the Fallibility of the Eye Witness*, 51 J Crim LC & PS 378 (1960), *Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitnesses Identification*, 29 Stan L Rev 969, at 971-980 (1977).

34 Chesterman, *Op cit*, para 52, citing EF Loftus, *Eyewitness Testimony*, 33 (1979).

35 *Id*, citing Loftus, 159. See also the Law Reform Commission of Australia's Report No. 26 (Interim), *Evidence*, paras 419-421, 664-668 (ALRC 26-1985).

Supreme Court in *Bloom v Illinois*,[36] forty-three years after *Cooke v United States*,[37]

> "[c]ontemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of the officers of the court."

Fifthly, "[t]he shock and spontaneity of most courtroom disturbances probably increases the margin for error, particularly when several individuals are involved in the same incident."[38]

Sixthly, the judge will have no certain knowledge of the *mens rea* of the offender:[39] an inference as to what it may be, however reasonable on the facts, has no guarantee of infallibility. Seventhly, and very much related to the sixth consideration, the judge can only guess at the mental capacity of the offender,[40] who, up to the incident, may have betrayed no evidence of a deep-seated mental infirmity.

The following comments may be made on these objections, most of which, it may be observed, are applicable to eye witness evidence generally. First, it is no doubt true that eye witnesses are sometimes fallible but that does not affect the argument that the judge has a unique advantage in being an eye witness,: unique because it is not enjoyed by him in any other case of which he has to dispose. Second, the judge will invariably have lengthy experience of the stressful atmosphere of courts, in all cases as an advocate and in most cases as a judge, and it is difficult to see why it should reduce his "capacity to perceive complex events". Thirdly, while age can doubtless reduce perceptual capacity, this is simply another aspect of the frailty of eye witness evidence in general. Fourthly, while it is true that contemptuous conduct may frequently affront a judge in a personal sense, society rightly expects judges not to be swayed by considerations of that nature. Fifthly, while the margin for error may be increased because of the "shock spontaneity" of the occurrence, this is also a criticism which could be levelled at any form of eye witness evidence. Sixthly and seventhly, while the judge's inference as to the *mens rea* of the contemnor has certainly no guarantee of infallibility, the same can be said of any judge or jury.

A more substantial objection is that, by reason of the breadth of the concept of "in the face of the court" under present law, the judge may in fact witness nothing of the allegedly contemptuous conduct. In such instances, the

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36 391 US 194, at 202 (1968).

37 *Supra*.

38 Kuhns, *supra*, at 50.

39 *Id*.

40 *Id*.

overtness rationale cannot apply. It could, of course, be saved by a narrowing of the definition of *in facie* contempt to conduct within the sight or hearing of the judge or, alternatively, by treating unwitnessed *in facie* contempt as *sui generous* and uniquely entitling the contemnor to a jury trial where it constitutes a major offence.

Our Tentative Conclusions

On this, as on the general question whether the offence of *in facie* contempt should be retained, we are strongly influenced by the fact that the present law is giving rise to no problems. The arguments against depriving judges of a seldom used residual power which, in the last analysis, ensures that they can control court proceedings are, in our view, persuasive. *Our tentative conclusion is that, accordingly, in facie contempt should continue as a summary procedure and should be tried by the judge before whom the alleged disruption occurred.*

4. *Limiting the physical scope of in facie contempt*

We now must consider whether, if *in facie* contempt is to be retained, it should be limited in its physical scope. Two possibilities suggest themselves. The *first* would seek to provide a geographical limit on the area within which *in facie* contempt may be committed. The second would limit *in facie* contempt to cases where the judge or judges actually witnessed the conduct in question. As may readily be appreciated, these options are not mutually exclusive: it is quite possible to favour either alone or both of them in conjunction.

(a) *A geographical limit?*

A strong case may be made for the prescription of a definite geographical limit within which *in facie* contempt can be committed:

> "It is desirable that any exception to the normal processes of the law, including those that protect rights of the accused, should receive as limited a scope as possible. It is also desirable that there be as much certainty as possible as to the conditions under which the summary procedure can be invoked and that, when the summary procedure is invoked, there is as high a degree of certainty as possible as to what the accused actually said or did."[41]

If a geographical limit is to be set, the question arises as to whether it should be prescribed in general or specific terms. This issue arose in England in a narrow context, but the discussion of the Phillimore Committee is nonetheless useful to record and consider. The context was that of taking photographs in court or its precincts which was prohibited by section 41 of the *Criminal*

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41 Chesterman, *Improper Behaviour in Court*, para 61.

Justice Act 1925.

> "It was represented to us that there is considerable uncertainty as to how far the 'precincts' extend, and that this is a source of difficulty to journalists seeking photographs of persons involved in court proceedings. We have therefore considered whether it would be possible to devise some definition of general application which would remove such uncertainty as may exist. The difficulty is that court buildings vary greatly throughout the country. Sometimes a court is situated in a corner or on particular floors of a town hall or of municipal offices. Sometimes it is a detached building on its own or it may form one of a block of courts. Sometimes a court sits on a single occasion in a building not normally used as a courthouse at all. Sometimes the building has paths leading to it from the highway and sometimes a door or steps leading directly to the pavement of the public highway. We consider that it would be impracticable to attempt to define for all purposes what are the precincts of a court. However, no doubt in many cases it may be possible by means of a map or plan displayed in the court premises to define the extent of what will normally be treated as the court and its precincts. *We recommend that this should be done whenever practicable for the guidance and assistance of all having business in the court.* This should not, however, in any way limit or prejudice the court's powers to determine and declare the limits of its own precincts, or to extend them if, for example, an actual or threatened demonstration in the highway outside should interfere with proceedings in court."[42]

We are not enthusiastic about a reform on these lines. It seems to us that it would be the worst of all solutions since it would involve line-drawing of an illusory and misleading nature, on account of the court's ability, under the Committee's proposals, to extend the line further, apparently retrospectively, to deal with an apprehended difficulty. The idea that the line could thus be extended makes a mockery of objectivity: the notion of "precincts" would become a malleable tool capable of being fashioned in any shape to accomplish the purposes of a court seeking to extend its punitive power.

Whether *any* line-drawing is sensible may, however, be doubted; inevitably it would lead to disappointed expectations (albeit unjustifiable ones), as well, perhaps, as actually encouraging intrusive conduct just beyond the pale.

We conclude therefore that it would be better, on balance, to leave the geographical limit of in facie contempt unencumbered by precise definition.

42 *Phillimore Report*, para 41.

(b) *A requirement that the judge or judges have actually witnessed the conduct in question?*

We now must consider whether there should be a requirement that the judge or judges actually witness the conduct in question. In favour of this view, it may be argued that it is inherently unjust to the defendant that he or she should be subjected to the summary procedure of *in facie* contempt proceedings if the judge (or judges) did not actually witness the alleged misconduct. One of the important rationales for this summary procedure is missing. As against this it may be replied that, at most, this argument establishes that the summary procedure is of doubtful fairness in such cases; it does not establish that conduct in court, merely by virtue of being done when the judge (for whatever reason) does not witness it, should lose the character of *in facie* contempt. For example: a defendant throws a book at the judge; that act is unquestionably an *in facie* contempt if the judge sees the book coming; it is scarcely less so if the judge is taking a note at the time and thus has no certainty as to its provenance. *Accordingly, we do not consider that there should be such a requirement.*

5. Making absence from court no longer constitute an in facie contempt

We now must consider whether the non-attendance at court by a witness or legal representative should constitute an *in facie* contempt. As we have seen, this view, so far as lawyers are concerned, has much support in the United States and in the Canadian decision of *McKeown v The Queen*.[43] We have also noted that a witness who fails to turn up to give evidence may be convicted of criminal contempt where the purpose of not attending is to sabotage the trial.

In favour of characterising absence as *in facie* contempt, it may be argued that it amounts to an insult to the court which is felt by the court "within the four walls". A snub, albeit at a remove, may be considered to occur where it is received.

As against this there are strong considerations militating against this approach. In particular, the case for urgent action is difficult to sustain; moreover, the judge who proceeds in a *summary manner can have no certain knowledge of why the defendant was absent.*

Our tentative conclusion is that the absence from court, even if wilful, should not constitute in facie contempt. We consider that the best way to deal with this type of default is by creating a specific statutory offence, in respect of which the requisite mens rea would involve intent or recklessness as regards the interference with the administration of justice; the provision should be qualified so as to make "reasonable excuse" a defence. There seems no point in attempting to prescribe specific instances which would constitute an excuse in this context.

43 16 DLR (3d) 390 (Sup Ct of Can, 1971).

Journalistic Privilege

Whether or not the law is to retain *in facie* contempt, it is necessary to consider whether a journalistic privilege to refuse to disclose sources of information should be part of the law. A threshold question, of course, is whether such a privilege, assuming it were desirable, would be constitutionally permissible. This issue goes to the heart of the separation of the powers. The Supreme Court decision in *Re O'Kelly*,[44] on one view, forecloses the possibility of legislation, providing for such a privilege: it is the judiciary, and no other institution, whose function it is to prescribe what is to constitute evidence. If this is so, neither the executive nor the legislature can have any role in establishing the rules of evidence.

We doubt whether this is the true position. We consider that the Constitution has not debarred the legislature from a role in the development of the law of evidence. Indeed, in spite of broad statements consistent with a contrary view, it seems clear that the courts have accepted that this is so.[45]

If we are correct in this view, then the question resolves itself into one concerning the permissible leeway given to the Oireachtas in prescribing cases where a witness is not obliged to disclose a source. We consider that the Constitution permits a legislative exclusion of this nature, provided it serves a rational goal, which can be justified or defended on the basis of factors to which the Constitution attaches importance, and which do not infringe against the requirements of constitutional justice.

In this context, it may be useful to approach the matter from the starting point of Wigmore's fourfold test, which Gavan Duffy J favoured in *Cook v Carroll*[46]. These conditions are as follows:

(1) the information must originate in a confidence that the identity of the informant will not be disclosed;

(2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;

(3) the relationship must be one which in the opinion of the Court should be fostered;

and

(4) the injury that would result for the relationship by reason of the

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44 108 ILTR 97 (Sup Ct, 1974). See also *The People v T*, CCA, 27 July 1988, analysed by R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 151-153 (1989), and Jackson, *Evidence - Competence and Compellability of Spouses as Prosecution Witnesses*, [1989] DULJ 149.

45 Cf *Cully v Northern Bank Ltd*, [1984] ILRM 683 (High Ct, O'Hanlon J). See now the *Central Bank Act 1989*, section 16.

46 [1945] IR 515.

disclosure of the identity of the informant must be greater than the benefit thus gained for the correct disposal of the proceedings.

As regards these factors, it is not clear to what extent, if any, the present law is inhibiting the publication of material which should, in the public interest, be published.

It is worth recalling what the New South Wales Full Court stated in *Re Buchanan*[47] regarding journalistic ethics:

> "Every truly democratic system of government rests upon the rule of law, and no system is truly democratic if it does not. If the law of the land is to rule, it follows, of necessity, that the courts administer the law must not be impeded in the performance of the function by any who give their allegiance however sincerely, to the private codes of minorities, however admissible codes may, for other purposes, be".

We do not wish for a moment to minimise the desirability or moral worth of the journalistic profession seeking to govern its members by codes of behaviour: on the contrary we see considerable social benefit in such attempts at controlling excesses, whether motivated by a misunderstanding of the law, political sentiment or the desire for commercial gain. But we consider it equally manifest that the claim to follow the prescriptions of a journalistic trade union - or disinterested professional or vocational norms - should in no sense give to a journalist the right to override constitutional or statutory principles as to the admissibility of evidence.

It may be worthwhile mentioning the drawbacks to a journalistic privilege. First, there is a risk that an unscrupulous journalist might be tempted "to publish exaggerated or even imagined information or allegations",[48] since he or she would be able to attribute their provenance to an unidentifiable source. This is not, of course, to suggest that journalists as a group are in any way untrustworthy. Indeed Ireland can be proud of its long tradition of journalistic integrity. But it is nonetheless true that a change in the law providing for the non-disclosure of sources would mean that, if any untrustworthy journalist engaged in exaggeration or concoction, the damage to justice could go unimpaired. Secondly, an unscrupulous informant could equally whisper exaggerated or false information in the ear of a journalist without fear of discovery. To take but one area where this might result in injustice and unwarranted political confusion, the whole subject of Irish-British relations in respect of Northern Ireland would become open to manipulation in a manner that would scarcely be for the benefit of the nation as a whole.

Another matter worth noting is that an argument in favour of a journalistic

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47 [1964-5] NSWR 1379, at 1380.

48 Law Reform Commission of Western Australia's *Report on Privilege for Journalists* para. 4.7 (Project No. 53. 1980).

privilege based on the public's "right to know" is self-defeating since, "if an allegation of serious misconduct is made in a newspaper, but the allegation cannot be adequately investigated because the source of the information is withheld, the publisher is in effect asserting the public's 'right to know' on the one hand and denying it on the other".[49]

Moreover, as we have already noted, while *O'Kelly's* case is authority for the proposition that journalists enjoy no privilege *as such* to withhold the sources of their information, this is not to say that the court will never have regard to the confidentiality of the communication. The tests in *Cook v Carroll* were formulated by Gavan Duffy J in the context of confidences to a spiritual advisor but that is not to say that they could not be applied in other contexts. If all the requirements there laid down were established, a court might not consider it proper to order a journalist to disclose his source, even though the evidence was relevant and admissible.

In the light of these considerations, we tentatively recommend that the law relating to journalists' obligation to give evidence and, when doing so, to answer questions, should not be altered.

Sound Recorders

We now must consider the question of contempt of court in relation to sound recorders. We can do so only be addressing the general issue of the use of sound recorders in court. Several possible approaches might be favoured, ranging from a complete ban on their use, though conferring an express discretion on the judge to authorise their use, to a complete liberty to use them subject only to restriction in specific cases for specific reasons. Parallel with this is the question of who should be authorised to use sound recorders and for what purposes. We shall first address these issues in a general way by considering the case for and against a wide-ranging entitlement to make sound recording.

The Case in Favour of a Wide-Ranging Entitlement to Make Sound Recordings

The case in favour of a wide-ranging entitlement to make sound recordings rest on two principal arguments.

(1) ***Open justice***[50]

The general principle that justice should be administered in public is one that has the support of the Constitution.[51] Street CJ, of the New South Wales Supreme Court, put the matter well:

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49 *Id.*, para. 5.6.

50 See generally the New South Wales Law Commission's Report on the subject, of March 1984, paras 2.6 ff.

51 Cf. *Casey*, 434ff. *In re R Ltd*, [1989] IR 126 (Sup Ct).

"It is a deeply rooted principle that justice must not be administered behind closed doors - court proceedings must be exposed in their entirety to the cathartic glare of publicity. There are limited exceptions to the observance of this principle but these are well defined and sparingly allowed. Statutes are made by public processes. They are judicially administered in public proceedings. It is only thus that the right of representation and of due hearing of all legitimate submissions can be seen to have been accorded to parties subjected to the judicial process. Moreover, publicity of proceedings is one of the great bastions against the exercise of arbitrary power as well as a re-assurance that justice is administered fairly and impartially."[52]

If the principle of open justice is to be given full effect it should not be subject to limitations unless they are essential in the interests of justice. It may be suggested that the concerns about the risks of abuse of sound recordings are somewhat fanciful, at all events to the extent that they would imply a general rule of exclusion.

(2) The role of the media

It may be argued that the media play an important democratic role in their attendance at court proceedings and their reporting on them. As Professor Sawer has observed, in a democracy, it is:

"essential that public interest in the working of the law be maintained. That can be achieved to some extent by the principle of public hearings, but the number of laymen with interest in, or knowledge of, the law likely to visit courts is very limited; press reporting is much more likely to ensure widespread awareness of the legal system and prompt information about features of the law likely to require attention."[53]

The Constitution recognises the importance of the press in attending court proceedings. Why, therefore, should any inhibition be placed in the way of the media in reporting proceedings which they are entitled to report? Sound recordings will encourage greater accuracy and reduce the potential for disputes as to whether proceedings were accurately reported.

Against this, it may be suggested that the role of the media should be assessed realistically. The New South Wales Bar Association observed that:

"the media are not in truth the representatives of the public. Those

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52 *R v Brady*, 29 July 1977, Sup Ct of NSW, Ct App, transcript of judgment pp3-4, quoted by the New South Wales Law Reform Commission in its Report, para 2.11.

53 G Sawer, *Privilege*, in the Australian Press Council, *To Name or Not to Name*, p11 (1980), quoted by the New South Wales Law Reform Commission in its Report, para 5.8. See also *Maryland v Baltimore Radio Show Inc.*, 338912, at 920 (*per* Frankfurter J, 1950), *Richmond Newspapers Inc v Commonwealth of Virginia* 448 US 555, at 586, fn 2 (1980).

persons who attend Court from the media are employees of the very large companies who seek to make profits out of news. The companies in question have little or no particular concern about either the administration of justice or the interests of the public. They do greatly prize the opportunity to report Court proceedings. The advantage to them of Court proceedings is that the coercive power of the State is used to compel the provision of salacious or embarrassing information which would otherwise be very hard to collect in circumstances where they enjoy substantial immunities from suit for defamation. If the press did not enjoy those immunities, they would take very much less interest in Court proceedings."[54]

While this statement relates to the media in another country, and while the tone is somewhat sour, it is useful in reminding us of the fact that the motives of the media in reporting court proceedings are not necessarily limited to that of serving as a democratic link between the courts and the public: other considerations at times come into play, and these include ones that, while understandable in the context of selling newspapers or increasing audience numbers, are less than altruistic. At times the media will report on cases with a salacious or embarrassing element, not because of some moral or political lesson that may be learned from them but because a substantial number of the readership or audience is pleased to read or hear about them.[55] Of course it is possible to rationalise this type of reporting on the basis that, if this is indeed what many of the public want, the provision of such a service performs an essential democratic function. We need not enter into discussion of the merits of this controversial proposition; it is sufficient to note that it involves an argument quite different from the argument that the media's reporting of court cases acts as a link between the courts and the people.

The Case Against a Wide-ranging Entitlement to Make Sound Recordings

The case against a wide-ranging entitlement to make sound recordings rests on four principal arguments.

(1) Dangers relating to coaching of witnesses

If sound recordings were widely available it is possible that they could be used to brief and coach persons who had not yet given evidence. It is of course true that the risk of coaching already exists, and that, where the second witness did not hear the first witness giving evidence, a good note of what an earlier witness, or the judge, has said will assist in coaching; but it is surely beyond argument that a sound recording would better capture the nature of what took place than can a note, however well taken.

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54 Letter from the New South Wales Bar Association to the New South Wales Law Reform Commission, 30 November 1983, quoted in the Commission's Report, para 5.7.

55 It should not be thought that the constitutional and statutory limitations on publishing reports of indecent or obscene matter completely remove this problem.

The reply to this argument is that the increase in the risk of coaching likely to be brought about by a wide-ranging entitlement to record seems small. If the entitlement is restricted to lawyers rather than to the parties to litigation and witnesses, then the matter will be controlled by the rules of etiquette of the profession.

(2) Disturbing witnesses

A wide-ranging entitlement to record might be considered likely to disturb some witnesses. To this suggestion the New South Wales Law Reform Commission has replied that if the recording is only to be used to prepare a report, "then there is very little difference when compared with the use of handwritten notes by journalists and the argument loses considerable force".[56] While this is true to some extent, it cannot be denied that some witnesses may not have their discomfort removed by learning the purpose of the recording: their anxiety can spring from the experience of being recorded rather than from an apprehension as to what is to happen to that recording at some future time.

(3) The risk of distraction to court proceedings

Sound recorders could disturb the court proceedings to the extent that they might be played back or have cassettes changed. While this may be so, the problem seems a trivial one, capable of being easily controlled by the trial judge. Recent advances in technology have made the problem of even less potential seriousness than a few years ago.

(4) Privacy considerations

Giving evidence in court is usually a stressful process for witnesses. Moreover the matters to which their evidence relates can be personal, embarrassing or shameful. If a witness knows that his or her evidence is being recorded and that the recording may be replayed to persons with a prurient interest in the case, this may add to the pressures on the witness. Apart from the question of added pressures, it may be considered an unwarranted invasion of his or her privacy that such an intimate record should be made, with the risk of later being replayed, whether in circumstances authorised by the court or otherwise.

The obvious reply to this concern may seem to be that a witness's right to privacy is secondary to his or her obligation to give evidence in open court[57] and that a written record of what he or she has to say can be just as

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56 In their Report, para 5.13.

57 The question of the merits of the present law relating to the circumstances in which proceedings should be held *in camera* is one which ranges well beyond the scope of contempt of court and need not here be addressed, save to note that any significant changes in the law relating to the use of sound (and, *a fortiori*, video) recorders would make it desirable to review the scope of the law relating to *in camera* proceedings.

damaging as an oral one. While there is force in this reply, it is also true that the legal rules relating to the obligation to give evidence in open court were developed before the recent technological advances. There is something intrusive about retaining on tape the actuality of a witness's performance which is over and above that which a transcript involves.

A specific aspect of this question may be disposed of briefly. In certain circumstances the press have a right to attend, but not report, court proceedings,[58] or to report only limited aspects of the proceedings.[59] We consider it beyond argument that the media should have no right to sound record evidence where no report of the proceedings is possible; we also consider that they should have no right to sound record proceedings where there is an entitlement to report only aspects of the proceedings, as, for example, under the *Criminal Procedure Act 1967*. The risk of prejudice or damage to a party to the proceedings seems too great.

Eligibility to Make a Sound Recording

It is now necessary to consider the question of who should be eligible to make a sound recording, if such recordings are to be permitted at all. We will examine five categories of person:

(i) persons having no connection with the proceedings;
(ii) the media;
(iii) researchers;
(iv) authors; and
(v) parties to litigation or their legal representatives.

(i) Persons having no connection with the proceedings

The weakest claim to an entitlement to make a sound recording comes from persons having no connection with the proceedings. The spectre of busybodies or persons with a prurient interest immediately occurs. It would be wrong, however, to dismiss this claim out of hand. A member of the public is entitled to attend all court proceedings save those limited number which the law prescribes are to be held other than in public. If such a person may hear the evidence and (it seems) take notes, why should he or she not also be entitled to make a sound recording? The answer might appear to be that the court would have no effective control over what the person did with the recording. While undoubtedly it is true that the court would have far more effective control over lawyers, for example, this answer may not fully meet the difficulty. If a person with no interest in proceedings may take notes and do with them what he or she wishes, why is their uncertain fate any less alarming than the uncertain fate of a recording? Indeed, one of the primary dangers with sound recordings - that of the enhanced opportunity to coach a witness -

58 Cf. *Casey*, 434ff., *In re R Ltd*, [1989] IR 126 (Sup Ct).
59 Cf the *Criminal Law Procedure Act 1967*, section 17.

has little or no application where the person making the recording is unconnected with the case. Moreover, it would be quite possible to have a general rule which permitted persons with no such connections to make sound recordings, while reserving to the court the power to prohibit the recording, in part or in full, if the particular circumstances indicate that this would be desirable.

(ii) ***The media***

We have already discussed the merits of the media's claim to an entitlement to make sound recordings when we considered the general argument that sound recordings are necessary to bolster the media's role in acting as an important link between the courts and the public.

If the media were to have an entitlement to record, a number of consequential issues would arise. It seems clear enough that the recording could in such circumstances be made and used only for the purpose of reporting the proceedings, save with leave of the court. A related, important issue is whether in any or all circumstances, it should be possible to broadcast such recordings rather than state their contents.[60] The argument in favour of such a possibility is a good deal more controversial than the simple issue of whether the media may make sound recordings. There is of course an analogy with reporting proceedings of the Oireachtas, but the step is a far more significant one in view of several factors, such as the facts that (in contrast to TDs) witnesses may be speaking under legal obligation rather than by choice, and that the dissemination of such a recording to a wide audience might increase the risk of intimidation or reprisals in relation to witnesses, as well as invading their privacy. Accordingly, without prejudice to any conclusions at which we may ultimately arrive in respect of the media's entitlement to *make* sound recordings of legal proceedings, we will not further address the separate question of their entitlement to *broadcast* these recordings as we consider that it raises important and complex issues of communications policy which range well beyond the scope of the present paper.

(iii) ***Researchers***

We must now consider whether researchers should be entitled in any circumstances to make sound recordings. The case in favour is, of course, that research into the judicial process can help to improve it and to increase its capacity to deliver justice. Indeed, the idea that there should be no research into the judicial process or that unnecessary obstacles should be placed in its way is an alarming one.

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60 In Australia it appears that broadcasting of a sound recording of judicial proceedings has occurred "without criticism": New South Wales Law Reform Commission's Report, para 5.17. The Commission recommended that such broadcasting should be permissible with leave of the court.

The only particular difficulties in relation to sound recordings being made by researchers would seem to concern the question of identifying who is a researcher and the question of the adequacy of the controls over what might later be done to the recording in the hands of the researcher or someone else. The answer to these difficulties may be that it is best to leave their resolution to a case-by-case basis. Although research into the judicial system can sometimes be inspired by political or ideological motivations, we consider it wrong on that account to erect a presumption of *mala fides* or of impropriety against researchers.

(iv) Authors

Some authors who write about the judicial process fall into the category of researchers; others do not easily do so, save through a fairly extended meaning of that category. There have been examples of books being written about the trials of famous persons[61] or of cases of notoreity[62] or broad public interest.[63]

There would seem to be a strong argument in favour of authors being permitted to make and use sound recordings. A few questions, similar to those in relation to researchers, arise. The first is the definition of an author - a somewhat more difficult matter than that of the definition of a researcher. Perhaps no more is necessary than that he or she be defined as "a person who, in the opinion of the court ..., is *bona fide* engaged or intending to engage in the writing of a book or article on a subject in respect of which those proceedings are relevant".[64] The court could have power to question a person who asserts this status in order to confirm his or her eligibility. The court could, moreover, be able to prescribe such conditions on the use of the recording as appear to it proper.[65]

(v) The parties and their legal representatives

A strong case may be made in favour of the parties and their legal representatives being permitted to make sound recordings. The benefits, in terms of exactitude, speed and cost, seem considerable. The possible disadvantage, to which we have already referred, is the enhanced capacity it confers on legal representatives to coach witnesses. As we have already indicated, the reply to this concern is that it can be mitigated by giving the

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61 The arms trial is one recent example.

62 For example, the "Kerry babies" prosecutions.

63 For example, the recent litigation between the Dunnes and the National Maternity Hospital.

64 This is the solution of the New South Wales Law Reform Commission, in para 5.21 of its Report.

65 The New South Wales Law Reform Commission proposes that the recording should not be made available to any person other than the servant or agent of the author and then only for the purpose of assisting with the writing of the book or article; moreover, the recording should not, save with leave of the court, be used to correct or call in question the whole or any part of an official transcript of the proceedings; further, no copy of the original recording should be made by any person: *id*, para 5.22.

judge power to prohibit the making of sound recordings by parties or the representatives in cases where, either in the particular circumstances or by reason of the general category of proceedings,[66] the juage considers this desirable.

Our Tentative Conclusions

We must now attempt to determine what solution would best deal with the subject of sound recorders. We think it plain that *some* controls must exist, and equally plain that a complete embargo on their use is not called for. Within these parameters two competing strategies may be considered. One would have the legislation prescribe in detail the circumstances in which sound recording is permissible and the consequences of breach of these rules. These circumstances could of course be either broadly or narrowly drawn. The other approach would be for the legislation to leave the matter to the judge in the exercise of his or her discretion in the light of the circumstances of the case.

Our tentative conclusion is in favour of a model tending towards the latter approach but with some specific elements prescribed by legislation. This is in substance the strategy favoured by section 9 of the 1981 Act, which, we feel, captures the right balance, subject to a couple of points of detail. We see merit in limiting the potential range of persons who may apply for leave to record (though not necessarily be granted it). This should in our view be limited to: (1) the parties, their legal representatives or any other person acting in the proceedings on their behalf[67]; (2) representatives of the media; (3) researchers; and (4) authors of books or articles. We consider that the provision relating to forfeiture contained in section 9(3) should not be included in the proposed legislation, in view of the constitutional uncertainties relating to forfeiture[68]; in any event, the problem of unauthorised or otherwise illegal sound recording relates in only the most unimportant of ways to the instrument used to make the recording - in contrast to such engines of potential illegality as gambling machines.[69]

Television and video recordings

The question whether television and video recording of judicial proceedings should be permissible is one which we do not propose to consider in the present paper. It might be argued that our proposals to include specific provisions in the legislation relating to sound recordings and contempt of court make it necessary to address also the question of television and video

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66 In this context it is worth recalling that the New South Wales Law Reform Commission, in their Report, para 4.15, noted that they had been informed that no sound recorders are allowed at all in the Central Criminal Court (Old Bailey), "presumably because of the risk that the recording could be used to brief subsequent witnesses".

67 For example in proceedings where a litigant was not legally aided but was being helped by a friend.

68 Cf *Casey*, 251-253, R Byrne & W Binchy, *Annual Review of Irish Law 1987*, 107-108 (1988).

69 Cf *Casey*, 252.

recordings. We are of the view, however, that the subject raises such distinctive and complicated issues not of pressing urgency, that it should not be dealt with in the present paper.

CHAPTER 11: REFORM PROPOSALS IN RELATION TO SCANDALISING

The law relating to scandalising is controversial: "[p]erhaps more than any other branch of contempt law scandalising the court is most open to question".[1] In this chapter we examine whether scandalising should be subject to any controls under the law of contempt of court, and if so, how best they should be structured.

The Case in Favour of the Status Quo

We here consider the case in favour of the *status quo* in relation to scandalising. Where we refer to the *status quo*, we mean the general position, rather than every specific aspect, however trivial.

The argument concentrates on three policies at the heart of the existing law:

1. Protecting the efficacy of the judicial process as integral to the administration of justice and, more basically, to the maintenance of the rule of law in society.

2. preserving public confidence in the administration of justice; and

3. deterring future attacks on the judiciary by early preventive action.[2]

1. Protecting the administration of justice and the rule of law

The present law of contempt for scandalising may be identified as supporting

1 *Borrie & Lowe*, 244.

2 See Chesterman, *Public Criticism of Judges*, para 3.2, the Law Reform Commission of Australia's *Report on Contempt of Court*, para 422 (1987).

"the maintenance of the rule of law through the proper functioning of a court system staffed by independent judges".[3] If judges could be criticised freely without the strong sanctions provided by the law of scandalising, then as well as weakening public respect for the judiciary - a matter we consider presently - the scandalous comments would have the more direct effect of suggesting to all those disposed to defy the law in other ways that they might get away with it.

To this argument it can be replied that, while it may be considered essential to maintain the particular social order that exists in a country at any particular time,[4] the question remains as to whether contempt proceedings as at present structured are a necessary, or even a tolerable, way of accomplishing this goal. Some may argue that the criminal law could adequately deal with the problem of scandalising by means of prosecutions for a considerably more narrowly drawn offence[5] at the suit of the Director of Public Prosecutions, with the trial judge exercising no more intrusive a function than in relation to prosecutions for other offences. As we have seen, however, in *The State (DPP) v Walsh*[6] the Supreme Court expressed concern that ordinary jury trial for scandalising (and other contempts) could imperil the administration of justice. Whether this fear is greater than is warranted and whether the rationale of *Walsh* goes so far as to *require* the retention of proceedings for scandalising, as opposed to a (possibly more narrowly drawn) criminal offence are matters for debate.

2. *Preserving public confidence in the administration of justice*

In support of the existing law of contempt for scandalising, it may be argued that public confidence in the administration of justice requires that criticism of the courts and of judges be firmly controlled. As well as weakening the efficacy in general of judicial decrees, scandalous assertions may have the more insidious effect of encouraging the public gradually to lose confidence in the fairness or abilities of judges, and thus slowly to abandon their trust in the administration of justice. The long-term result may be to transform a system of law into a system of mere orders, and to transform a public sentiment of having an obligation to obey the law into one of being merely obliged to do so.[7]

It has, however, been argued that:

> "[t]here is no clear evidence that public confidence in the system of

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3 Cf Chesterman, *supra*, para 3.2 (setting out, *inter alia*, arguments in favour of present approach).

4 We do not here address the problem of particular social orders which are anti-democratic or otherwise illegitimate.

5 We discuss below the possibility of the legislation's prescribing just such an offence.

6 [1981] IR 412 (Sup. Ct).

7 This is an issue going to the core of jurisprudential debate: see, e.g. HLA Hart, *The Concept of Law* (1961).

administration of justice could ever fall so low that for this reason alone the system would be destroyed by political action. An event of this nature could only occur as part of a much more thoroughgoing revolutionary assault, such as some versions of Marxist doctrine contemplate, upon the structure of government as a whole. In this wholesale revolution, a lack of public confidence in the administration of justice would be only one of the numerous contributing factors. Acceptance, perhaps in a cynical spirit, of the fallibility of human institutions is the more likely outcome of allegations impairing 'public confidence'."[8]

As against this, it may be replied that public opinion on the performance of the judiciary is more easily susceptible to being manipulated and inflamed than might first appear. Many people have strong views on the justice of the manner in which particular legal proceedings are conducted as well as on such matters as verdict, sentence or award. They maintain these views without having attended the proceedings and frequently without having acquired anything like complete information on the evidence and legal submissions. Their views on such matters as *mens rea*, evidential proof and sentencing could not always be characterised as clear - minded and consistent. The fact that people *should not* be prejudiced in their opinions does not prevent them from being so in fact. Perhaps proceedings for contempt serve a valuable function here in preventing the manipulation of public opinion in relation to the judiciary and the administration of justice by politically - motivated persons or cynically - minded members of the media.

The need for a sense of perspective is important. The Law Reform Commission of Australia observes that:

> "[a]t the end of the day, a great deal of argument in this area is pure speculation. At most, one can conclude that, while the maintenance of public confidence in the system is desirable in general terms, it is not an 'absolute good' to be pursued at all costs. In particular, it should not override the need for public education as to the genuine flaws in the system, even though the process of disclosing and remedying these may make significant inroads into public confidence for a significant

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8 Law Reform Commission of Australia's *Report on Contempt of Court, supra*, para 424. See also Chesterman, *Public Criticism of Judges*, para. 39; cf *Borrie & Lowe*, 244:

> "The rationale of the offence, namely, the undermining of public confidence in the administration of justice seems highly speculative and some might say that it is too vague a principle to justify imposing restrictions upon freedom of speech. In any event it could be argued that it is hardly likely that the public of today is no naive that it will lose confidence in the administration of justice as a result of insults or abuse heaped upon a judge. It might also be wondered why the system of justice is apparently so unsure of itself that it has to suppress attacks even if they are unfounded or malicious".

period of time."[9]

3. Deterring future attacks by early preventive action

The third policy we identified was that of *deterring* future attacks on the judiciary by early preventive action. Our courts have stressed[10] the deterrent element in contempt proceedings for scandalising. A poisonous flow, unhindered, may eventually destroy completely the stream of justice.

The difficulties with this argument are twofold: first, there is a risk of judicial intervention based on fanciful fears (or alternatively, unconvincing rationalisations), as to the danger to the administration of justice, and, secondly, the emphasis on deterrence does not easily fit within a criminal model in that, in ordinary criminal prosecutions, the question of deterrence is never a factor in determining the matter of *liability*, whereas in contempt cases the issues of liability and punishment can be blurred.

The Case Against Contempt Proceedings for Scandalising

We now must consider the case *against* the retention of contempt proceedings for scandalising. Professor Chesterman summarises well three arguments against the approach of the present law:

> "It limits freedom of expression - which includes individual freedom of speech and freedom of the press - to an unjustifiable degree, because criminal liability is imposed without it being necessary to establish that the community, or any institution or person within it, has been harmed or put in jeopardy in any significant way.
>
> Criminal liability is imposed without the offence being defined in sufficiently precise terms to give fair warning to individuals as to what types of statements will give rise to liability.
>
> Liability is often imposed without proof of criminal intention *(mens rea)* on the part of the accused."[11]

To these arguments may be added two further arguments (also addressed by Professor Chesterman): that the law of scandalising is *discriminatory* in its application and that it is an *unnecessary* adjunct to other remedies in civil and criminal law.

Each of these five arguments requires separate consideration in view of their

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9 *Report on Contempt of Court, supra*, para 425. Whether this argument retains its force if justification or fair comment may be pleaded successfully as defences to a charge of scandalising may be debated.

10 Cf. *The State (DPP) v Walsh*. [1981] IR 412 (Sup Ct).

11 Chesterman, *Public Criticism of Judges*, para 47.

wide - ranging implications.

1. Scandalising and Freedom of Speech

(a) The position under the Constitution

We must first consider whether the present law relating to scandalising offends against the constitutional right of free speech. The short answer would seem to be that the courts have definitively stated that it does not. It will be recalled that in *In Re Kennedy and McCann*,[12] O'Higgins CJ said:

> "The right of free speech and the free expression of opinion are valued rights. Their preservation, however, depends on the observance of the acceptable limit that they must not be used to undermine public order or morality or the authority of the State. Contempt of court of this nature carries the exercise of these rights beyond this acceptable limit because it tends to bring the administration of justice into disrepute and to undermine the confidence which the people should have in judges appointed under the Constitution to administer justice in our Courts."

Similarly, in *The State (DPP) v Walsh*,[13] O'Higgins CJ said that the conduct complained of in the case before the court:

> "is a form of contempt which falls within the archaic description 'scandalising the court'. This form of contempt is committed where what is said or done is of such a nature as to be calculated to endanger public confidence in the court which is attacked and, thereby, to obstruct and interfere with the administration of justice. It is not committed by mere criticism of judges or judges, or by the expression of disagreement - even emphatic disagreement - but what has been decided by a court. The right of citizens to express freely, subject to public order, convictions and opinions is wide enough to comprehend such criticism or expressed disagreement.
>
> Such contempt occurs where wild and baseless allegations of corruption or malpractice are made against a court so as to hold the judges'... to the odium of the people or actors playing a sinister part in a caricature of justice'."[14]

The better interpretation of this passage seems to be that there should be considered to be a constitutional right to criticise judges and courts *up to a certain point*; beyond that point, no constitutional protection should be afforded the criticism - indeed, the Constitution should be seen as *requiring* the protection of the courts against such intrusion.

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12 [1976] IR 382, at 386 (Sup Ct).
13 [1981] IR 412, at 421 (Sup Ct).
14 Citing *AG v Connolly* [1947] IR 213, at 220 (*per* Gavan Duffy P).

Having said this, it is fair to point out that no case so far has involved an argument that the Constitution permits types of criticism which would be stigmatised as contempt at common law. Thus the broad statements quoted above should not be seen as foreclosing debate on a narrow issue such as we have just mentioned.

(b) The position under the European Convention

We now must consider the position under the European Convention. Of course Irish law is in so sense subsidiary to the provisions of the Convention. As Maguire CJ stated in the Supreme Court decision of *In re O Laighleis*[15]:

> "The Court ... cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention...."[16]

In *Norris v AG*[17], O'Higgins CJ, for the majority, noted that counsel for the plaintiff had argued that the decision of the European Court of Human Rights in *Dudgeon*[18] should be regarded by the Supreme Court as something more than a persuasive precedent and should be followed. Counsel had contended that, since Ireland had confirmed and ratified the Convention, there arose a presumption that the Constitution was compatible with the Convention. The Chief Justice rejected this submission. In his view acceptance of it

> "would be contrary to the provisions of the Constitution itself and would accord to the Government the power, by an executive act, to change both the Constitution and the law".[19]

It is, however, worth noting that, in the *State (DPP) v Walsh*[20], Henchy J, delivering the majority judgment, stated that, in upholding the current position as to contempt, to the extent of saying that it was for a judge and not a jury to say if the established fails constituted a major contempt, he

> "would stress that, in both the factual and legal aspects of the hearing of the charge, the elementary requirements of justice in the circumstances would have to be observed. There is a presumption that our law in this respect is in conformity with the European Convention on Human Rights, particularly articles 5 and 10(2) thereof".

This statement does not purport to give priority - or, indeed, any legal status - to the provisions of the Convention; thus it is not inconsistent with what was

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15 [1960] IR 93, at 125.
16 *Id* at 125.
17 [1984] IR 36 (Sup. Ct., 1963).
18 *Dudgeon v UK* (1981) 4 EHRR 149.
19 [1984] IR, at 66.
20 [1981] IR, at 440.

said earlier in *O Laighleis* and later in *Norris*. Henchy J gives no indication how there could be a presumption that our legislation[21] could, at the same time, be in conformity with the Convention and with the Constitution in view of the fact that they were promulgated at different times, without regard for each other, and containing provisions that may not easily be reconciled.

At all events it is worth considering whether our present law of contempt for scandalising is in harmony with the Convention, since such analysis may enlighten our general considerations of the issues of principle and policy.

Perhaps the best starting point is Article 10 of the Convention, which provides as follows:

> "(1) Everyone had the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In no case has the European Court of Human Rights had to address the matter of scandalising.

It has been observed that the Court's decision in *Sunday Times v UK*:

> "cannot be regarded as a wholesale condemnation of the contempt laws. On the contrary, it was accepted that such laws had a legitimate aim within Art. 10(2). Further, the Court was only concerned with that aspect of contempt aimed at protecting the 'authority' of the judiciary. It did not pass comment [on], nor therefore criticise the application of [,] contempt when concerned to protect the 'impartiality' of the judiciary. All that the European Court specifically disapproved of was

21 Henchy J's reference to "our law" probably refers to our legislation (and, perhaps common law rules) rather than our Constitution. It would be an odd rule which could explain how a Constitution promulgated more than fifteen years before the Convention was drawn up ought in any historical sense by presumed to be in harmony with it.

the imposition of a particular restraint in the particular circumstances."[22]

Our own view is that the goals of "maintaining the authority and impartiality of the judiciary" are capable of sustaining intact *a* law of contempt for scandalising in the face of an Article 10 challenge. This is not to say, however, that a law of this nature could never fall foul of the Article, however draconian and restrictive it may be. It is only where the law containing such controls is *necessary* in a democratic society to the purpose of giving effect to the goals we have mentioned that it will withstand scrutiny under Article 10. Whilst Article 10(2) leaves to Contracting States a margin of appreciation, the notion of necessity here implies that the offence must correspond to a "pressing social need", and be "proportionate to the legitimate aim pursued".[23]

In this context it is worth recording Walker's libertarian analysis:

> "The wide remit of scandalising certainly carries with it the danger of unnecessary and oppressive use, just as the common law contempts in relation to *sub judice* litigation were held to have been in an over-restrictive manner in the *Sunday Times* case itself. Indeed, the dangers of violating Article 10 are greater in regard to scandalising since it concerns publications which reflect on the performance of the legal system or judiciary and therefore always relates to 'matter[s] of undisputed public concern'.[24] The administration of justice must not be cocooned from such comment, as the European Court of Human Rights emphasised in the following terms:
>
> > '... whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them ....'[25]
>
> It may therefore be a matter of considerable doubt whether the offence of scandalising wholly complies with the European Convention which is certainly an argument for further reform if not for abolition."[26]

One aspect of the present approach may give rise to particular difficulty. It can be argued that Article 10(2) could not support a law which makes it an offence to criticise a court or judge *with justification:*

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22 *Borrie & Lowe*, 84.

23 *Sunday Times v UK* (1979) 2 EHRR 245. Cf. Nathanson, *The Sunday Times Case: Freedom of the Press and Contempt of Court under English Law and the European Human Rights Convention*, 68 Ky LJ 971, at 991-992 (1980).

24 *Sunday Times*, para 66.

25 *Id*, para 65.

26 Walker, *Scandalising in the Eighties*, 101 L Q Rev 359, at 382-383 (1985).

"As defamation law itself recognises in general terms, it is undesirable, and certainly not 'necessary' to protect reputations against justifiable criticism. Far from being necessary to protect 'the rights of others' it is positively detrimental to them to use scandalising law to 'cover up' instances of genuine misconduct".[27]

We will address the question of justification in relation to scandalising later in this chapter.

2. *Imprecision of Definition*

As we have noted, the law of contempt by scandalising has been criticised for imposing criminal liability without defining the offence in sufficiently precise terms to give fair warning to individuals as to what types of statements will give rise to liability.[28] Our Constitution requires of law that it have a core of ascertainable meaning: so-called legal rules which lack this element are not only unjust in failing to give fair warning to those contemplating action but also impractical in that they fail to guide conduct effectively; thus their deterrent effect is confused.

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27 Chesterman, *Public Criticism of Judges*, para 56.

28 Cf *id*, para 60 (footnote references omitted):

> "The doctrine that criminal offences should be clearly and unambiguously defined has been recognised within the common law for a long period. It is referred to by Coke and Blackstone, along with many more modern writers. In modern times, it has been explicitly recognised that this doctrine cannot be too rigid: some flexibility must be maintained to permit judicial creativity in the criminal law. The doctrine is closely linked with through theoretically district from, the principle that judges in criminal cases should not create new offences, so as to impose liability on individuals who had no means of foreseeing that this might occur, and the presumption that statutory offences should not be retrospective. These principles may perhaps be considered as combining to form one single principle, the principle of legality, to the effect that if conduct cannot be clearly and unequivocally seen from the sources of law available to lawyers and the general public, to constitute a criminal offence at the time when the conduct takes place, it should not be capable of attracting criminal liability in a subsequent prosecution."

See also *King v AG* [1981] IR 233, the Law Reform Commission's *Report on Receiving Stolen Property*, para 53 (LRC No. 23-1987), *AG (ex rel Society for the Protection of the Unborn Child Ltd) v Open Door Counselling Ltd*, [1988] IR 593, and the Report of the European Commission of Human Rights in the case brought by the defendants in this decision against Ireland, (Applications Nos. 14234/88 and 14325/88), adopted on 7 March 1991. Cf O'Malley, *Common Law Crimes and the Principle of Legality* 7 Ir L Times (ns) 243 (1989).

In the light of *The State (Walsh) v DPP*,[29] this criticism gains added force. If the law of contempt by scandalising[30] is beyond the capacity of a juror to discern, "untrained and inexperienced"[31] as he or she may be, and if it needs the intellectual muscle of a judge in every case to say whether conduct constitutes contempt, then it seems that the offence lacks sufficient coherence and certainty to guide conduct. Otherwise, one would have the curious position that the law of contempt by scandalising is to be considered sufficiently clear for ordinary people in our community to understand when contemplating particular conduct but not sufficiently clear for similar ordinary people - the jury - to understand when looking back on that conduct.

It is interesting in this context to note how the question of specificity was addressed by the European Court of Human Rights. Article 10(2) of the Convention, as we have seen uses the expression "prescribed by law". In the *Sunday Times*[32] case, the Court expressed the opinion that:

> "the following are two of the requirements that flow from th[is] expression ... firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and appreciation are questions of practice."

The Court made it clear that the rules of law might emerge from judicial exegesis as well as from statute.

How does the offence of scandalising measure up to these requirements of specificity? Central to its definition is the notion of the offending statement's being "calculated to" damage public confidence in the administration of justice. Professor Chesterman has noted that this phrase:

> "seems to require that the remarks in question must have some

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29 *Supra*.

30 Henchy J's rationale for exclusive judicial determination of what constitutes contempt is not restricted to cases of scandalising but is preeminently suited to contempts of these kind, where usually it is the legal quality of the statement rather than the fact of its occurrence or the identity of its author that is in issue.

31 [1981] IR, at 440.

32 [1979] 2 EHRR 245, para 49.

potentiality to impair public confidence, without it being necessary to prove that such impairment takes place. But this is as far as it goes: it still scarcely amounts to a precise definition of the necessary link between the remarks which are alleged to 'scandalise' and the harm which the offence of scandalising seeks to avert (impairment of public confidence)."[33]

The fact that, on occasion, the courts express the test in terms of calculation to undermine public confidence in the administration of justice, *if repeated*, while perhaps improving the justice of the criterion by narrowing its focus, has the effect of rendering the test less consistent, and thus still more uncertain.[34]

It would be wrong, however, to consider that an offence expressed in terms of its *tendency* to have a particular effect should necessarily be stigmatised as so lacking in certainty as to offend against the principle of legality. The offence of obscenity is also defined in terms of a tendency - "to deprave and corrupt".[35] Moreover, other offences contain conceptual ingredients of similar generality: indeed the concept of negligence, which is integral to several offences, including manslaughter, is widely recognised as involving a category of circular reference: I ought to avoid injuring those whom I ought not to injure in the circumstances.

3. The Mens Rea *Restrictions*

Although, as we have seen, the *mens rea* dimensions of scandalising are unsettled, it seems clear that the offence does not embrace a comprehensive requirement of *mens rea* in respect of all the elements of the *actus reus*. In particular, the courts appear to consider it unnecessary to show that the defendant either intended to impair public confidence in the administration of justice or was reckless in this respect.[36]

Does this raise a constitutional issue? The short answer seems to be that it does not, in view of the fact that in several cases where the point might have been taken (especially those relating to the question whether there is a right to trial by jury) the High Court and Supreme Court never suggested that the absence of *mens rea* rendered proceedings for scandalising outside the pale of the definition of an offence, for the purposes of the Constitution.[37]

The problem is perhaps attributable to the fact that the Courts have yet to

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33 Chesterman, *Public Criticism of Judges*, para 63.

34 *Id.*

35 *R v Hicklin*, LR 3 QB 360, at 371 (1868). See Chesterman, *op. cit.*, para 63.

36 See *AG v O'Kelly* [1928] IR 308 (High Ct, Sullivan P, Meredith and Hanna JJ), *AG v Connolly*, [1947] IR 213 (High Ct, Gavan Duffy P, Maguire and Davitt JJ), *Re Hibernia National Review Ltd*, [1976] IR 388 (Sup Ct), *Re Kennedy and McCann*, [1976] IR 387 (Sup Ct).

37 Even in *Re Earle* [1938] IR 485 (Sup Ct, 1937), where the Court held that scandalising proceedings were not criminal in nature.

provide a fully satisfactory analysis of the nature of an *offence* for the purpose of Article 38 of the Constitution. In the Supreme Court decision of *Melling v O Mathghamhna*[38] Kingsmill Moore J identified the following three *indicia:*

> "(i) They are offences against the community at large and not against an individual. Blackstone defines a crime as 'violation of the public rights and duties due to the whole community, considered as a community'. 4 Bl. Comm. 5.
>
> (ii) The sanction is punitive, and not merely a matter of fiscal reparation ...
>
> (iii) They require *mens rea* for the act must be done 'knowingly' and 'with intent to evade the prohibition or restriction ...' *Mens rea* is not an invariable ingredient of a criminal offence, and even in a civil action of debt for a penalty it may be necessary to show that there was *mens rea* where the act complained of is an offence in the nature of a crime[39] ... but where *mens rea* is made an element of an offence it is generally an indication of criminality".

A fourth *indicium*, not specifically identified by Kingsmill Moore J, but evident in the judgments delivered in *Melling's* case, was what might be called the procedural characterisation of the particular legal process. Thus, the presence in *Melling* of such factors as the right to detain the defendant, to bring him in custody to a Garda Station, to enter a charge against him in all respects in the terms appropriate to the charge of a criminal offence, to search him and examine what is found, to bring him before a District Justice in custody, to admit him to bail or detain him if bail is not forthcoming, and to impose on him a pecuniary penalty backed by the sanction of imprisonment in default of payment, all pointed in the direction of a finding that the process to which Mr Melling had been subjected was of a criminal rather than a civil nature.

Clearly the first of these *indicia* is of a different order than the others. It raises troublesome jurisprudential questions as to the proper function of the criminal law. It is vague enough in its enunciation, offering no clear insights as to how a court should seek to discern the circumstances in which an act is "against the community at large and not against an individual". Most offences - against the person and property - will usually involve a discernible individual victim; and most criminal acts involving an individual victim are also torts, or, less frequently, other breaches of the civil law, such as breach of contract or of trust or unjust enrichment. The present distribution of liability between the criminal and civil spheres is the result, not so much of philosophic reflection by courts or legislatures, as of a concatenation of historical developments - of political controversies, boundary disputes between

38 [1962] IR 1, at 25.

39 Citing *Lee v Danger Grant & Co.*, [1892]2 QB 337 and *Bagge v Whiteland* [1892]2 QB 355.

courts, and activism (or inertia) of particular judges or legislators.

Having said this, it is as well to be conscious of the need for the criminal law to retain a close relationship with immoral and anti-social conduct. A society which, for pragmatic considerations, let the criminal law expand to cover conduct that lacks either dimension would endanger the close association in the minds of the community between criminality and wrongful behaviour. A legal system with such a diluted moral underpinning of its criminal code could sacrifice much in cohesion and respect for the law.[40]

The second and third *indicia* mentioned by Kingsmill Moore J are in a different order from the first, in offering modes of analysing the *content and structure of the particular legal process to which the defendant is subject,* rather than seeking to discern a particular moral or social quality in the impugned conduct.

In *McLoughlin v Tuite*[41] the Supreme Court, upholding the decision of Carroll J,[42] held that the statutory penalty under section 500 of the *Income Tax Act 1967* of £100 for failure to comply with a notice requiring the delivery of returns for certain income tax years did not have the characteristics of a criminal offence.

The Supreme Court concentrated on the second, third and fourth *indicia* to the neglect of the first. Finlay CJ said:

> "No question of the detention or bringing into custody of a person who fails to make a return arises. There is no concept of nor provision for a charge in any way appropriate to or similar to the charge of a criminal offence. No right to search the person detained or to examine papers found upon him arises by reason of his failure. He can never be brought in custody before any court in connection with the matter and no question of bail arises. Most importantly of all, he is never, by reason of the imposition on him of a penalty under this section, at any risk of being imprisoned for default of payment ...
>
> In the instance of a penalty under s.500 of the Act of 1967 no question of *mens rea* arises at all. It is of importance that in other provisions of the income tax code which expressly and explicitly create criminal offences which are punishable either by a fine with imprisonment in default of payment, or by imprisonment without a fine, clearcut and explicit *mens rea* is clearly provided for. Such offences are found to be

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40 Cf P Devlin, *The Enforcement of Morals*, ch 2 (1965). It should be noted that acceptance of this essentially empirical point in no way involves a necessary commitment to Devlin's radical and controversial thesis as to the enforcement of morals presented in ch 1 of this work.

41 [1989] IR 82.

42 [1986] IR 235.

knowingly, wilfully or fraudulently committed. The provision for the recovery of this penalty against the estate of a deceased taxpayer is, again, quite inconsistent with its existence as a criminal offence.

In short, the only feature which could be said to be common between the provisions of s.500 ... and the ordinary constituents of a criminal offence is that the payment of a sum of money is provided for which is an involuntary payment and which is not related to any form of compensation or reparation necessary to the state but is rather a deterrent or sanction. The Court is not satisfied that the provision for a penalty in that fashion in a code of taxation law, with the general features which have been shortly outlined in this judgment, clearly establishes the provisions of the section as creating a criminal offence."

In *McLoughlin v Tuite* the *mens rea* issue was presented in an unusual context which made it easier to resolve than it can be in the generality of cases. In view of the fact that the legislation contained other, somewhat similar, provisions, but which, in contrast to section 500, prescribed a clear *mens rea* requirement, it was tempting to apply the *ejusdem generis* rule, not merely to interpret section 500 as excluding a *mens rea* element but also as prescribing a non-criminal obligation. Where the case is less straightforward - where there is only one statutory provision, unencumbered by any relationship with other statutory provisions - the task facing the Court is formidable. The *Melling* formula is devoid of guidance of a principled quality on the question of *mens rea*. Kingsmill Moore J, as we have seen, confined himself to making three propositions, which, in combination, offer no more than predictive hints as to how cases are likely to be resolved. These propositions are, in summary:

1. *Mens rea* is not an *invariable* ingredient of a criminal offence;

2. in certain civil proceedings *mens rea* may be required;

3. where *mens rea* is "made an element of an offence"[43] it is *generally* an indication of criminality.

Thus, in any case where the statutory provision does *not* contain an element of *mens rea*, all that the court can do by way of response is note that such absence is rare for criminal offences. The court's function is more than that of a detective looking for clues; if it were merely that, it could make inferences based on the statistical frequency of certain phenomena occurring in legislation. There must be a strong element of principled analysis, and this has so far been lacking in relation to the *mens rea* requirement.

How would the courts respond to the argument that the absence of a clear element of *mens rea* in the definition of contempt by scandalising means that

43 It is of course strictly incorrect to describe the statutory provision as an offence before the question whether it is in fact such has been resolved.

the wrong is not an offence, by virtue of the third criterion of Kingsmill Moore J in *Melling*? The question is not easy to answer. The whole thrust of the decisions on contempt thus far suggests that the courts would not look with favour on this argument, yet we consider that it has some force. The essence of contempt proceedings for scandalising is to preserve the integrity of the administration of justice. As O'Higgins CJ put in in *The State (DPP) v Walsh*,[44] "[t]he primary purpose of such action is not to punish those whose criminal conduct has endangered the administration of justice. It is to discourage and to prevent the repetition or continuance of conduct which, if it became habitual, would be destructive of all justice". It is difficult to see in the summary procedure for contempt the essence of the criminal function.

4. *Discriminatory Application*

The fourth argument against retention of contempt proceedings for scandalising is that the present law is susceptible to discriminatory application. The defendants in these cases tend either to be politicians,[45] persons challenging some aspect of the social order that judges may perceive to be particularly sensitive,[46] or members of the media,[47] rather than private individuals.

Perhaps this concentration may best be explained on the basis that such defendants are more likely to sway public opinion than are private individuals.[48] It has also been argued that "[c]oncentration on public figures and the media may be justified on the broad basis that power demands responsibility".[49] We cannot deny that the potential for settling political scores exists in relation to scandalising or that the invocation of this remedy may in its effect, if not intent, have an anti-leftist or anti-republican emphasis. Nevertheless we consider that these problems are not *inherent* in the notion of a remedy for scandalising, but rather depend on the integrity and sensitivity of particular judges and prosecuting authorities at any particular time.

5. *Civil and Criminal Alternatives to Scandalising*

It may be argued that the alternatives to contempt proceedings for scandalising

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44 [1981] IR, at 428.

45 Cf, e.g., *AG v Ryan and Boyd*, [1946] IR 70 (High Ct, Maguire P, Gavan Duffy and Haugh, JJ).

46 Cf, e.g., *AG v Connolly*, [1947] IR 213 (High Ct, Gavan Duffy P, Maguire and Davitt, JJ), *The State (DPP) v Walsh*, [1981] IR 412 (Sup Ct), *In re Hibernia National Review Ltd*, [1976] IR 388 (Sup Ct).

47 Cf e.g., *AG V O'Kelly* [1928] IR 308 (High Ct, Sullivan P, Meredith and Hanna, JJ) (where the defendant was the future President of Ireland), *AG v Connolly, supra, In re Hibernia National Review Ltd, supra, Re Kennedy and McCann*, [1976] IR 382. See also Dhavan, *Contempt of Court and the Phillimore Committee Report*, 5 Anglo-Amer L Rev 186, at 212 (1976).

48 Cf Chesterman, *Criticism of Judges*, para 85 (1984). See also the Law Reform Commission of Australia's *Report on Contempt of Court*, para 435.

49 *Id.*

are, or with reform could be, sufficient in the way of protection for judges and the administration of justice, so that there is no real need for retaining scandalising procedures.

The remedy that most obviously comes to mind is defamation. Any judge of whom it is falsely alleged that he or she is incompetent[50] or dishonest in the discharge of his or her constitutional functions may as a general principle sue for defamation. Where the false allegation relates to the judge's personal conduct the action for defamation is again available. So far as the allegation relates to the performance of judicial functions, the distinction between libel and slander should be noted: slander will be actionable *per se* only where it falls within one of the four exceptional cases recognised under common law, namely:

1. Slanders imputing unchastity or adultery to any woman or girl[51];

2. Slanders affecting a person's official, professional or business reputation[52];

3. Slanders imputing a criminal offence punishable by death or imprisonment[53];

   and

4. Slanders imputing a contagious disease which tends to exclude the sufferer from society.[54]

All other slanders, in order to be actionable, must cause special damage to the plaintiff. Removal from office on the resolutions of both Houses of the Oireachtas[55] would clearly amount to such special damage.

It seems probable that slanders imputing incompetence or dishonesty to a judge in the discharge of his or her judicial functions would in almost all cases fall within the second of the four exceptions and in many instances within the third as well. Even an allegation relating to personal conduct would in many cases be caught by section 19 of the *Defamation Act 1961*, which makes it plain that, provided the words are calculated to disparage the plaintiff in his or her office, profession, calling, trade or business, they need not be spoken of him or her *in the way of* his office, profession, calling, trade

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50 As to the allegation of relative lack of competence among candidates eligible for judicial appointment, see *Doyle v The Economic Newspaper Ltd*, [1981] NI 171 (High Ct, Murray, J, 1980); see further *McMahon & Binchy*, 622.

51 *Defamation Act 1961*, section 16; see further *McDonald*, 90-91, *McMahon & Binchy*, 616.

52 *Defamation Act 1961*, section 19; see further *McDonald*, 86-89, *McMahon & Binchy*, 616-617.

53 See *McDonald*, 82-85, *McMahon & Binchy*, 617-618.

54 See *McDonald*, 85-86, *McMahon & Binchy*, 618.

55 Article 35.4 of Bunreacht na hEireann.

or business.[56]

It would be mistaken, however, to think that defamation offers the same range of protection for judges and the administration of justice as do proceedings for scandalising. In several ways it falls short of doing so:

> *First*, there are *defences* to an action for defamation which have no complete counterparts in relation to scandalising: these include justification,[57] privilege (absolute[58] or qualified[59]) and fair comment,[60] as well as the statutory defence under section 21 of the *Defamation Act 1961*.[61] Whether these defences should have an equivalent range of operation in respect of scandalising is an important issue in this context,[62] since, if it were considered just that they should do so, the argument in favour of retaining scandalising proceedings would be weakened in view of the significant overlap that would thus arise in relation to defamation proceedings.
>
> *Secondly*, in contrast to proceedings for scandalising, allegations of impropriety made against the judiciary *as a whole* may fail to constitute actionable defamations on the basis of the largeness of numbers.[63] Again, this difference may not necessarily be worth relying on since there is a strong argument in favour of loosening the restrictions in this area of the present law of defamation.[64]
>
> *Thirdly*, scurrilous abuse that unquestionably amounts to scandalising may not constitute defamation if it lacks propositional coherence or credibility.[65]

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56 Cf *McMahon & Binchy*, 616-617. It is interesting to speculate on what personal qualities off the Bench are expected of a Judge today, such that an allegation of a failing in their regard would be calculated to disparage him or her in his or her office. Adultery with counsel, a litigant or a witness? Cf *Jones v Jones*, [1916] 2 AC 481, *Devine v Keane*, 61 ILTR 118 (High Ct, 1926), *Thompson v Bridges*, 273 SW 529 (1925).

57 See *McDonald*, ch 6, *McMahon & Binchy*, 638-641.

58 See *McDonald*, ch 7, *McMahon & Binchy*, 641-647.

59 See *McDonald*, ch 8, *McMahon & Binchy*, 647-657.

60 See *McDonald*, ch 9, *McMahon & Binchy*, 657-661.

61 See *McDonald*, 229-234, *McMahon & Binchy*, 637-638.

62 We consider the merits of changes on these lines later in this chapter.

63 See *McDonald*, 56-59, *McMahon & Binchy*, 635-636, *Symposium on Group Defamation*, 13 Clev - Mar L Rev 1 (1964) (esp Fryer, *Group Defamation in England, id*, 26, which analyses the relevant Irish cases), *Le Fanu v Malcolmson*, 1 H L Cas 637, 9 ER 910 (1848), *McSorley v Masterson*, 79 ILTR 45 (KBD, NI, 1945), *O'Brien v Eason & Son*, 47 ILTR 266 (CA, 1913).

64 See Campisano, *Note: Group Vilification Reconsidered*, 86 Yale L J 307 (1979).

65 See *McMahon & Binchy*, 627-628, Chesterman, *Public Criticism of Judges*, para 14.

Fourthly, judges may with good reason be slow to take defamation proceedings in cases of scandalising.[66] They may be reluctant to subject themselves to the rough-and-tumble of litigation - and defamation proceedings can at times be very rough. The defendant may not be a mark. The risk of a jury disagreement, for whatever reason, could put the judge's career into jeopardy. Moreover, the idea of defending the correctness of the exercise of their judicial powers may seem to some judges to be abhorrent.

Fifthly, to regard defamation proceedings as an adequate remedy for scandalising may be considered to misunderstand the essential purpose of proceedings for scandalising, which is to protect the *administration of justice* rather than the personal dignity or reputation of the judiciary. Of course, protection of judges' dignity and reputation may be a *necessary* condition of the protection of the administration of justice but it is scarcely a sufficient one.

Sixthly, the remedies afforded under defamation law may be far less effective or flexible than the sanctions available for contempt. Injunctions against allegedly defamatory publications are hard to obtain and are subject to constitutional restrictions[67]; there will be no way of enforcing an award for damages or costs against an impecunious defendant. In contrast, the court in contempt proceedings for

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66 Se *Regina v Glanzer*, 38 DLR (2d) 402, at 408 (Ont H Ct, McRuer, CJHC, 1962). Cf. the observations of former Supreme Court Judge, Henchy J (*Contempt of Court and Freedom of Expression*, 33 N IR LQ 326, at 336 (1982)):

> "Whether, when the criticism of judicial performance or capacity is such that the judge who is the object of the criticism abandons the option of silence and elects instead for the benefit of tax-free-capital gains in the form of damages for libel, such a course is a desirable substitute for a motion to commit for contempt is a topic on which I am reluctant to express our opinion - Notwithstanding the lucrative experiences of at least two of my Irish brethren, and despite the occasional severe criticism that has been written about my own judicial imperfections, I have never discovered any comment or criticism that I thought would found a successful action for libel. But I live in hope: as Dr Johnson said: 'Hope is always liberal; and that they trust her promises make little scruple of revelling today on the profits of the morrow'. But, as at present advised, I tend to the conclusion that judicial remuneration contains a built-in emollient for injured judicial feelings. As was stated in the United States Supreme Court [in *Craig v Harney*, 331 US 367, at 376 (1946)]: 'Judges are supposed to be men of fortitude, able to thrive in a hardy climate'".

In this context it is interesting to note that Lynch J wrote an extensive response in *Magill* (March 1986) to an article by Gene Kerrigan on the "Kerry Babies" tribunal, of which Lynch J was the sole member. R Byrne & J Paul McCutcheon, *The Irish Legal System*, 39 (2nd ed, 1989) observe that "... the judiciary would appear to be prepared nowadays to engage in public debate where necessary, even though this may have the less comfortable result of subjecting them to greater scrutiny. This is likely to be beneficial in the long run".

67 See *X v RTE*, Sup Ct, 27 March 1990, affirming High Ct, Costello J, 27 March 1990, Irish Times, 28 March 1990.

scandalising has a wide discretion as to how to deal with the defendant.[68]

Our Tentative Conclusions as to Retention or Abolition of Scandalising

We must now state our tentative conclusions. *We are of the view that it would be wrong to abolish completely the law of criminal contempt for scandalising; but we are of opinion that significant alterations, substantive and procedural, are called for.*

I. How the Law Should Be Changed

1. Introduction

Under present law, scandalising constitutes contempt where what is said or done is of "such a nature as to be calculated to endanger public confidence in the court which is attacked and, thereby, to obstruct and interfere with the administration of justice".[69] This represents an objective test of likelihood falling well short of the "clear and present danger"[70] required in the United States.

2. Comparative Aspects

In this context it may be useful to note developments, and proposals for change, in some other common law jurisdictions. In England the Phillimore Committee proposed that the offence be one consisting of the publication in whatever form, of matter imputing improper or corrupt judicial conduct with the intention of impairing confidence in the administration of justice.[71] The truth of the allegedly scandalising statement should not afford a defence save where public benefit could be shown.[72]

The English Law Commission examined the Phillimore Committee's proposals,[73] in their Report, *Criminal Law: Offences Relating to Interference with the Course of Justice*,[74] published in 1979. The Commission's analysis is pertinent and of high quality. The Commission saw two principal problems with the Committee's proposed new offence. First, there would be great difficulty in interpreting a phrase such as "with intent to impair confidence in the administration of justice". As the Commission observed,

> "[t]he Committee clearly had in mind that it should mean more than an intention to lead people to think that a particular judgment should

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68 Cf the Law Reform Commission of Australia's *Report on Contempt of Court*, para 427.
69 *The State (DPP) v Walsh*, [1981] IR 412, at 421 (Sup Ct, *per* O'Higgins CJ).
70 *Bridges v California*, 314 US 252, at 763 (1941).
71 *Phillimore Report*, para 164.
72 We shall examine this aspect of the Report in detail below.
73 *Phillimore Report*, para 166.
74 Law Com. No. 96.

not have been given, for they characterised the offence as one which struck generally at the administration of justice. It is doubtful whether an attack on the impartiality of a bench of magistrates in a particular locality, or an attack on courts as tribunals concerned with a particular body of law, such as industrial tribunals, would be within the offence."[75]

Secondly, the Commission considered that an offence penalising the publication of matter imputing improper judicial conduct would be too wide, principally because of the uncertain scope in this context of the term "improper": it might well be "improper" for a judge to interfere too much in the conduct of a case, or continually to interrupt counsel.[76]

The Commission thought that it would be sufficient to penalise the publication of matter which imputed *corrupt judicial conduct* to a court[77] or tribunal or a member of a tribunal; allegations short of this were, in the Commission's view, "unlikely generally to impair confidence in the administration of justice".[78] With the offence thus confined, the Commission considered that there was no need to require in addition an intent to impair confidence in the administration of justice:

> "Whatever the intention, it is sufficiently serious that such an allegation is made."[79]

However, the Commission considered that a *true* allegation of judicial corruption should not be penalised in any circumstances. Where it was false, liability should attach only if the defendant either *knew* it to be so, or was *reckless* whether it was false, and he intended it to be taken as true.[80] Publication in this context would embrace only a communication addressed to the public at large,[81] but this could be in any form, whether written, oral or visual.[82] Moreover, a person who distributed the material should be liable in the same way as the publisher.[83]

The clause in the draft legislation[84] incorporating the Commission's proposals[85] provides as follows:

> "(1) Subject to subsection (2) below, if-

75 *Id.*, para 3.66.
76 Cf *Jones v National Coal Board*, [1957] 2 QB 55, *The People (DPP) v McGuinness*, [1978] IR 189.
77 Cf Law Com No. 96, Page 142 (Appendix A, clause 13(1)(a).)
78 *Id*, para 3.67.
79 *Id*, para 3.68.
80 *Id*.
81 *Id*, para 3.69.
82 *Id*.
83 *Id*.
84 *Id.*, Appendix A, clause 13.
85 *Supra*.

(a) a person publishes or distributes a false statement alleging-

(i) that a court or tribunal or such a body as is mentioned in section 2(1)(c) ... is corrupt in the performance of its functions, or

(ii) that any judge, magistrate, arbitrator or person holding a statutory inquiry, any member or officer of a court or tribunal or any member of such a body as is mentioned in section 2(1)(c) ... has been corrupt in the performance of his functions in relation to any judicial proceedings which have come before him,

and

(b) at the time when he publishes or distributes it he intends it to be taken as true but knows it to be false or is reckless whether it is false, he is guilty of an offence.

(2) Publication or distribution of such a statement outside England and Wales is not an offence under this section".[86]

"Publication" and "distribution" are defined by clause 32 as meaning publication or distribution *to the public at large.* Paragraph 6 of schedule 1 part ll of the draft legislation makes the consent of the Attorney General necessary for the institution of proceedings for an offence under clause 13. Paragraph 5 of part 1 of schedule 1 prescribes a maximum penalty of two years' imprisonment.

No legislative action has followed this recommendation.[87]

In this context it is worth noting the recommendations of the Law Reform Commission of Hong Kong in its *Report on Contempt of Court,*[88] published in 1986, that there be a new offence consisting of the publication, in whatever form, of a false statement alleging corrupt or improper conduct in judicial proceedings where that statement is likely to bring the administration of

86 P142 of the Report.

87 It may be noted that *Miller,* 386, considers that the English Law Commission's proposed offence is too restrictive in its scope insofar as it catches only allegations of *corrupt* conduct. He notes, by way of criticism, that it would not cover the type of allegations is issue in *Gallagher v Durack,* 45 ALR 53 (1893) where the conclusions of the High Court of Australia, in *Miller's* opinion, "seem realistic". There the allegation was, in effect, that the Federal Court had bowed to outside pressure in reaching its decision - a charge of timidity rather than corruption.

88 Topic 4, December 1986, para 6.9.

justice into disrepute. It would be a defence that the accused honestly believed the statement to be true and that he had reasonable grounds for that belief. No prosecution for the offence could be instituted except with the consent of the Attorney General.

As may be appreciated, this proposal is an amalgam of earlier proposals elsewhere in common law jurisdictions. The Commission noted that it had considered but ultimately rejected the "clear and present danger" test advocated by the Law Reform Commission of Australia. Such a formulation did not necessarily attack those statements which the Law Reform Commission of Hong Kong thought should be regarded as culpable. They considered that, in deciding whether a particular statement is likely to bring the administration of justice into disrepute, regard could be had to a number of factors:

> "These could include the likelihood of repetition of the statement; whether the statement is likely to be given credibility; the nature and reputation of the maker of the statement and the circumstances in which it is made; and whether the statement has a significant bearing on the administration of justice as a whole."[89]

The Law Reform Commission of Australia in their Discussion Paper[90] and subsequent Report[91] recommended that the scope of scandalising be formulated in the following terms (so far as the *actus reus* is concerned). A remark which is critical of judges or courts should be treated as a "scandalising" remark only if it imputes corrupt conduct to a judge so as to bring the administration of justice who disrepute. The degree of likely repetition or republication of a remark should be a factor taken into account in assessing whether the remark brings the administration of justice into disrepute. Thus if a scandalising remark were made in circumstances suggesting no reasonable likelihood of publication,[92] no liability should arise.

In determining whether a remark has the relevant effect, a court should be expressly required to consider whether the remark genuinely carries credibility. In doing so it should take account of the nature and reputation of the maker or disseminator of the remark, and the circumstances in which the remark is made or disseminated. In cases where an allegedly scandalising remark is directed against a single judge or a small number of identified judges, the court, before it finds the remark to be scandalising, should satisfy itself that the remark has significant bearing upon the administration of justice as a whole. The factual truth of the remarks would afford a defence.[93]

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89 *Id*, para 6.8.

90 *Contempt and the Media* (ALRC DP 26).

91 *Contempt of Court* (1987).

92 Cf *AG v O'Ryan and Boyd* [1946] IR 70 (High Ct, Maguire P, Gavan Duffy and Haugh JJ, 1945) (so far as the sending of the letter to Judge Sealy was concerned).

93 We do not here address the question of *mens rea* in relation to the defence of truth. We shall address presently in greater detail the Commission's analysis of the merits of the defence of truth.

Commenting on the effect of these proposals, the Commission observed that:

> "[t]he 'outer edges' of the existing offence would disappear, so that there would be no liability (for instance) in respect of vague, misguided allegations of susceptibility to external pressures on the part of the courts, and no liability in respect of specific allegations of misconduct which were shown to have a basis in fact or to be honestly believed to be true. The chief function of the offence, as thus redefined, would be to fill any gap in legal protection against serious and unwarranted public designation of the judiciary which results from the practical unavailability, and theoretical unsuitability, of civil defamation claims by judges."[94]

3. *Policy Analysis*

When we come to analyse what law would be best for the legislature to adapt, four issues arise: (a) the type of conduct which should fall within the scope of scandalising; (b) the necessary degree of danger to the administration of justice; (c) the requisite *mens rea*; and (d) the necessary mode of communication.

(a) Types of Conduct Which Should Constitute Scandalising

Here we must consider the type of conduct which should fall within the scope of scandalising. Three possible elements present themselves for analysis: (a) imputing corrupt conduct to a judge or court; (b) giving a false account of legal proceedings; and (c) scurrilously abusing a judge or court.

(i) *Imputing corrupt conduct to a judge or court*

We have no difficulty in accepting that imputing corrupt conduct to a judge or court should fall within the scope of scandalising. Accusations of this nature go to the heart of the legal system. If there is to be an offence of scandalising at all imputations of corruption are of its essence.

(ii) *False or misleading accounts of legal proceedings*

We equally have no difficulty in accepting that publishing to the public or a section of the public a false or misleading account of legal proceedings should be capable of constituting contempt by scandalising. The evil which this can involve is no less serious in some instances than imputing impropriety to a judge or courts. A false or misleading report can leave a judge, or the judicial system in general, subject to serious opprobrium which

94 *Report*, para 458.

may be difficult to displace. We recommend that criminal liability should be based on the test of intention or negligence, whereby the publisher would be responsible only if he or she intended to publish a false or misleading account or ought to have been aware that the account was false or misleading. We recommend that it should also be an offence to provide a false or misleading account of legal proceedings to another in circumstances where the provision of that account is intended or likely to result in the publication to the public or a section of the public of a false or misleading account of such legal proceedings.

(iii)*Scurrilous abuse*

As we have seen, those engaging in scurrilous abuse of judges or courts have often been found guilty of scandalising the court. We appreciate that the dignity of the court should not be subjected to insult and villifications, but we are also concerned that the law of contempt of court should not be open to being used as a tool in the hands of the judiciary to force respect for their decisions. Vulgar abuse falling short of defamation is not actionable in relation to private citizens,[95] nor to those engaging in political activity, including Ministers of the Government. There is no clear evidence that vulgar abuse of the judiciary which falls short of defamation would have such an untoward effect on the administration of justice as to warrant rendering conduct of this nature criminal. *Accordingly we tentatively recommend that abuse, even if scurrilous, should not constitute the offence of contempt by scandalising.*

(b) The Necessary Degree of Danger to the Administration of Justice

We now must consider the question of the necessary degree of danger to the administration of justice. Should a slight risk suffice? Should there be a "real and present danger"? Or should the standard be pitched somewhere between these two tests?

This issue has parallels with the question of contempt under the *sub judice* rule, but there is no *a priori* reason why the same degree of danger should govern both contexts, since the *sub judice* rule seeks primarily to ensure justice for persons involved in litigation, whereas the law of scandalising concentrates on protecting the integrity and efficacy of the administration of justice. Nevertheless, we see merit in the test of a risk, other than a remote one, that the administration of justice, the judiciary or any particular judge or judges, will be brought into disrepute. A "clear and present danger" test could raise constitutional doubts, in view of the (albeit incomplete) body of Irish

95 See *Harberagen v Koppens*, [1974] 2 NZLR 597, *Fisher v Nation Newspaper and Rooney*, [1901] 2 IR 465, *McMahon & Binchy*, 627 - 628.

jurisprudence on the constitutional dimensions of the law of contempt of court. Accordingly, *we tentatively recommend that the test should be that of a risk, other than a remote one, that the administration of justice, the judiciary or any particular judge or judges, will be brought into serious disrepute.* We have some hesitation about qualifying disrepute by requirement that it be "serious". Surely, it might be asked, allegations or reports which risk bringing the administration of justice, or judges, into *slight* or *moderate* disrepute should warrant the imposition of criminal liability? On balance, we consider the limitation of seriousness to be prudent. The level of risk is pitched at a relatively low level - it need be only "other than remote". It seems to us, moreover, that the guarantee of free speech should extend some way into controversial statements impinging on the administration of justice and the judiciary. If the risk is not of serious disrepute, we are of the view that it should not call for a criminal sanction.

(c) The Requisite *Mens Rea*

The general approach of the criminal law is to require proof of intention or recklessness rather than defining liability in terms of negligence or even strict liability. We are not attracted by a strict liability solution in this context. While the integrity of the administration of justice is a most important goal, it can be achieved by less drastic means than criminalising persons whose behaviour is deserving of no moral stigma.

As we have seen from our reference to developments and proposals in other jurisdictions, the *mens rea* issue is complicated by the question whether the defendant's intention or recklessness (if they are to form part or all of the *mens rea* test) should relate to the damage to the administration of justice which the communication may cause. Inclusion of such an element would make proof of the offence difficult in some cases, even though the defendant's conduct may have been seriously anti-social and worthy of moral condemnation.

A possible compromise which we do not at present favour would be to require proof of intention or recklessness in relation to publishing the offending statement, while placing the onus on the defendant in such circumstances to show, on the balance of probabilities, that he had neither intended nor been reckless in regard to the possible damage to the administration of justice.

We have come to the conclusion, and tentatively propose, that the best test here (as in relation to the sub judice rule) is one of negligence: liability should depend on whether it was reasonably foreseeable to the person communicating the imputation or account that such publication creates a risk, other than a remote one, that the administration of justice, the judiciary, or any particular judge or judges, will be brought into serious disrepute.

(d) The Necessary Mode of Communication

It may be argued that private communications should not generate criminal liability for scandalising. If sent to a judge, for example, they may greatly offend him or her, but they scarcely create a risk of bringing the administration of justice into serious disrepute. To this it may perhaps be replied that, while normally no such risk would be foreseeable, it does not amount to a principled reason for restricting the definition of the offence. Moreover, it is possible to envisage cases where such a risk might arise, as, for example, where a malevolent person wrote a letter to several judges credibly though falsely alleging corruption against one of their colleagues. *Our view at present is that it would be best to limit the offence of scandalising to cases where the communication is published to the public or a section of the public, and we so tentatively recommend.* Other cases can more appropriately be dealt with under other existing criminal provisions.

In the light of our analysis of the issues, our tentative conclusion is that the general structure[96] *of the actus reus and mens rea of scandalising should consist of communicating to the public or a section of the public either (i) an imputation of corrupt conduct in regard to a judge or (ii) an account, full or partial, of legal proceedings, where the imputation or account, as the case may be, is false in such respect as to make it reasonably foreseeable to the person communicating the imputation or account that such publication creates a risk, other than a remote one, that the administration of justice, the judiciary, or any particular judge or judges, will be brought into serious disrepute.* The first mode of committing this offence is one which, as we have seen, has the support of a number of law reform agencies. The second is designed to ensure that, apart from other modes of contempt[97] which may be constituted by a false representation of legal proceedings, the law of scandalising should attach to this type of misconduct. A publisher who elects to describe what took place in court is engaging in a serious venture; in view of the damage to the administration of justice which may flow from misrepresentation, it seems to us reasonable that he or she should take reasonable care in this process.

(e) Truth and the Public Interest as Defences

We now must consider whether truth should be a defence to an accusation of scandalising, whether in its own right or conditional on its being established in conjunction with there being a public interest in publication.

It might be thought self-evident that truth should afford a defence. If a judge is taking bribes or is drunk when on the bench, why should publication of this fact be subject to censorship, under threat of imprisonment or fine? Surely it is in the public interest that such information should be broadcast widely

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96 We discuss in detail below the questions whether truth and the public interest should render the communication lawful.

97 As for example, where witnesses may be deterred from giving evidence or where the jury may be prejudiced against one of the parties.

rather than suppressed?

Nevertheless, as has already been indicated, several law reform agencies which have examined the issue have concluded that truth should *not* afford a defence (save possibly when the public interest is shown to require publication). In England, as we have seen, the Phillimore Committee recommended that truth alone should not be a defence. They argued as follows:

> "In view of the special constitutional position of courts and judges, we do not think that a criminal trial is the right way of testing this issue. A defence of truth may or may not be advanced in good faith; an allegation of bias, for example, may follow a long and responsible investigation or it may be generalised as malicious invective on the part of somebody who has lost his case. The latter is usually, no doubt, best ignored but if, in the extreme case, a prosecution were brought and such a defence put forward its effect would simply be to give the defendant a further and public platform for the wider publication of his assertions or allegations, which might be wholly without foundation. An allegation of bias in relation to a particular case might, if the defendant were permitted to plead justification, be used in effect as a means of getting a case reheard. Finally, a simple defence of truth would permit the malicious and irresponsible publication of some damaging episode from a judge's past, however distant, calculated to cast doubt upon his fitness to try a particular case or class of cases".[98]

The Phillimore Committee were, however, disposed to let *truth in conjunction with public benefit* constitute a defence, as it does in England and Wales (as in Ireland[99]) in regard to criminal libel. They added an important proviso:

> "In our view, the proper course for anyone to take who believes that he has evidence of judicial corruption or each of impartiality is to submit it to the proper authority, namely the Lord Chancellor or the Secretary of State for Scotland, as the case may be. It is they who have the power of removal of judicial officers below High Court level if they misbehave - and they are the appropriate recipients for complaints as to the conduct of High Court Judges. It is hard to conceive how it could be held to be for the public benefit to publish allegations imputing improper motives to those taking part in the administration of justice if the defendant has taken no steps to report the matter to the proper authority, or to enable the authority to deal with it."[100]

The Law Reform Commission of Canada, in their Working Paper on Contempt,[101] recommended that the truth of the facts and of public interest

98 *Phillimore Report*, para 165.
99 *Defamation Act 1961*, section 6.
100 *Phillimore Report*, para 166.
101 WP 20. p61 (recommendation No.13).

to disclose them should be a defence to scandalising. The response was interesting. *All* the judges consulted and "a vast majority"[102] of lawyers said they were firmly opposed to this possibility for the following reasons. First,

> "to allow this defence would leave the way open to judicial guerilla warfare. One can well imagine that certain people, for ideological, political or personal reasons, would not hesitate to make such charges for the sole purpose of discrediting the justice system ... and gaining an ideal platform for waging their campaigns, all at a minimal risk. In such a situation, the judge, having been placed in the role of the accused, is in a very difficult position to defend himself..."[103]

Secondly,

> "even if we assume the allegation to be accurate, it was pointed out by some that proving the truth of the facts in defence is not the most appropriate procedure in the circumstances. In practice, a judge will not hesitate to withdraw from a case if his impartiality is in doubt in the least. In practice, as well, an individual who wishes to draw allegation to such an allegation or to what he feels is improper conduct on the past of a judge, has other means of making himself heard, ranging from reporting the fact to the Chief Justice, to making a formal complaint to the Canadian Judicial Council or other similar organisation."[104]

The Commission repudiated the strategy they had adopted in their Working Paper of requiring that the true disclosure be in the public interest. The arguments they had heard convinced them that, "although this criterion is valid in theory, it runs into serious practical problems. It was pointed out to us that the very notion of public interest and its application in each particular case would create serious problems."[105]

The Commission noted that the defence was not admissible under existing Canadian law, yet this situation had never created any genuine problems. "Evidently there are better, more legitimate, means of reporting a judge's misbehaviour than by affronting judicial authority".[106] While taking the view that the defence should not be part of the law, the Commission noted that:

> "[i]t is not impossible, however, that one day, if it is called upon to deal specifically with this question, Canadian case-law will decide to break with tradition and allow this defence, just as it is allowed in matters of

102 *Report on Contempt of Court*, p26.
103 *Id.*
104 *Id.*
105 *Id.*, p27.
106 *Id.*

defamatory libel."[107]

The Law Reform Commission of Australia, as we have seen, recommended[108] that the factual truth[109] of an allegedly scandalising remark should afford a defence. In neither its Discussion Paper nor the Report did the Commission explain precisely why it came to this conclusion. In both documents, however, the arguments for and against the defence are set out in detail. Part of the case in favour of the defence is expressed as follows:

> "The chief argument in favour of formally introducing a defence of justification in scandalising cases is that so long as it does not exist, well-founded allegations of judicial misconduct may be punished and, more importantly, people in possession of sound evidence establishing judicial misconduct may be restrained from revealing it publicly out of fear of being convicted of contempt. The public scrutiny which is necessary to ensure the proper functioning of any social institution of major importance will thus be significantly hampered in the case of the judiciary, and a dangerous tradition of excessive deference to the judiciary may arise within the media and the community at large."[110]

The Commission addressed the question of the relevance of alternative mechanisms of enquiry. If the task of investigating the merits of factual complaints against judicial officers was unduly distasteful and embarrassing for a judge or jury, the answer was not to reject the defence of justification but to ensure that the whole case was referred to another more appropriate investigative body, such as a Royal Commission. In any event, an individual with a complaint could always refer the matter to an Attorney-General's Department.

The Commission went on to state that:

> "[p]aradoxically , however, arguments *against* admitting justification as a defence in scandalising cases also derive support from the existence of agencies other than courts to deal with complaints about judicial misbehaviour. It may be contended that when a citizen wishes to make such a complaint, the proper course of action is to submit it to an appropriate agency, where it can be dealt with privately and discreetly, rather than publicising it to the world at large. The underlying issue here is the fundamental ore whether the scrutiny of judges by official bodies should itself be open to public scrutiny, or conducted behind closed doors. If the former, it is inappropriate for scandalising law to repress public criticism about judges even when it is based on fact. If

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107 Id.

108 In para 460 of their Report.

109 Or an honest belief in its truth where the alleged contemnor was not recklessly indifferent to the question of truth or falsity. We examine the *mens rea* issue presently.

110 *Report on Contempt of Court*, para 439.

the *latter*, the denial of justification as a defence to a change of scandalising is appropriate, because otherwise complainants can have the merits of their complaints adjudicated in an ordinary court in the course of the prosecution for scandalising instead of their being diverted to the appropriate agency for private determination."[111]

We have considered the several arguments put forward by the law reform agencies on the topic. We are not impressed by many of those arguing against the universal availability of the defence of truth. The suggestion that the defence should not be available (save when in conjunction with public benefit) because some defendants might seek to use the contempt proceedings as a public platform or to have a case reheard[112] seems to us to involve far too overbroad an exclusion to deal with a small minority of cases. The logic of such an argument would be that all appeals in civil and criminal litigation should be abolished because some appellants use the process to gain publicity or to rehearse old grievances. The suggestion that the defence to truth should be excluded in order to accommodate a vaguely conceived limitations period against the irresponsible disclosure of "some damaging episode from a judge's past, however distant",[113] seems to us unsustainable. The fact that a judge received a bribe ten years ago is a matter of public concern, disclosure of which should not be censored by criminal threats. Moreover, this element is so small a factor in the general context of the law of scandalising that using it to support a universal exclusion of the defence of truth carries no credibility.

Nor do we think that the defence of truth would herald an age of "judicial guerilla warfare"[114] by political ideologues. An allegation of justification which has no basis of fact will be rejected: the fate of the contemnor - imprisonment or a substantial fine - is a sufficient disincentive to engage in scandalising conduct. It is conceivable that an occasional such person might be sufficiently inspired by the desire for his or her day in court, with consequent publicity, that he or she would make a scandalising statement; but we seriously doubt whether the existence of a specific defence of truth would have any distinctive influence one way or the other. What is far more likely is that persons such as this are motivated to make public remarks which may fall foul of the contempt law, not because they hope to get away 'with it' or to gain cheap publicity but because they have a deep conviction that the system of justice in capitalist societies, while formally incorporating objective norms of justice, in fact operates so as to protect the interests of the dominant elements in

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111 *Id*, para 441.

112 Cf. the *Phillimore Report*, para 165.

113 *Id*.

114 Law Reform Commission of Canada's *Report*, p26.

society at the expense of those of the media.[115]

We reject the suggestion that the defence of truth should be available only where disclosure is in the public interest. Apart from the conceptual uncertainty of the notion of the public interest,[116] we consider that, while in some cases no doubt it would be preferable if the complaint were made to the appropriate authorities, the failure to do so should scarcely render the person who makes the disclosure guilty of a criminal offence.

Accordingly we tentatively recommend that the truth of a communication should render it lawful. We considered whether the onus of proving the untruth of the communication should rest on the prosecution. For several reasons, including that of the ordinary presumption as to how judges behave, we are of the view that the onus of proof of the falsity of an imputation of corrupt judicial conduct should not rest on the prosecution, and that the onus of proof of its truth, on the balance of probabilities, should rest on the defence. As regards the other proposed mode of committing the offence of scandalising, however - the communication to the public or a section of the public of a false account of legal proceedings - clearly the onus here of proving the falsity of the account should rest on the prosecution.

(f) Liability of Editors, Media Proprietors and Others

We now must consider the question of the liability of editors, media proprietors and others for scandalous publications. Our tentative view is that the principles of liability which we propose for these persons in respect of *sub judice* contempt should apply also to scandalising. We can perceive no basis for prescribing a different set of principles in the present context. *Accordingly we recommend that the same principles should here apply.*

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115 Cf *EMS Namboodiripad v TN Nambiar*, 1970 AIR 2015 SC, discussed by Gaur, *Constitutional Rights and Freedom of the Media in India*, 11 Media L & Practice 44, at 52-53 (1990). The divergence between formal and actual justice can scarcely be denied. A large business corporation has access to sophisticated information about the law as well as the best legal advice and representation. An unemployed person from the inner city may have effective access to none of these.

116 Cf. the Law Reform Commission of Canada's *Report*, p27.

CHAPTER 12: REFORM PROPOSALS IN RELATION TO THE *SUB JUDICE* RULE

In this chapter we critically examine the *sub judice* principle in both criminal and civil proceedings and make tentative proposals for reform of the law on the subject. The issues raised in our analysis are not easy to resolve satisfactorily since they involve the confrontation of what are essentially competing values. Thus, the norms of freedom of expression and open justice are not always comfortably harmonised with those relating to the right to a fair trial and the preservation of public confidence in the administration of justice.[1]

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1 See the Law Reform Commission of Australia's *Report on Contempt of Court*, paras 241 ff (1987). The need to ensure that *justice be dispensed impartially* is a fifth underlying goal, related to the fourth. The Law Reform Commission of Canada, in their Worki… Paper 20, p38, state:

> "Any act that could affect this impartiality must be guarded against and suppressed. To take a hypothetical example, publishing virulent articles in a small town newspaper about someone accused of a particularly violent and revolting crime could create an atmosphere that is prejudicial to the trial, could influence potential jurors and could give the impression of having an influence one way or the other on the decision, thus making it virtually impossible for justice to be dispensed with in an unemotional and detached manner.
>
> The second is that the system of justice must be, and must continue to appear to be, neutral if public confidence is to be retained. To prejudice the outcome of a trial is to destroy this image in the eyes of the public and thus indirectly to undermine the authority of the judicial process. As has often been said, justice must not only be done, it must be seen to be done.
>
> If, for example, every newspaper unanimously states that someone who has been found guilty deserves a harsh sentence, one can readily imagine the consequences of this on the public: if the sentence handed down is harsh, the public may believe that this outside pressure had an influence; on the other hand, if it is light, the public may think the judge was reacting negatively to this same pressure. In either case, the interests of justice are not served.
>
> The third basis is more technical. The law of evidence carefully screens the facts to see what ought to be admitted. Evidence is customarily excluded if it is untrustworthy. In fact, the law of evidence is largely made up of rules excluding evidence. Therefore, only a part of the evidence is submitted to the trier of fact. As a result, the entire system of evidence would be undermined if the publication of inadmissible evidence were allowed. For example, one can imagine the effect on the jury if it read in the paper that the accused had made a confession that was inadmissible in court, or if it read about the accused's criminal record, when he had elected not to testify so as to avoid its being placed in evidence."

Arguments Against the Retention of the Sub Judice Rule

First we consider the principal arguments that may be made against the retention of the *sub judice* rule. These are, first, that the rule offends against the constitutional entitlement to freedom of expression; second, that there is not sufficient empirical support for the assumption underlying the rule's rationale that juries would be so affected by a publication as to prejudice the fairness of their adjudication; and, third, that an extension and improvement of alternative remedies would suffice to ensure justice to all parties.

1. The Constitutional Argument

First we consider the argument that Article 40.6.1° of the Constitution renders the existing *sub judice* rule unconstitutional. That provision guarantees the liberty for citizens to express freely their convictions and opinions. It provides that the guarantee for this liberty is subject to public order and morality. Moreover, it provides that, "[t]he education of public opinion being ... a matter of such grave import to the common good, the State shall ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State". Finally, it provides that "the publication or utterance of blasphemous, seditious or indecent matter is an offence punishable in accordance with law".

Thus far our courts have not been called on to examine the effect of these provisions in relation to the *sub judice* rule. It would therefore be rash to rely on statements by the Courts as to the effect of Article 40.6.1 made in other specific contexts where, it may be hazarded, the particular matter of the *sub judice* rule was not central in the minds of the judges.

The first point that can be made is that freedom of expression has been a value central to European and American culture for more than two centuries; its protection under the Constitution is thus a matter of fundamental importance rather than of rhetorical dimensions:

> "Numerous great political and intellectual figures - Burke, Paine, Jefferson and Mill, to name but a few - have been associated with this principle. It requires that legal or other governmental restrictions on freedom of expression and publication must be affirmatively justified. The onus of justification lies on those who seek to impose a restriction. In particular, prior restraints on any publication - as could be imposed, for instance, if a government had power to censor the press - are only justifiable on thoroughly compelling grounds, such as national security in time of war."[2]

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2 Law Reform Commission of Australia, Discussion Paper No. 26, *Contempt and the Media*, para 14 (1986).

It may be argued that the right of the citizens to express freely their convictions and opinions is subject only to the express limitations provided in Article 40.6.1. As against this it may be replied that the Constitution must be read as a whole and that accordingly rights must be balanced and harmonised. The right of free speech must be balanced with other constitutional rights inhering in other citizens, including the right to a good name and the right to fair legal proceedings, whether criminal or civil. The complete absence of any reference to these competing rights may be considered an argument in favour of the necessity of weighing them against the express liberty of expression since quite obviously they must have considerable weight if the Constitution is to retain any echo of concern for justice.

In this context it is worth recalling what Henchy J had to say, in relation to defamation, in *Hynes-O'Sullivan v O'Driscoll.*[3] He could not:

> "believe that the guarantee in Article 40.3.1^{0} ... that the State will protect, and, as far as practicable, by its laws defend and vindicate the personal rights of the citizen would be effectuated if a right to defame with impunity is recognised on such a purely subjective basis. An occasion of qualified privilege is to be given recognition only to the extent that it is necessary under Article 40.6.1^{0} to recognise, on an objective basis, the right to express freely convictions and opinions. The constitutional priorities would be ignored if the law considered an occasion of qualified privilege to depend only on the honest opinion of the communicator as to the existence of a right or duty in the other person to receive the communication. The constitutional right to one's reputation would be of little value if a person defamed were to be deprived of redress because the defamer honestly but unjustifiably believed that the person to whom the words were published had a right to receive the communication."

It is also worth noting another aspect of Henchy J's rejection of the argument that reasonable belief that the recipient of an intended communication should render the situation one of qualified privilege:

> "The public policy which a new formulation of the law would represent should more properly be found by the Law Reform Commission or by those others who are in a position to take a broad perspective as distinct from what is discernible in the tunnelled vision imposed by the facts of a single case. That is particularly so in a case such as this, where the law as to qualified privilege must reflect a due balancing of the constitutional right to freedom of expression and the constitutional protection of every citizen's good name. The articulation of public policy on a matter such as this would seem to be primarily a matter for

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3 [1988] IR 436, at 449.

> the legislature."[4]

These passages are consistent only with the view that the freedom of expression guaranteed by Article 40.6.1 is not qualified merely by the express limitations contained in that provision. Moreover, the essence of this freedom, in Henchy J's perception, is one in respect of which the Oireachtas has been given a wide margin of appreciation.

McCarthy J's analysis of the scope of Article 40.6.1 also contradicts the view that the freedom of expression easily overrides other competing rights. He noted that the defamed party:

> "has a constitutional right that the State shall protect as best it may from unjust attack and in the case of injustice done vindicate his good name (Article 40.3.2°). Such a right co-exists with a guarantee of liberty for the exercise of the right of citizens to express freely their convictions and opinions (Article 40.6.1°). The defence of qualified privilege is itself an impairment, in the interests of the common good, of the right to vindication of one's good name. This does not mean that it should be sparingly allowed but, rather, that its existence should be clear, and clear to all parties."[5]

It is noteworthy that McCarthy J identifies the justification for the defence of qualified privilege in the interests of the *common good* rather than in the *individual's right of free speech*. In other words, it is because of the *social* benefits in employers and politicians, for example, speaking on matters of ultimately social concern, that qualified privilege may attach to what they say.[6]

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4 *Id*, at 450.

5 *Id*, at 454.

6 As to McCarthy J's argument relating to the *desideratum* of clarity, cf R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 444 (1989):

> "... [O]ne may perhaps doubt the strength of the argument that an honest and reasonable belief in the duty or interest of the recipient to hear what is told should not make the occasion one of qualified privilege because the existence of the privilege 'should be clear, and clear to all parties'. Such clarity rarely exists in the law of tort. Certainly it need not exist in relation to another aspect of qualified privilege - the question of malice. In many cases the plaintiff will have no clear knowledge of the defendant's state of mind when he made the statement. Moreover subjective considerations play an important role in determining the presence or absence of malice. Further, even accepting fully the premise that 'an occasion of qualified privilege is a legal conclusion to be drawn from established facts', there is no reason why one must be driven to the conclusion that 'a mistaken belief cannot be the foundation to establish a fact'. It all depends on what is meant by 'facts'. A reasonable, mistaken belief in the entitlement or duty of the recipient to receive a communication is as much a fact as any other. Whether the court should engage in such fact-finding is perhaps a difficult question but that difficulty is in no sense attributable to the *inability* of the court to do so, if this is considered desirable."

As against this it is fair to point out that in the recent unsuccessful application[7] for an injunction against RTE in relation to a proposed television programme in which the plaintiff would be named as a person involved in a bombing in Birmingham, McCarthy J expressed the opinion that the constitutional guarantee of the vindication of the good name of every citizen had to be read in the context of the constitutional guarantee of the freedom of expression. He noted that a citizen's good name may be vindicated in damages but a restraint on freedom of expression cannot be similarly vindicated. Finlay CJ referred to the "two conflicting questions", of the right of expression, the giving of information and the giving and receiving of views on the one hand and the protection of the plaintiff's name on the other. This case reminds us that the constitutional dimensions to freedom of expression are substantive rather than merely rhetorical; but the case does not in any respect challenge the long-accepted principle that this freedom is substantially qualified by competing rights.

The question therefore remains as to the extent to which the freedom of expression impinges on the *sub judice* rule. The answer inevitably depends on two factors: (1) how strongly the courts prize the constitutional requirements of fairness in legal procedures, the administration of justice and the right to a good name, and (2) the extent to which the courts are willing to leave to the Oireachtas a "margin of appreciation" in fine-tuning the competing constitutional rights. As to the first factor, the requirements of fairness in legal procedures, the administration of justice and the right to a good name must surely be likely to be perceived by the courts as weighing heavily against an untrammelled freedom of expression. As to the second, we have noted that in *Hynes O'Sullivan v O'Driscoll*,[8] Henchy J saw a major role for the Oireachtas, rather than the courts, in fashioning the contours of defamation law. The contrast between this approach and that of the United States Supreme Court is worth noting. It may be that, on contempt of court, the courts will not be disposed to allow such scope to the Oireachtas, but this will scarcely result in any significant narrowing of the present *sub judice* rule. Naturally the courts are likely to be concerned to ensure that the integrity of administration of justice is carefully preserved. An unduly narrow *sub judice* restraint, apart from subjecting those involved in legal proceedings to the risk of injustice and prejudice, would impinge on the efficacy and quality of justice administered by the courts. This is a matter on which the courts have shown themselves to be particularly sensitive.[9]

We conclude that, on balance, the argument that the present *sub judice* rule offends against the constitutional entitlement to freedom of expression is not sustainable on the basis of the law as articulated thus far by the courts.

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7 *X v RTE*, Sup Ct, 27 March 1990, aff'g High Ct, Costello J, 27 March 1990, *Irish Times*, 28 March 1990.

8 *Supra*.

9 Cf *The State (DPP) v Walsh*, [1981] IR 412 (Sup Ct).

2. *The Scientific Argument*

We must now consider the argument that there is not sufficient empirical support for the assumption underlying the *sub judice* rule's rationale that juries would be so affected by a publication as to prejudice the fairness of their adjudication.

An Australian writer[10] summarises the position well:

> "The psychologists' studies are in no way determinative of the issue of how often and to what extent juries are prejudiced by pre-trial publicity. The issue is a complex one and will often depend upon the personalities of the jurors involved and the different factual situations. The erratic results of some of the studies bear witness to this as well as to the methodological difficulties in such inquiries. However, it is clear that the effect of prejudicial publicity wanes with the effluxion of time and that its seriousness will revolve in good part around the kind of material that is the subject of the publicity. The evidence on balance supports the legal contention that steps need to be taken, both remedial and prophylactic, to minimise the situations in which material that has a potential to 'poison' legal proceedings is punished. The evidence also suggests that the ambit of prophylactic measures, such as the *sub judice* rule, needs to be kept within clearly defined limits because only a small range of prejudicial publications has a real likelihood of affecting the impartiality of jurors' deliberations. Further, the studies give some credence to claims that remedial measures, such as continuance, change of venue, admonition and sequestration go a useful way toward neutralising the effects of pre-trial publicity. Similarly, the actual presence of jurors throughout the whole period of a trial, together with their not inconsiderable efforts to consider issues dispassionately and on the basis of the evidence before them in the courtroom, mean that an important countervailing force generally exists against such publicity."[11]

One particular aspect of psychological theory is of central relevance. This is *dissonance theory*, which "begins with the unobjectionable assertion that people dislike inconsistencies and do their best to avoid them".[12] Dissonance occurs "when one cognitive or affective element present in our thoughts implies something inconsistent with another element also present. When contrary cognitive or affective elements are present in our minds, we strive towards some form of resolution. Once resolution is achieved, the more harmonious state of cognitive or affective consonance is returned to".[13] It has been stated that:

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10 See Freckelton, Research Paper No. 4 *Prejudicial Publicity and the Courts*, (Australian Law Reform Commission, 1986).

11 *Id*, p31.

12 *Id*, p9.

13 *Id*.

"[o]ne of the most notable ways in which our minds resolve dissonance is by attempting to reconcile second and third impressions with initial sense data. It is again a recognised principle of psychology that people are often initially loath to reject previous stances or beliefs in preference for a new point of view. One may even go as far as to assert that there is a relationship between perception and beliefs which results in the creation of a barrier excluding new data available to an individual but contrary to his or her beliefs. Krech and Crutchfield highlight the most dangerous extreme:

> 'Because perception is functionally selective, and because beliefs and attitudes play a role determining the nature of this selectivity, new [contradictory] data ... may not even be perceived'.[14]

The other important factor in belief resistance is the concept of self reinforcement. This is the process whereby the passage of time actually preserves and affirms the belief; it is what allows old beliefs to maintain themselves and can even create new data for self-incorporation, increasing the intensity of the belief.

Thus, the first impression is particularly important; our general inclination when entering into cognitive dissonance may well be to maintain the accuracy of the first impression even in the face of contrary evidence. Then, we may well unreasonably and perversely adhere to our first impression if our error is impressed upon us. Finally, the more time goes by, the more our tendency may be to become convinced of our first impression's correctness. In the light of this the way in which first impressions are created assumes great significance. If, as suggested, those first impressions would most likely be slanted by virtue of the selective data upon which they are founded, worrying consequences follow, the more so if the media presentation of those initial sense impressions to the reader, watcher or listener is itself biased or partial .... The danger is that prejudicial publicity will induce the formation of belief on the basis of inadequate or biased data which will affect the way in which jurors make decisions in the courtroom, when they become charged with their fact-finding task. The potency of the media is fuelled by at least two other factors. First is their propensity, if it is not constrained by *sub judice* and other laws, to repeat again and again the selective and partial information which first caused the formation of beliefs on the part of the public. Given the rigidifying, self-perpetuating nature of beliefs in the first place, repetition of the material which first gave birth to them cannot but reinforce those first impressions. The objectionable aspect of this is that, from a psychological point of view, it makes it less likely that those beliefs will be shifted by what may objectively be said to be

14 D Krech and RS Crutchfield *Theory and Problems of Social Psychology*, 190 (1948).

contrary evidence; the state of cognitive dissonance when entered into will tend to be resolved in favour of the first impressions even more readily than otherwise."[15]

After a review of the empirical studies, Mary Connors draws the following conclusions:

"- prejudicial publicity can influence jurors' initial judgments of guilt;

- the trial process itself, in which the *voir dire* is particularly important, dissipates much of the effect of the prejudicial publicity;

- publicity does not need to be presented in a sensational fashion to bias jurors;

- information concerning a confession is the inadmissible evidence most difficult to dispel;

- prejudicial publicity is most likely to affect jurors when other information is lacking or when the evidence is evenly weighted."[16]

The importance of the *voir dire* examination of would be jurors is also stressed by Padawer-Singer and Barton[17] whose empirical findings "suggest that one solution perhaps lies in thorough *voir dire* examinations in which lawyers can stress the importance of examining the evidence and rejecting prejudicial information which is not part of the trial ...".[18]

It is of some interest to note that more than one study has found a greater susceptibility of women to being influenced by pretrial publicity.[19]

Of course in Ireland counsel have only very limited scope to challenge would-be jurors for cause shown. They cannot ask questions seeking to establish bias or other unsuitability unless they have some *prima facie* evidence to launch them on this journey. An interesting question arises as to whether this aspect of our law should be reformed so as to reduce the risk of prejudice to defendants (or other participants in the legal process) resulting from publicity about the case. This question, we think, should best be addressed in the context of a general reform of the law relating to juries. At present we are

15 Freckelton, *op cit*, pp10-11.

16 Connors, *Prejudicial Publicity, An Assessment*, 41 Journalism Monographs 1, at 23 (1975), cited by Freckelton, *op cit*, p29.

17 AM Padawer-Singer and AH Barton, *The Impact of Pre-Trial Publicity on Juries' Verdict*, in RJ Simon ed, *The Jury System in America* (1975).

18 *Id*, at 136, quoted by Chesterman, *op cit*, p28.

19 Cf Chesterman, *op cit*, p25.

content to note that there is a substantial body of empirical evidence which supports the ordinary common sense judgment that publicity can cause prejudice which is by no means insignificant.

3. *Alternative Remedies*

We now must consider the argument that there is no need for a law of *sub judice* contempt because the alternative remedial and prophylactic measures adequately protect the interests of justice at present or could do so if reformulated and extended in their scope. It is worth noting what these measures embrace.

(a) Change of venue

The court has power to change the venue of proceedings on a broad discretionary basis.[20] The law on this matter has been most thoroughly developed in the United States, in view of the eclipse of *sub judice* contempt there. Appellate courts have considered such matters as the following in determining the appropriation of an order for change of venue:

> "the length of time between the arrest and the trial;
> the nature and character of the publicity;
> the prosecution's responsibility for the publicity;
> the community atmosphere;
> the nature of the crime;
> the percentage of prospective jurors who were unaware of the publicity or who had not become unalterably biased again the defendant;
> the defendant's use of at least a substantial portion of his or her allotted peremptory challenges due to the amount of publicity;
> the number of jurors selected who admit to having heard or seen the publicity;
> the attempts made by the trial court to abate publicity; this can include, for example, restrictions upon the news media;
> other precautionary or curative measures taken, such as sequestration and continuance; and
> the probable efficacy of a change of venue."[21]

(b) Postponement and adjournment

Section 6(4) of the *Criminal Justice (Administration) Act 1924* provides as follows:

> "Where, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of a person accused is expedient as

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20 Cf. the *Courts Act 1981*, section 31, the *Courts (Supplemental Provisions) Act 1961*, section 26, *Ryan & Magee*, 264-266.

21 Freckelton, *op cit.*, pp. 38-39 (citations omitted).

> a consequence of the exercise of any power of the court under this Act to amend an indictment or to order a separate trial of court, the court shall make such order as to the postponement of the trial as appears necessary."

This power is "in addition to and not in derogation of any other power of the court"...[22] Thus, as *Ryan & Magee*[23] point out, one such power is to postpone a trial on account of "the existence of prejudice in the jury".

Postponement and adjournment must be distinguished from abandonment. In *The People (AG) v Singer,*[24] the defendant, before a jury was empanelled, had argued that his trial should be abandoned for three reasons, one of which was that, in the course of the lengthy preliminary inquiry in the District Court, unfounded and extravagant statements had been made about him by witnesses and counsel, which had been extensively published in the press. The trial judge rejected this argument, as did the Court of Criminal Appeal. O Dalaigh J, for the Court, held that the trial judge "could have taken no other course. The several matters on which the [defendant] relied did, however, indicate that more than usual care was called for in impanelling a jury and in the conduct of the trial. But the [defendant] brought nothing forward to warrant the suspension of his trial, much less the abandonment of it. Indeed, the Court does not find it possible to conceive of circumstances which would enable an accused person to demand the abandonment of his trial..."[25]

In the United States, in spite of the guarantee under the Sixth Amendment of a speedy trial, the courts have developed the doctrine of *continuance,*[26] whereby in the case of prejudicial publicity, they may adjourn proceedings until "the fires of prejudice ... cool".[27] The remedy is secondary to that of change of venue; it may not be appropriate in cases where the fires of prejudice are unlikely to abate or where, having done so, they may easily be rekindled.[28]

(c) Voir dire

In Irish law, the scope of challenge for cause in respect of potential jurors is narrowly drawn. In *The People (AG) v Lehman (No. 2),*[29] the appellant had been convicted of murdering his wife but the conviction had been set aside

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22 Section 6(6).

23 *Ryan & Magee*, 267.

24 1 Frewen 214 (CCA, 23 June 1961).

25 *Id*, at 217.

26 See Freckelton, *Prejudicial Publicity and the Courts*, p.40 (Australian Law Reform Commission, Reference on Contempt of Court, Tribunals and Commissions, Research Paper No. 4, 1986).

27 *Maine v Superior Court*, 68 Cal. 2d 375, at 387 438 P 2d 372, at 380, 66 Cal. Rptr 724, at 732 (1968).

28 Cf. Freckleton, *op. cit.,* p. 40.

29 [1947] IR 137 (CCA, 1945).

by the Court of Criminal Appeal on the ground that certain irrelevant questions had been put to him on cross-examination, which had tended to prejudice him. In the re-trial, counsel for the appellant had been refused permission to put to each juror before he was sworn the following question:-

> "Did you read the newspaper reports of the proceedings in the Court of Criminal Appeal with special reference to the questions asked of the accused in cross-examination at the previous trial?"

If the answer had been "yes", counsel said that he would have challenged for cause shown.

The appellant had been again convicted. His second appeal to the Court of Criminal Appeal was unsuccessful. Sullivan CJ said:

> "It is, in the opinion of this Court, well settled that counsel for an accused is not entitled to question a juror with a view to ascertaining whether a right of challenge should be exercised. It is equally well settled that even expressions of opinion by a juror are not a ground of challenge unless they are corrupt as proceeding from ill will, and that jurors if challenged cannot be questioned about such expressions which must be proved *aliunde*. This Court is satisfied that the learned Judge was right in refusing to allow counsel for the accused to question the jurors with the object that he stated ..."[30]

Clearly this approach is so narrow as to make it difficult for an accused to test whether a prospective juror is likely to be prejudiced against him by virtue of having formed a view as to his guilt on the basis of a report of an appeal ordering a re-trial, in which reference to inadmissible evidence has been made. To exclude a question on the lines sought to be proferred by counsel in *Lehman (No.2)* can scarcely be justified on the basis that it would amount to a "fishing trip". Even if the test is that the questioner must "lay a foundation of fact" in support of his ground of challenge,[31] and even if that foundation must create a *prima facie* case, it seems unjust that he should not be permitted to attempt to find out from a prospective juror whether a risk of prejudice which has been created (albeit necessarily) by factors external to the prospective juror have had prejudicial effects on him or her.

Where the defendant has actual evidence that a prospective juror is directly aware of his previous convictions or bad character it seems clear that a challenge for cause is capable of succeeding, but where this knowledge comes from the media, courts in England are a good deal more circumspect about

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30 *Id.*, at 141 (citations omitted). Cf. *The People (AG) v Singer*, 1 Frewen 214, at 224 (CCA, 23 June 1961).

31 *R v Chandler*, [1964] 1 All ER 761, at 767 (CCA, *per* Lord Parker, CJ).

holding that a challenge for cause should succeed.[32] We doubt whether any distinction in principle can be built on this factual difference in the manner of learning the same facts. All must surely depend on the circumstances of each case.

(d) Discharge

A trial judge may discharge an entire jury if he or she considers this necessary in the interests of justice.[33] Where the judge fails to take this step, it may afford a good ground for appeal,[34] but only where this amounts to an abuse of his broad discretion.[35]

A recent example of the improper failure to discharge a jury, which resulted in the quashing of a conviction is *R v Cullen and others*.[36] At a late stage of a trial in England of three Irish people for conspiracy to murder Mr Tom King, Secretary of State for Northern Ireland, in which each of the defendants had elected not to give evidence, the Home Secretary announced the Government's intention to change the law on an accused person's right to silence. The statement created much media interest; Mr King was interviewed on television in his capacity as Secretary of State. He said that those who stood on the right to silence, particularly terrorists, did so to conceal their guilt. Lord Denning, retired Master of the Rolls, was also interviewed. He said that too many people has been acquitted when they were guilty and that the right to silence ought to be abolished, particularly in Northern Ireland.

Counsel for the three applied to the trial judge, Swinton Thomas J, for the jury to be discharged and a fresh trial ordered. He refused the application,

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32 Contrast *R v Box and Box*, 47 Cr. App. Rep. 284 (1963) *R v Hood*, 52 Cr. App. Rep. 265 (1968) and *R v Gash*, [1967] 1 All ER 811 with *R v Kray*, 53 Cr. App. Rep. 412 (1969). Thus Richard Buxton QC states *(Challenging and Discharging Jurors - 1*, [1990] Crim L Rev 225, at 232):

> "It would ... appear to be the position that a juror's direct knowledge of convictions or bad reputation is in itself a ground for challenge, but that if such matters have merely been published in the media it is necessary to go further and show that that publication has positively caused a particular juror to be unable to try the case impartially."

33 See Buxton, *Challenging and Discharging Jurors - 2*, [1990] Crim. L. Rev. 284, at 284. In *The State v McMullen*, [1925] 2 IR 9, at 19 (CCA, 1924), Kennedy CJ referred to:

> "... the established rule and practice that it is lawful for the Judge at the trial to discharge the jury before verdict when necessity, in the sense of a high degree of need, for such discharge is made evident to his mind from facts ascertained by him".

34 See *AG v Power*, [1932] IR, at 613 (CCA, *per* Kennedy CJ (for the Court)).

35 In *The State v McMullen*, *supra*, at 19, Kennedy CJ went so far as to say that "[t]he existence of such necessity or high degree of need is a matter for the determination of the Judge at the trial, and for him alone, and his decision is not open to review. It is a matter depending upon the exercise of a judicial discretion both as to the facts relevant to be considered in the particular case and as to the effect of those facts".

36 140 New LJ 629 (CA, Crim. Div., 27 April 1990).

ruling that any prejudice to the three caused by these comments could be overcome by an appropriate direction to the jury in the summing up. After a fifteen-hour retirement the three were convicted by a majority of ten to two. They were each sentenced to twenty five years imprisonment.

The appeal was based, *inter alia*, on the ground that Swinton Thomas J should have discharged the jury and ordered a new trial.

Beldam LJ, giving the judgment of the court, said:

> "We approach the question whether the judge erred in failing to discharge the jury with two matters well in mind. The first is that, as Lord Atkin once said, 'The path of justice is a public way' and that with the media reaching out into most homes in the country it is unavoidable that those called to do jury service may from time to time be exposed to public comment and debate on matters which impinge on the administration of justice and the criminal law though in general it is most unlikely that such debate or comments would encroach upon the issues of a trial actually in progress. That there may be a risk of prejudice to particular legal proceedings arising incidentally from a discussion of public affairs and other matters of general public interest, appears to us to be recognised by section 5 of the Contempt of Court Act 1981. But this does not mean that in some circumstances public discussion and debate may not be so pointed and so prejudicial that it will be necessary to discharge a jury if the risk of injustice to an accused is to be avoided. The second matter we have in mind is that, when the judge considered the application at the trial, he was exercising his discretion. To the exercise of that discretion this court must give great weight. To reverse the judge's ruling it is not enough that the members of this court would have exercised their discretion differently. We must be clearly satisfied that the judge was wrong; but our power to review the exercise of his discretion is not limited to cases in which he has erred in principle or there is shown to have been no material on which he could properly have arrived at his decision. The court must, if necessary, examine anew the relevant facts and circumstances to exercise a discretion by way of review if it thinks that the judge's ruling may have resulted in injustice to the applicants.[37]
>
> When the judge made his ruling, he once again said that if by reason of the publicity which had been engendered he thought that a fair trail of the accused was endangered, as it had been submitted by defending counsel it was, he would have had to discharge the jury. His view was that he could readily cure any harm that could have been done, which he greatly doubted because he had previously told the jury that they must try the case on the basis of the evidence they heard and not on the basis of anything they read in the newspapers or heard on

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37 Citing *Evans v Bartlam* [1937] AC 473.

television...

On the hearing of the appeal it seemed to the court that the first question which had to be considered was whether this extensive coverage in the media generally and the very pointed statements made in the television broadcasts created a real risk of prejudice to the appellants because the jury might be influenced against them since they had remained silent. Mr Rawley, who appeared for the Crown, had seen the video recordings which we have seen. In answer to the court Mr Rawley agreed that there was such a risk and that it was real in the sense that it was not fanciful. His contention was that such a risk could be, and was, eliminated by the judge's direction to the jury. The court too had formed the impression that the power and nature of the statements which had been made in the course of the broadcasts did constitute a real and not a fanciful risk that the jury might be influenced to the view that, particularly in a terrorist case, a refusal to give an explanation in answer to questions or in evidence was the refuge of the guilty and incompatible with innocence.

The judge had said on more than one occasion that if he thought that a fair trial of the accused was in danger, or if he was satisfied there was a serious risk to a proper verdict or a fair trial, he would have discharged the jury. Neither he, nor Mr Rawley at that time, had had the opportunity to see the recordings. We are satisfied that if the learned judge had seen them he would not have discounted the risk of prejudice to the appellants to the extent that he did and would have been bound to be less confident that it could be eliminated by a direction to the jury.

Consequently it seems to us that this is a case in which this court ought to review the exercise by the judge of his discretion in the light of the evidence we have seen from the video recordings and of the concession made by Mr Rawley in this court.

The statements to which we have drawn attention, which were powerfully made, were on their face of general application but they had a particular relevance to the trial of the accused. Two of them had declined to answer questions after their arrest and all of them had elected not to give evidence and thus to maintain their right to silence. The allegations made against the accused were that they were part of a terrorist organisation and that they had conspired to murder Mr King and others unknown. The coincidence that the remarks should have been made when the trial of the applicants had reached such a critical stage and should have been made by the minister who was alleged to be the victim of the proposed conspiracy would not, in our view, enhance the perception that justice was seen to be done. The judge regarded it as important that the trial which had continued for some length of time should come properly to its close. Very little of the

evidence which was given at trial was the subject of challenge and much of its was read to the jury. It is difficult to see what injustice the Crown would have suffered if a retrial had been ordered. As Lord Atkin said in *Ras Behari Lal v King Emperor.*[38] 'Finality is a good thing: but justice is a better.'

The great controversy and intense media interest sparked off by the Home Secretary's announcement and the press conferences would inevitably have subsided and its impact would have waned in a matter of a month or two. It is true that two or three days would have elapsed before the jury retired to consider their verdict and that before they did so they would have had the advantage of the very fair summing-up which the judge delivered to them. We were invited to pay regard ... to the time that the jury deliberated before eventually reaching a verdict by a majority of 10:2 after 15 hours. We have carefully considered the directions which the learned judge gave with a view to dispelling the risk of injustice as he perceived it.

In the final analysis we are left with the definite impression that the impact which the statements in the television interviews may well have had on the fairness of the trial could not be overcome by any direction to the jury and that the only way in which justice could be done and be obviously seen to be done was by discharging the jury and ordering a retrial.

In our judgment that is what the judge should have done... [B]eing of the opinion that the verdict of the jury should be set aside on the ground that in the circumstances it is unsafe, we allow the appeals and quash the conviction."[39]

In *The People (AG) v Gilmore and Cunningham,*[40] the two appellants had been convicted of conspiracy to defraud. Four other defendants had been acquitted. One of their grounds of appeal to the Court of Criminal Appeal was based on the publication in one of the evening newspapers, during the course of the trial, of matter which, they said, might tend to affect the minds of the jury adversely to them and so prejudice the prospects of a fair trial. There was some substance in this assertion: Dixon J, for the Court of Appeal, observed:

"There can be no doubt that the publication did have the tendency, particularly as some of the information conveyed was, apparently, not accurate and also by reason of the juxtaposition of items of information in such a way as to suggest an inference, adverse to the accused, which would not be open without such juxtaposition. Although there was no evidence on the point, it would be unreal to suppose that none of

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38 [1933] All ER 723, at 726.
39 140 New LJ, at 629-630.
40 1 Frewen 101 (CCA, 25 July 1950).

the jury saw or heard of the publication."[41]

The matter was brought to the attention of the trial judge the day after the publication, which was the third day of the trial, and counsel for all the accused asked to have the jury discharged, although counsel for two of them (who, as matters transpired, were later acquitted by direction) qualified his application by the intimation that his clients felt they could not afford another trial.[42] The trial judge, while deploring the publication, took the view that, in all the circumstances, it might be more damaging to the accused to discharge the jury than to go on with the trial. Accordingly he refused the application.

The Court of Criminal Appeal rejected the appellants' argument that their conviction should be quashed on this ground. Dixon J stated:

> "The question of discharging the jury is essentially one for the discretion of the trial Judge and, while individual judges might take different views on the matter, the important consideration is that, as was done here, the trial Judge, who has seisin of the case and is familiar with all its facts and circumstances, should exercise his discretion judicially. This Court would have power, in a proper case, to review the refusal of the trial Judge to discharge the jury but it would require very coercive circumstances to justify its doing.
>
> In the English case to which we were referred - *R v Firth*[43] - it was held by the Court of Criminal Appeal that the trial Judge should have acceded to the application to discharge the jury and the conviction was quashed. The circumstances there were, however, different, as the application was based on the fact of inadmissible evidence as to another case against the accused having been given in an inadvertent answer by a witness. However given, and notwithstanding the direction of the trial Judge to the jury to exclude it from their minds, inadmissible evidence of a character always regarded and treated as highly prejudicial had been given at the trial. Further, it would have been possible in that case to ensure -what could not have been ensured with any certainty in the present case -that the prejudicial matter would not be present to the minds of a fresh jury. A consideration of this kind may have been an element in the trial Judge's view in the present case that the interests of the accused might be better served by proceeding with the

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41 *Id.*, at 106.

42 The case was decided long before the legislation in 1962 providing for criminal legal aid. The issues of equality and justice thus raised in relation to the discharge of juries are indeed troublesome: it is disturbing to suspect that the Court might have been receptive to the argument that a discharge following a prejudicial publication, which would generally be necessary in the interests of justice, might not be so because the lack of means of a particular defendant would impose on him too great a financial burden if there were a retrial.

43 [1938] 3 All ER 783.

trial rather than by discharging the jury. The fact that two of the accused the present appellants were, in the event, convicted, does not refute the possible soundness of that view.

In the course of his charge, in fact in the forefront of it, the trial Judge gave the jury a very strong and, in our view, adequate warning against allowing the publication in question, or any similar extraneous matter, to influence their minds in arriving at their verdict. He did not, of course, state the contents of the publication nor were any of the matters stated or alleged in it given in evidence. That his warning was probably effective may be inferred from the circumstance that a subsequent question by the Jury strongly suggests that they had heeded and intended to apply his warning as to another matter, *viz.* as to treating the statement of one of the accused as evidence against anyone but himself.

In all these circumstances, we think that the trial Judge properly exercised his discretion in the matter and that this Court would not be justified in interfering with that exercise of his discretion."[44]

The Supreme Court granted the appellants' further appeal against conviction on grounds not of present relevance.

What is significant about Dixon J's analysis in the Court of Criminal Appeal is that it appears to reason that, on account of the fact the poison released by the publication would be likely to be lethal to any future jury trying the case, the trial Judge had exercised his discretion legitimately in refusing to discharge the jury. It may be debated whether such an approach is acceptable, based as it is on a hand-wringing posture rather than a serious attempt to resolve[45] an important issue of general importance. The result of this approach would be that, the more insidious and long-lasting the poison caused by publication, the surer the accused would be that he would be likely to be prejudiced by it, with the court standing idly by. If this is so, then the case in favour of stringent deterrent and punitive criminal sanctions against publishers for such conduct, whether through the machinery of contempt proceedings or otherwise, seems compelling.

Our Tentative Conclusion

We have come to the tentative conclusion, in the light of the arguments we have considered, that it is necessary in the interests of justice, supported by constitutional norms, that the *sub judice* rule be formulated in such a way that

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44 1 Frewen, at 106-108.

45 The Court of Criminal Appeal did not consider whether, for example, the *individual* jurors who had read the offending publication might have been discharged, whether their prospective substitutes could not have been examined on the same question, or whether a change of venue might have sufficed.

it effectively protects the entitlements of persons involved in criminal and legal proceedings. The right of free speech cannot override these requirements. We are of the view that improvements in certain procedures - such as jury challenges and discharge - may well be desirable, in their own right, from the dictates of justice; the question as to what precisely these reforms should be we leave to a future report dealing with the law on juries. We do not consider that, if improvements in these areas were made, a relaxation of the *sub judice* rule would be warranted. To do this would, in our judgment, unjustly interfere with the rights of affected parties. Procedural improvements can mitigate, but not remove, the risk of injustice which would flow from a relaxed *sub judice* rule.

Let us now turn to consider how best the law on the subject of the *sub judice* rule can be improved in specific areas.

The Extent of Publication

First we must consider how the concept of publication should be defined. The question is to a large extent related to the separate issue of whether contempt by publication should be different, so far as concerns its *mens rea* requirements, from contempt consisting of interfering with witnesses, jurors and others by means otherwise than by publication. If there are to be different tests, then of course the matter of defining the scope of publication is vital. If the same test is to apply, then the matter of defining the scope of publication is of no crucial significance.

Our present view, for reasons stated later, is that different tests should apply. It may therefore be useful to note how "publication" is defined in the British legislation, where different tests apply to cases of contempt by publication and other forms of contemptuous interference.

Section 2(1) of the *Contempt of Court Act 1981* provides that:

> "'publication' includes any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public."

It seems clear that the word "includes" here is equivalent to "means", rather than connoting a non-exhaustive list.[46] The reference to "any section of the public" appears capable of covering a press conference.[47] *Miller* considers that "[p]resumably it would also cover the case of an over-talkative policeman who announced in a pub in the presence of a member of a jury that the accused had previous convictions."[48] While such a disclosure would amount to

46 See *Miller*, 143.

47 *Id*, 144. Cf *Re McArthur* [1983] ILRM 355 (High Ct, Costello J, 1982).

48 *Miller*, 144.

publication for the purposes of the law of defamation,[49] it seems doubtful whether it would come within the scope of the definition of "publication" provided by section 2(1) since the communication would scarcely be considered to be "addressed" to a section of the public rather than the intended listener. Of course, a person talking in a loud voice could in some circumstances be considered to be addressing his remarks to more than those to whom they are ostensibly addressed; but it would seem to attach an unduly broad meaning to the notion of "addressing" to include cases of unintended and inadvertent communication even where the speaker ought to have been aware that he could be heard by a section of the public with whom he did not wish to communicate.

A difficulty of characterisation arises in relation to a communication directed exclusively at the judge or a juror (or prospective juror[50]). Should it be considered a "publication" in all, some or no cases? The answer would seem to be that it should. Thus, if a person contacts a judge or juror and informs him that the defendant in the case he is hearing is a convicted rapist this should be considered a publication for present purposes.

With this qualification, we are satisfied that section 2(1) offers a useful model for a definition of publication in relation to the sub judice principle, and we tentatively recommend that the legislation incorporate this approach.

We considered, but rejected, the argument that publication should be expressly defined as being limited to a section of the public *likely to comprise those having a connection with the case*.[51] We do not consider this necessary in view of the cumulative requirements of *actus reus* and *mens rea* which we shall propose in respect of the *sub judice* principle. The effect of these, in conjunction with the definition of publication which we have proposed, is that publications exclusively to sections of the public not likely to comprise those having a connection with the case will simply not be capable of constituting contempt under this rubric.

Prejudice

Next we must address the question of the risk of prejudice. Should the issue be one of *likelihood* of prejudice or of the *quantum of prejudice* in the event that it transpires? Or should the issue more properly be one which insists on proof of a high likelihood of a high quantum of prejudice?

The English experience is instructive. At common law the courts emphasised the first requirement, of a high risk of prejudice. The Phillimore Committee considered that the latter requirement, of serious prejudice, was more

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49 *Cf McMahon & Binchy*, 609-612.

50 Cf *Prothonotary v Collins* (1985) 2 NSW LR 549.

51 Cf *Borrie & Lowe*, 68, and the Law Reform Commission of Australia's *Report on Contempt of Court*, paras 250-253.

important.[52] What emerged from Parliament[53] was a formula embracing both requirements: section 2(2) of the 1981 Act provides that "the strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced".

Judicial interpretation of this provision has given a broad meaning to the word "substantial". In *AG v English*,[54] Lord Diplock said:

> "'Substantial' is hardly the most apt word to apply to 'risk', which is a noumenon. In combination I take the two words to be intended to exclude a risk that is only remote. With regard to the adverb 'seriously' a perusal of the cases cited in *AG v Times Newspapers Ltd*[55] discloses that the adjective 'serious' has from time to time been used as an alternative to 'real' to describe the degree of risk of interfering with the course of justice, but not the degree of interference itself. It is, however, an ordinary English word that is not intrinsically inapt when used to describe the extent of an impediment or prejudice to the course of justice in particular legal proceedings, and I do not think that for the purposes of the instant appeal any attempt to paraphrase it is necessary or would be helpful."

Miller observes that:

> "[t]he latter part of this statement must surely be right in suggesting that there is serious prejudice to or impairment of the course of justice where the outcome of a criminal trial is jeopardised. However, the former part is much more problematic in concluding that the qualifying adjective 'substantial' does no more than 'exclude a risk that is only remote'. Admittedly this is consistent with a standard dictionary definition of the word, but 'substantial' is used also to mean 'ample' or 'considerable' and the background to s2(2) suggests that it was Parliament's - or at least Lord Wigoder's - intention that the word should bear this meaning. As it is, it seems that the statutory test now has effectively the same meaning as the common law test as interpreted by Lord Reid in the *Sunday Times* case. In other words, a remote possibility of (serious) prejudice is not sufficient, but apparently a small likelihood is, albeit that the courts may refrain from inflicting a

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52 *Phillimore Report*, para 113.

53 After an amendment was successfully moved by Lord Wigoder, when the Bill was at Report Stage in the House of Lords, inserting the word "substantial" in order to mitigate the restricting effect of the subsection on the news media: see *Miller*, 154. *Miller* notes (*id*) that "Lord Hailsham LC doubted whether the additional word would make any difference and it seems that he has been proved right".

54 [1983] 1 AC 116, at 141-142.

55 [1974] AC 273.

punishment."[56]

The Law Reform Commission of Australia reported in 1987 that, according to interviews it had conducted in England the introduction of the formula "substantial risk of serious prejudice" in section 2(2) had given the media "a moderate amount of freedom (compared with the pre-existing common law) in reporting and commenting on current criminal cases, without provoking undue uncertainty as to how the formula operates in practice".[57]

In Canada, the Law Reform Commission of Canada in its *Report on Contempt of Court*[58] proposed the formulation of the offence of interference with judicial proceedings in the following terms:

> "Every one commits an offence who, while judicial proceedings are pending ....
>
> (b) publishes or causes to be published anything he knows or ought to know may interfere with such proceedings."

This was included in legislative proposals[59] which were not enacted.[60]

The difficulty with the Canadian proposal is the uncertainty as to the level of risk and of possible prejudice. A newspaper editor will frequently be aware (and thus "know") that an article *may* interfere with proceedings to a greater or lesser extent. But it seems unwise to capture all such instances within the

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56 *Miller*, 155. Another formulation worth noting in the present context is Sir John Donaldson MR's in *AG v News Group Newspapers*, [1986] 2 All ER 833, at 841:

> "There has to be a *substantial* risk that the course of justice in the proceedings in question will be *seriously* impeded or prejudiced. This is a double test. First, there has to be some risk that the proceedings in question will be affected at all. Second, there has to be a prospect that, if affected, the effect will be serious. The two limbs of the test can overlap, but they can be quite separate. I accept the submission of counsel for the defendants that 'substantial' as a qualification of 'risk' does not have the meaning of 'weighty', but rather means 'not insubstantial' or 'not minimal'. The 'risk' part of the test will usually be of importance in the context of the width of the publication. To declare in a speech at a public meeting in Cornwall that a man about to be tried in Durham is guilty of the offence charged and has many previous convictions for the same offence may well carry no substantial risk of affecting his trial, but, if it occurred, the prejudice would be most serious. By contrast, a nationwide television broadcast at peak viewing time of some far more innocuous statement would certainly involve a substantial risk of having some effect on a trial anywhere in the country and the sole effective question would arise under the 'seriousness' limb of the test. Proximity in time between the publication and the proceedings would probably have a greater bearing on the risk limb than on the seriousness limb, but could go to both."

57 Law Reform Commission of Australia's *Report on Contempt of Court*, para 317.

58 Pages 43-44 of the Report (section 4 of draft legislation).

59 Bill C-19, 1984, clause 33.

60 See the Law Reform Commission of Australia's *Report on Contempt of Court*, para 295.

net of criminality, since the risk that this will happen will in some instances be very low and the possible interference may also in some cases be very low. A general criticism of the *sub judice* rule which the media sometimes make is that a vague criterion of liability forces them to "play safe" and decide not to publish material which would, if tested in a court, be found unexceptionable.[61] This criticism would appear to have particular force in respect of the criterion here discussed.

Another approach would be for the legislation to prescribe in detail the specific categories of disclosure which offend against the *sub judice* rule. This could be accomplished by making it an offence to publish any of these disclosures, without regard to the question of the degree of risk of prejudice or of the probable extent of the prejudice if it transpires. An alternative approach would require proof of *both* a prohibited disclosure and of unwarranted risk of prejudice.

The latter approach receives the support of the Law Reform Commission of Australia. To constitute *sub judice* contempt, a publication must not only create a substantial risk that the criminal trial will be prejudiced by virtue of possible influence on the jury but it must include one or more of the following statements, namely, statements to the effect, or from which it could reasonably be inferred, that:

> the accused is innocent or is guilty of the offence, or that the jury should acquit or should convict;
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> the accused has one or more prior criminal convictions;
>
> the accused has committed or has been charged or is about to be charged with another offence, or is or has been suspected or committing another offence, or was or was not involved in an act, omission or event relating to the commission of the offence, or in conduct similar to the conduct involved in the offence;
>
> the accused has confessed to having committed the offence or has made an admission in relation to the offence;
>
> the accused has a good or bad character, either generally or in a particular respect;
>
> the accused, during the investigation into the offence, behaved in a manner from which it might be inferred that he or she was innocent or guilty of the offence;
>
> the accused, or any person likely to provide evidence at the trial (whether for the prosecution or the defence), is or is not likely to be

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61 Cf *id*, para 289.

a credible witness;

a document or thing to be adduced in evidence at the trial of the accused should or should not be accepted as being reliable; and

the prosecution has been undertaken for an improper motive (subject to the defence that the statement was true or that the defendant has taken reasonable steps to ascertain whether it was true and honestly believed that it was).[62]

In support of this approach the Commission stated that it considered that, in accordance with fundamental principles regarding certainty in defining criminal liability, the law on *sub judice* contempt should be expressed more precisely than it was at common law:

"This implies that a statutory offence, or a series of offences, should wholly or partly supersede the existing common law. So far as possible, the aim of legislative reform should be to spell out the categories of publicity which are likely to infringe or jeopardise to an unacceptable degree the right of an accused appearing before a jury to have a fair trial. Journalists should at least be able to ascertain from the statute the categories of publication which are 'at risk' of being held in contempt, as well as the principles determining whether a particular publication will in fact incur liability .... It may be added that, if a list of 'at risk' categories turns out to be insufficiently exhaustive, additions to it can be effected b[y] statutory amendment and, if a particular prohibition in the list is later thought unnecessary, it can be removed without the remaining prohibitions being affected. To this extent, the list is flexible and adaptable, though it must be acknowledged that legislative changes, even minor ones, often take a long time to achieve."[63]

Our Tentative Conclusions

We have found this question a difficult one, in which the competing arguments are finely balanced. We came to the view that it would not be desirable for the legislation to prescribe a list of categories of default (whether or not supplemented by a requirement that there also be a particular degree of risk of prejudice). The danger with any list is that it cannot anticipate the unusual case where, though the risk of prejudice is high, the type of disclosure falls outside the listed categories. There is no reason in justice why such a case should not be punished. The argument that journalists need to have some way of estimating whether or not a proposed publication will fall foul of the law of *sub judice* contempt does not require that they work from a list. This is because the general criterion as to risk of prejudice gives them a

62 *Id*, para 299.
63 *Id*, para 291.

meaningful standard. We see some merit, however, in the inclusion of a list on the lines of that proposed by the Law Reform Commission of Australia, but serving the purpose not of constituting the only ways in which *sub judice* contempt may be committed but rather as a *non-exhaustive* guide to the media as to the types of disclosure which are capable of constituting contempt. With respect to a disclosure falling outside this list, the editor or programme maker would have to determine (as he or she also would in respect of a disclosure falling within the list) whether the disclosure creates a risk of prejudice which the law prohibits. We do not at this point recommend that the legislation adopt this particular strategy, but we would greatly welcome views on the desirability of this approach.

As regards the question of how that risk of prejudice should be defined in the legislation, we are of the view that the best approach would be to prescribe that the sub judice rule applies to any publication which creates a risk, other than a remote one, that the course of justice in the proceedings in question will be seriously impeded or prejudiced. As may be seen, this is the test adopted in England in section 2(2) of the 1981 Act, as interpreted in the decisions. As we noted, that subsection uses the adjective"substantial" but the courts have interpreted this as meaning "other than remote". We consider that a risk of this level should be sufficient to generate liability if the prejudice thereby risked is of serious proportions. In this general context it should be borne in mind that, under the approach we favour,[64] liability will not be strict but rather defined in terms of the failure to exercise due care.

Risk to the Administration of Justice in general rather than in respect of a Specific Case

We now must consider the question whether "trial by the media" should be subject to control by the law of contempt where it is not likely to prejudice particular proceedings but nonetheless may be considered to risk defaming the administration of justice The Australian Law Reform Commission set out the question well:

> "The basis of metaphors such as 'usurping' the functions of courts and 'embarrassment' to the courts is a judicial fear of 'trial by the media' being viewed by the public as a rival to, if not a substitute for, trial within the court system. The aphorism that 'justice must be seen to be done' as well as actually being done is interpreted as requiring that the public should approve of what they see being done by the courts, without being distracted by prejudgments, re-enactments or other forms of media treatment which might encourage them to believe that 'justice' was being done not by the courts at all but by the media instead. The

64 Later in this chapter, we tentatively propose that liability should attach, on the basis of the risk we have proposed above, to proceedings which are *active*. With regard to the period *before* proceedings are active, we propose a more narrowly drawn offence with a far higher requisite degree of risk.

idea that the media actually carry out 'trials' is, however, illusory in one important respect: it is the courts, and the courts alone, who actually make the decisions in which legal rules are applied to specific facts, determinations as to rights and liabilities are made, and citizens are affected as to their liberty, property, legal obligations etc. As with the law of scandalising ... the primary aim of contempt law in this area is to preserve the confidence of litigants, and of the public generally, in the operation of the judicial system, rather than to stave off any genuine 'usurpation' of the courts' role in society by media organisations. A 'climate of prejudice' is seen as distinctly prejudicial to this aim. Also at stake, to a more limited degree, are the 'comfort' (for want of a better word) of judges in making decisions which may be at odds with media opinion, and the desire of individuals contemplating litigation to look forward to proceedings which will not be subjected to slanted commentary (perhaps adverse to their own wishes and expectations) by the media. The underlying question is whether the basic values of freedom of speech and publication are important enough to override these real or apparent concerns relating to the system of administration of justice, and to individual judges, litigants and potential litigants."[65]

The central argument in favour of the law of contempt's extending to publications which risk interference with the administration of justice in general rather than in respect of specific proceedings is that a central rationale of contempt is to protect the administration of justice: if it fails in this goal it is not serving its goal effectively. The mere fact that that goal usually is concerned in some way with particular proceedings, forthcoming, current or past, is no reason in principle why, in cases where proceedings are not in focus, the goal of protection should be abandoned.

The principal argument against extending the law of contempt beyond cases where proceedings are in focus is that it renders the definition of the offence of contempt uncertain,[66] and speculative. Thus the Australian Law Reform Commission state:

> "It is argued in support of ... prohibitions on the ground of prejudgment ... that, if the media were free to prejudge cases for the courts, their inadequate and one-sided attempts at this would deter future potential litigants from exercising their right to seek legal remedies in the courts. There is, however, no clear evidence of the truth of this. A plaintiff trying to decide whether or not to instigate a claim, or a defendant making up his or her mind whether to enter a defence or try to reach a settlement, has inevitably to weigh up a wide range of competing factors. Economic and emotional considerations may become closely intertwined: for instance, the plaintiff may be aware that the claim may

65 ALRC Discussion Paper No. 26, para 147 (1986).
66 But see *contra Sunday Times v UK*, [1979] 2 EHRR 245.

be unsuccessful, and that a considerable sum in terms of legal costs is at risk, but may nonetheless decide to sue out of a determination to achieve a legal victory or 'go down fighting'. It is impossible in such situations to predict the impact (if any) of the possibility of media publicity purporting to prejudge any or all of the issues at stake. Similarly, the notion that the reputation of the courts is likely to suffer if, from time to time, a sentence is passed, or some other determination made, in opposition to the prevailing views expressed in media publicity is not provable. Far from resenting the fact that a court has made a decision contrary to views expressed in the media, the public may well respect the decision for having displayed a healthy independence, such as is generally said to be essential to the workings of a strong judiciary. It cannot, in short, be said that the detrimental effect of prejudgment or embarrassment upon public attitudes to the system of administration of justice is established with a sufficient degree of certainty to justify restrictions on freedom of publication on that basis alone."[67]

We must confess to remaining unconvinced by this analysis. The fact that prospective future litigants may also be affected by considerations other than a prospective publication is no reason for withholding the contempt jurisdiction if, as well as these external influences, the future litigants are likely to be affected to some extent by the prejudicial publication. It is, moreover, the nature of risk that one cannot in advance point to future cases where injury *will* occur: the whole point about risk is that such injury *may* occur.

In this context we should refer to the "prejudgment" test favoured by the House of Lords in the *Sunday Times* case. We are of the view that such a test would not effect an improvement in our law. We share the opinion of the Phillimore Committee that:

"The test of prejudgment might well make for greater certainty in one direction - provided a satisfactory definition of prejudgment could be found - but it is by no means clear that it is satisfactory in others, for instance - the case of ... 'gagging' writs ... It can be arbitrary in its application. For example, an opinion expressed on a legal issue in a learned journal would fall within the description of prejudgment given by Lord Cross of Chelsea.[68] Again, there has been much discussion and expression of opinion in scientific journals as to the manner in which thalidomide operates to produce deformities. These, too, would fall within the test of prejudgment and would therefore be contempts. Furthermore, the scope and precise meaning of the words 'prejudge' or 'prejudgment'as used in the House of Lords are no easier to determine in practice than the phrase 'risk of prejudice'. At what point does legitimate discussion or expression of opinion cease to be legitimate and

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67 ALRC Discussion Paper No. 26, para 148.
68 [1973] 2 WLR 298, at 330.

qualify as prejudgment? This may depend as much upon the quality and the authority of the party expressing the opinion as upon the nature of the opinion and the form of its expression. A *dictum* of Ulpian will carry more weight from its origin alone than a dozen judgments of as many long-forgotten but doubtless worthy praetors. Further, the expression of opinion and even its repetition can be so framed as to disclaim clearly any intention to offer a concluded judgment and yet be of highly persuasive character. The simple test of prejudgment therefore seems to go too far in some respects and not far enough in others. We conclude that no satisfactory definition can be found which does not have direct reference to the mischief which the law of contempt is and always has been designed to suppress".[69]

Our Tentative Conclusion

Our tentative conclusion is that there should be no exclusion a priori of contempt proceedings on account of the fact that a prejudicial publication risks injury to the administration of justice without reference to specific legal proceedings. The real issue relates to the degree of risk of injury which must be established: if that is sufficiently substantial, the law of contempt should work justly and efficiently. We do not favour the incorporation of a test of liability based on "prejudgment".

But equally we consider that it would be too severe to impose liability in respect of publications which create a risk, other than a remote one, of serious injury to the administration of justice in general, where there is no such risk in respect of any particular proceedings. In such circumstances, we consider that the risk of serious injury should be a good deal higher than merely being other than remote. The test we tentatively favour is one of likelihood. It seems to us just that the sub judice rule should extend to publications which are likely to cause serious injury to the administration of justice in general: such a test would not restrict the media unduly, in our view. In regard to this specific basis of liability, the law is encroaching on the area of contempt falling within the category of scandalising. In the present context, and for reasons similar to those applying to cases of alleged scandalising, we consider it proper that there should be a defence of justification. Thus, if, for example, a newspaper published an article claiming that the physical conditions of some courts made it impossible to administer justice fairly in them (because old people were unable to stay for long in court on account of the cold) it should be a good defence to any charge of contempt in publishing the article that the level of physical neglect did in fact have the effects alleged.

Temporal Limits

We now must consider whether there should, as under present law, be temporal limits on the scope of contempt of court by publication, so far as it relates to specific proceedings and, if so, where those limits should be

69 *Phillimore Report*, paras. 110-111.

drawn.

1. Should there be any temporal limits?
It is worth examining the threshold question whether *any* temporal limitations should be included in relation to this form of contempt. A strong argument may be made that they should not. Why in principle should a publication which carries a demonstrable risk (or certainty) of injury to the administration of justice in respect of specific legal proceedings not fall within the scope of the law of contempt by reason merely of the historical fact that, at the time of the publication, the legal proceedings had not begun? The likelihood and gravity of the injury may in some cases be far greater than in certain cases where the legal proceedings are already in progress at the time of the publication.

Two counter-arguments may be considered. The first is that publications before legal proceedings become current (or imminent) are not likely to cause serious interference with the administration of justice or the right of the participants in the litigation. As against this, it may be responded that, while this may no doubt be true in most cases, it will not invariably be so. For those cases in which it is not so, there will be unnecessary injustice.

The second counter-argument is that a clear-cut rule is necessary for those in the media: otherwise, the uncertainty will chill the exercise of their constitutional rights. As the Law Reform Commission of Canada stated:

> "If the principle of freedom of information is to be safeguarded any exception, such as the contempt rule, must be clearly laid down ... [T]he media must have as clear and precise a rule as possible, so that it will know the limits of its own freedom. Freedom of information must not be subject to an uncertain exception which might cause more harm than the good the contempt rule is trying to promote; in other words, in the trade off that ultimately results in these matters, the flexibility of the contempt power must not be maintained at the expense of the right of expression."[70]

In reply it may be said that nothing expressly stated in the Constitution and no clear analysis in any Irish judicial decision can support the suggestion that a law of contempt which extended to publications made before proceedings were initiated would on that account be unconstitutional.

2. Should the test be that of the imminence of proceedings?
One option would be to have a specific temporal limitation, which would

70 WP 20, p.42.

begin[71] at the point when proceedings are *imminent*. The Phillimore Committee's discussion of this solution offers a useful springboard for analysis:

> "It has many times been pointed out that statements made before proceedings begin can be just as prejudicial as those made at a later stage. In *R v Parke*,[72] for example, Mr Justice Wills made his well-known remark that 'it is possible very effectually to poison the foundation of justice before it begins to flow'. A fixed starting point, whether at the moment proceedings begin or at any other time, would be arbitrary. Secondly, it is hardly more difficult for a publisher to have to take care not to issue a prejudicial publication if he knows that proceedings are 'imminent' and will be instituted as soon as the court office is open than it is to take care not to publish immediately afterwards. In this connection, it is relevant that many of the formal steps which initiate proceedings are not taken in public, so that, unless they are informed by those who have set the law in motion, the press would not necessarily know whether proceedings have begun or not until the matter comes before the court. Finally, in England and Wales, the press have some protection by virtue of section 11 of the Administration of Justice Act 1960, which provides a defence to a publisher if he shows that he did not know and had no reason to suppose that proceedings were pending or imminent, as the case may be ...
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> "Impressive as these arguments are, the application of the concept of 'imminence' presents too many problems. The difficulties surrounding the day-to-day application of the law of contempt are already unavoidably great without adding to them by uncertainties of this kind. For example, there is no way of knowing what period the word 'imminent' is intended to cover. An *ex post facto* test would be liable to be unjust, because the publisher cannot foresee what may happen. The evidence submitted to us suggests that this uncertainty has an inhibiting effect upon the freedom of the press which is out of proportion to any value there may be in preserving it. Our analysis of the need to protect the administration of justice points clearly to the conclusion that, although there may be some risk before proceedings begin, the dangers increase as the trial approaches. Certainly this is true with regard to jurors and witnesses, who by the time the trial takes place and are likely to have forgotten all but relatively recent publications. It is also true of the danger of undermining public confidence in the administration of justice. The risks of creating prejudice and of damaging public confidence before proceedings begin undoubtedly exist, but they should not be exaggerated and can largely be eliminated if a sufficiently early starting point for the operation of

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71 We consider below the question of a possible *terminal* point beyond which publications would not fall under this contempt jurisdiction.

72 [1903] 2 KB 432, at 438.

the law is selected. Finally, and perhaps most important, a restriction in terms of time accords with the principles set out ... above, namely, that the law of contempt, combining strict liability and a summary procedure, should be invoked only where there is a serious and immediate threat to the administration of justice. This in practice is only likely to arise when the trial is due to take place in the near future. These arguments confirm our view ... that the law of contempt should not apply before proceedings begin."[73]

We see several difficulties with this analysis. The suggestion that an *ex post facto* test would be liable to be unjust "because the publisher cannot foresee what may happen" would seem to us to have validity only if publishers were to be exposed to liability without regard to whether they could reasonably foresee the occurrence of the legal proceedings. Such a rule would undoubtedly be unfair. But a rule which incorporated a test of reasonable foresight on this matter could not be stigmatised as unjust on the basis suggested by the Committee any more than the law of negligence could credibly be criticised for applying a test whereby the defendant's conduct is judged in the light of the information available to him or her at the time of acting rather than later.[74] The truth of the matter is that some legal proceedings, which have not yet begun, are perfectly foreseeable to anyone who gives the matter any thought.

Secondly, no conclusion that the law of contempt should not extend earlier than when proceedings have begun is warranted from the proposition that, "although there may be some risk [of damage to the administration of justice] before proceedings begin, the dangers increase as the trial approaches". While the proposition is true as a generality, it is not invariably the case. Even if it were universally true, it would not mean that the law of contempt should not apply to any publication appearing before the proceedings began: the risk of damage, though perhaps less than if the publications appeared later, may nonetheless be sufficiently substantial to warrant the sanction of contempt.

Thirdly, the admission that a serious and immediate threat to the administration of justice is in practice likely to arise when the trial is due to take place in the near future scarcely warrants the conclusion that the law of contempt should be restricted to cases where proceedings have begun. If the number of cases where there is an earlier risk of prejudice is likely to be few, then extending the law of contempt to cover such a handful of instances might not be regarded as oppressive.

Finally, it is worth noting (though not by way of criticism) that a central premise of the Committee's argument is that the law of contempt should combine strict liability and a summary procedure. If (as we tentatively propose) it should not necessarily contain either of these elements, then the

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73 *Phillimore Report*, paras 116-117.

74 See *Daniels v Heskin*, [1954] IR 73, at 86-87 (Sup Ct, *per* Kingsmill Moore J, 1952).

rationale for restricting contempt to cases where the publication occurs after the proceedings have begun is weakened.

3. ***Should the test be based on currency of proceedings?***
The third option would "start the clock" only when proceedings have begun. We have seen the central arguments in favour of this approach: the certainty it gives to the media and the relatively greater need to protect persons from publications during this period. Our analysis has also referred to the replies to these arguments: that certainty for the media is not the *summum bonum* of Irish Constitutional law and that there are cases, before the proceedings have begun, where publications can do untold damage.

Active Proceedings
It may be useful at this point to note how the British legislation has defined "active" criminal and civil proceedings. Criminal proceedings are active from the time an "initial step" has been taken until they are concluded.[75] The initial steps of criminal proceedings are:-

(a) arrest without warrant;

(b) the issue of a warrant for arrest;

(c) the issue of a summons to appear;

(d) the service of an indictment or other document specifying the charge;

and

(e) oral charge.[76]

It is clear that these times approximate closely to those when proceedings became pending at common law.[77] As *Miller* notes:

> "Proceedings are not active when they are only imminent, for example when a person is about to be arrested. This introduces a measure of certainty into the scope of the rule. Presumably there is little room for argument over precisely when a warrant for arrest was issued or a suspect charged. There may be more difficulty where a suspect is arrested without a warrant since the borderline balance between voluntarily 'helping the police with their inquiries' and arrest has

75 *Contempt of Court Act 1981*, Schedule 1, paragraph 3.
76 *Id*, paragraph 4 (references to Scottish law omitted here and in description of other relevant provisions of the 1981 Act).
77 *Miller*, 175.

sometimes been unclear ...."[78]

Miller goes on to make an observation which is of relevance to our deliberations:

> "Clearly there will be occasions where these provisions produce apparent anomalies. For example, those who emphasise the importance of fair trials can fairly ask why the full protection of the law of contempt should be withdrawn from a suspect who is 'helping the police with their inquiries' or from one whose arrest without warrant is imminent and virtually inevitable, perhaps towards the end of a siege. Those who stress the importance of Press freedom may note that the dividing line between assisting the police and the point of arrest is somewhat arbitrary when used in the present context. The truth of the matter is that there are bound to be anomalies wherever the line is drawn after the time of the actual commission of the offence. It is submitted that the Act has got the balance about right .... [A] publisher will have a defence under s3 of the Act if he neither knows nor suspects that the relevant proceedings were active."[79]

Under the British legislation, criminal proceedings are concluded:-

(a) by acquittal or, as the case may be, by sentence[80];

(b) by any other verdict, finding, order or decision which puts an end to the proceedings; or

(c) by discontinuance[81] or by operation of law.[82]

Criminal proceedings cease to be active if an order is made for the charge to lie on the file, but become active again if leave is later given for the proceedings to continue.[83] Criminal proceedings also cease to be active if the accused is found to be unfit to plead or a hospital order is made in his case.[84]

Criminal proceedings against a person which become active on the issue of a warrant for his arrest cease to be active at the end of the period of twelve months beginning with the date of the warrant unless he has been arrested

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78 *Id.* Cf McKenzie, Morgan & Reiner, [1990] Crim L Rev 22.

79 *Miller,* 175-176.

80 The meaning of which term is extended by paragraph 6 of Schedule 1 to include, *inter alia*, deferment of sentence.

81 Cf *id,* para 7.

82 *Id,* paragraph 6.

83 *Id,* paragraph 9. See also paragraph 10, dealing with revival, at the initiative of the accused, following discontinuance by virtue of section 23 of the *Prosecution of Offences Act 1985.*

84 *Contempt of Court Act 1981*, Schedule 1, paragraph 10.

within that period, but become active again if he is subsequently arrested.[85] This provision captures cases where, for example, a suspect disappears, escapes from prison before his trial or goes to a country from which he cannot be extradited.[86] It should be noted that the provision applies only where the criminal proceedings in question became active on the issue of a warrant for the person's arrest. Thus, if they became active by some other means - arrest without warrant, for example - it appears that they are not subject to this provision.

Proceedings *other than criminal proceedings and appellate proceedings* are, for the purposes of the 1981 Act, active from the time when arrangements for the hearing are made or, if no such arrangements are previously made, from the time the hearing begins, until the proceedings are disposed of or discontinued or withdrawn.[87] Any motion or application made in or for the purposes of any proceedings, and any pre-trial review in the county court, is to be treated as a distinct proceeding.[88]

Arrangements for the hearing of proceedings are made:

(a) in the case of proceedings in the High Court for which provision is made by rules of court for setting down for trial, when the case is set down;

(b) in the case of any proceedings, when a date for the trial or hearing is fixed.[89]

This postponement of the *sub judice* period "represents a significant relaxation of the law of contempt"[90] and "should also assist in curtailing the inhibiting effect of 'gagging writs'".[91] Nevertheless, as *Miller* notes, these provisions are:

> "not without their difficulties. For example, it ... frequently ... is very difficult to ascertain whether a case has been set down for trial in the High Court within para 13(a). Secondly, there is the fact that any motion or application which is made in or for the purposes of the proceedings is to be treated 'as a distinct proceeding'. This includes applications for discovery and interlocutory injunctions, the latter being commonplace in such potentially controversial areas as labour law and breach of confidence. Consequently the *sub judice* period in relation to these proceedings may begin at a relatively early stage
> and continue until they are 'disposed of or discontinued or withdrawn'.

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85 *Id*, paragraph 11.
86 *Miller*, 176-177.
87 *Contempt of Court Act 1981*, Schedule 1, paragraph 12.
88 *Id*.
89 *Id*, para 13.
90 *Miller*, 184.
91 *Id*.

> Presumably it must also follow ... that it is this notion or application which is the 'proceeding in question' within s2(2) of the Act and which must be put at risk of serious prejudice by the alleged contempt. Any alleged prejudice to the trial itself can be considered only once arrangements for the hearing have been made, unless of course it is accompanied by an element of intent or otherwise falls outside the bands of the strict liability rule."[1]

The 1981 Act provides in Schedule 1, paragraph 16 that appellate proceedings are active from the time when they are commenced -

(a) by application for leave to appeal or apply for review, or by notice of such an application;

(b) by notice of appeal or of application for review; or

(c) by other originating process,

until disposed of or abandoned, discontinued or withdrawn. Where, in appellate proceedings relating to criminal proceedings, the court either:

(a) remits the case to the court below, or

(b) orders a new trial or a *venire de novo*,

any further or new proceedings which result are treated as active from the conclusion of the appellate proceedings.[93]

Our Tentative Conclusions

We must now express our tentative conclusions on the question of temporal limits to the *sub judice* rule. We are conscious of three important policies affecting the issue: the need to protect those involved in legal proceedings from prejudice though improper publications; the public interest in ensuring that the media are not unduly cramped in their coverage of public affairs and newsworthy events; and the need for a degree of certainty in the legal principles so that they can be applied with some degree of confidence in the day-to-day operation of press, radio and television.

We were strongly attracted by the argument that no liability should ever apply to prejudical publications published before proceedings have become active. This appears to be the existing law; it has the merit of giving some degree of certainty to the law; and it has widespread acceptance in other jurisdictions. Nevertheless, after much consideration, we have concluded that it would be wrong for the legislation to give a blanket immunity to publications before

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1 *Id.* (citations omitted).

93 *Contempt of Court Act 1981,* Schedule 1, paragraph 16.

proceedings have become active, however serious and manifest the prejudice must have been apparent to the publisher. We think that it would be wrong to introduce a negligence - based test with regard to these publications, since that might be regarded as restricting the media too greatly. *Our tentative preference is for a narrow rule which would impose liability for contempt with regard to publications before proceedings are active where the publisher is actually aware of facts which, to the publisher's knowledge, render the publication certain, or virtually certain, to cause serious prejudice to a person whose imminent involvement in criminal or civil legal proceedings is certain or virtually certain.* Under this test, only cases which cry out for a sanction will fall within the scope of liability. No publisher could morally justify a publication of this character.

We would have preferred to express the test in terms simply of actual certainty, and we are conscious of the potential for debate about the concept of "virtual certainty". We have extended the definition thus far for two reasons. First, because the notion of "certainty" contains its own potential for debate as to its scope.[94] Secondly, because in those cases where prejudice has not in fact resulted - possibly on account of the prosecution for contempt - it would be quite wrong for the defendant, by reason of this fact alone, to escape responsibility.

As regards the dividing line based on proceedings being active, we are satisfied that the criteria specified in the Contempt of Court Act 1981 represent a suitable model for our legislation. We thus envisage two separate offences in respect of publication which may prejudice proceedings. The first offence would cover the "normal" case of sub judice contempt. This would be committed only where proceedings are active. It would require, as we have earlier proposed, that there be a risk, other than a remote one, that the course of justice in the proceedings in question will be seriously impeded or prejudiced. In a moment, we address the *mens rea* issue with regard to this offence. *The second offence would cover the rare case where, in relation to proceedings which are not active but are imminent, a person publishes material when he is actually aware of facts which, to his knowledge, render it certain, or virtually certain, to cause serious prejudice to a person whose imminent involvement in criminal or civil legal proceedings is certain or virtually certain.* The stringent *mens rea* element in this offence is plain. Our forthcoming discussion of the *mens rea* issue, therefore, addresses exclusively that question in the context of the first of these two proposed offences.

Mens Rea

We now must consider the question of the extent to which *mens rea* should be an element in the first offence of *sub judice* contempt with regard to criminal or civil proceedings. Three principal approaches may be considered,

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94 Cf *Hanlon v Fleming*, [1981] IR 489, at 497 (Sup Ct, *per* Henchy J).

each of which has its own subset of options. These are:

1. A test based on intention or recklessness;

2. A strict liability test;

3. A negligence-based test.

1. ***A test based on intention or recklessness***
A strong case may be made in favour of a test based on intention or recklessness. The main argument in its support is that this is the test that applies to criminal offences in general. As the Law Reform Commission of Canada stated:

> "the field of strict liability ought to be limited. Criminal law should be aimed primarily at punishing acts that are morally blameworthy, and strict liability offences should be limited to cases where it is absolutely necessary to protect society. Contempt for breaching the *sub judice* rule does not seem to us to constitute such a case."[95]

As to recklessness, the Phillimore Committee observed that:

> "a liability which rested only on proof of intent or actual foresight would favour the reckless at the expense of the careful. Most publishing is a commercial enterprise undertaken for profit, and the power of the printed or broadcast word is such that the administration of justice would not be adequately protected without a rule which requires great care to be taken to ensure that offending material is not published. Most responsible publishers in fact rely on expert advisers for this and similar purposes. We should not wish to discourage that desirable practice."[96]

A difficulty with regard to the notion of recklessness is that the matter on which defendant must have deliberated - however transiently - is one so troublesome that our courts take the view that only they are competent to determine its application in any particular case. If even a jury of dispassionate persons who have heard all the evidence are considered not sufficiently competent to determine whether the act constitutes a contempt,[97] how could the person who did the act be adjudged more capable of assessing its legal characteristics? All that he or she could do would be to address the possibility, in the abstract, of *any* publication being later stigmatised as a contempt by a court - which alone has the competence to determine the

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95 WP 20 p40. See also the Law Reform Commission of Australia's *Report on Contempt of Court*, para 258 (1987).

96 *Phillimore Report*, para 74.

97 Cf *The State (DPP) v Walsh* [1981] IR 412 (Sup Ct).

matter. As against this, it may be suggested that the difficulty is more theoretical than real. Even if the courts have the first and last word on what constitutes contempt, it is relatively easy for a layperson - and especially a newspaper editor or his or her legal adviser - to be fully confident that certain conduct is perfectly permissible and that other conduct unquestionably constitutes contempt. No doubt there is a range of conduct where the position is not clear, but that is a feature of the law in general and no one has on this account sought to reject the recklessness test for criminal law.

A further objection to this option is that a requirement of proof of *mens rea* in relation to contempt by publication would give rise to serious practical problems:

> "In the first place, where publication by a corporation is concerned, it is difficult to determine whose state of mind is relevant. Should it be that of the managing director, or the editor (in the case of a newspaper), or the sub-editor dealing with the particular article, or the journalist who wrote the article? Secondly, it will usually be difficult for the prosecution to adduce any worthwhile evidence at all as to the state of mind of the relevant individual or individuals at the crucial moment when the decision to publish is taken. Thirdly, in the particular context of 'intention to interfere with the administration of justice', the concept of intention is akin to that of purpose. Yet there may be a number of different purposes underlying a single publication. These may include, for instance, the purpose of selling newspapers or raising the ratings of a television channel, or furthering some 'good cause' within society, as well as that of interfering with the administration of justice. In such circumstances, must the court treat the predominant purpose as 'the intention', in deciding whether or not there is sufficient proof of *mens rea*, or would it be sufficient that only one of several purposes underlying the publication was an 'intention to interfere with the administration of justice'?"[98]

One modification worth considering is to shift the burden of proof. As the Law Reform Commission of Canada observed (at page 40 of Working Paper 20) to expect the prosecution to demonstrate that the accused in contempt cases acted wilfully or recklessly may well put the prosecution in an impossible situation ... equivalent to granting an immunity". If this approach were favoured it could be formulated in more than one way. The first would shift the onus if the defendant's conduct interfered with the administration of justice to the extent specified for the *actus reus*. A second, more restrictive, test would shift the onus only where (i) the defendant's conduct had such a quality *and* (ii) a reasonable person in the position of the defendant when he so acted ought to have appreciated that it had such a quality.

98 Law Reform Commission of Australia, *Report on Contempt of Court*, para 259 (1987).

2. *A strict liability test*

A strict liability test would hold a publisher liable for *sub judice* contempt where his or her conduct interfered with the administration of justice to the extent specified for the *actus reus*, without reference to any thoughts the publisher may have had on the matter. One argument in favour of this approach is that publishers *choose* to publish, whether for profit for political purposes or otherwise. Those who engage in publishing must inevitably appreciate that what they disseminate can have detrimental effects - for other individuals or for social institutions and processes. The decision to publish calls on the publisher to have regard to the possibility of these detrimental effects. If he or she publishes material that interferes with the administration of justice, he or she should not be excused because he or she did not intend thus to interfere and never adverted to the possibility of interference.

Against this argument, two points may be made by way of reply. The first is that, so far as the argument has force, it would defeat a defence of lack of intention or recklessness where the publisher, as a reasonable person, ought to have been aware of the danger to the administration of justice, but it does not explain why a publication made with all due care should nonetheless render the publisher criminally responsible. The second, related to the first, is that publication, far from being an activity that is *prima facie* suspect and anti-social, is in fact integral to human capacity and freedom. Its exercise should not be abridged by frightening those disposed to publish by the spectre of criminal liability for doing so, even where the would-be publishers could have no way of anticipating any threat to the administration of justice. Perhaps this latter point is again one suggesting a negligence-based test, since the argument in favour of a constitutional or human right to free speech is far from self evident to the extent that it would render immune from responsibility those who publish material which they ought to realise may damage the administration of justice and the right of persons to a fair trial.[99]

In support of an unmodified strict liability test it may be argued that whatever the theoretical arguments against it, it has worked reasonably satisfactorily in practice in those jurisdictions where it has been applied. Moreover, the courts are well able to fine-tune its application in "deserving" cases by prescribing only a limited penalty or none at all. It also should be noted that the *mens rea* element of the offence should not be considered in isolation. A strict liability rule where the *actus reus* is narrowly defined (requiring, for example, a high risk of serious injury to the administration of justice) would be a good deal less objectionable than one where the *actus reus* is broadly defined.

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99 It is instructive here to note how in *Hynes O'Sullivan v O'Driscoll*, [1988] IR 436, some members of the Supreme Court invoked the Constitution against the argument that a negligent belief in the interest or duty of the recipient to receive a communication should entitle the person making the communication to the defence of qualified privilege.

3. *A negligence-based test*

We now must consider the merits of a negligence-based test, whose criteria we have already adumbrated. If the publisher, as a reasonable person ought to have anticipated that it would interfere with the administration of justice to the extent prescribed in the *actus reus*, how can he or she object to being held criminally responsible? To argue that the publisher should be free from liability because he or she "meant no harm" may be considered too indulgent. If, for example, a man on a criminal charge risks losing his liberty on account of that careless indifference, this is something about which society should be sufficiently concerned to render the conduct an offence.

An argument from the opposite standpoint against the negligence-based test is that it does not adequately protect the administration of justice from injurious publications. Experience shows that a publication can sometimes have a surprising influence on the course of legal proceedings. In one sense it may be difficult, if not impossible, to predict the precise way in which the publication will have this influence, but in another sense the prospect in general terms of some detrimental influence resulting is one that can never (or virtually never) be discounted.[100]

If this criticism is sound it would require us to concede that a reasonable person would *always* appreciate the possibility of interference with the administration of justice resulting from *anything* that he or she might publish and that accordingly the decision to publish anything, however innocuous it may appear is inevitably a negligent one. Such a proposition seems to us to be entirely unconvincing. If the test is to be one of strict liability, it cannot seek to support itself on the basis of an *a priori* ascription of a constructive unreasonableness to the defendant's conduct in every case. In any event, where, as we propose, the risk must be of serious prejudice, the argument that a publisher would always be negligent in publishing any material loses its force.

If negligence rather than strict liability is to be the test, there may be merit in the legislation's giving would-be publishers some guidance as to the factors that are relevant in determining the matter of liability for negligence, rather than leaving them with no more of a yardstick than that of the "reasonableness" of their conduct. Perhaps it would be useful in this context

100 One is reminded here of the decisions of *Hughes v Lord Advocate* [1964] AC 837 (HL (SC)), *Reeves v Carthy and O'Kelly*, [1984] IR 348 (Sup Ct, 1982), *Burke v John Paul & Co Ltd*, [1967] IR 277 (Sup Ct), *Doughty v Turner Manufacturing Co Ltd*, [1964] 1 QB 518 (CA, 1963), and *Fitzsimons v Bord Telecom Eireann*, High Ct, Barron J, 31 July 1990, in the context of the tort of negligence: see *McMahon & Binchy*, 65-67.

to adopt with modification the fourfold test favoured by the courts[101] in relation to negligence in tort litigation, namely:

(a) the *probability* of an accident;

(b) the *gravity* of the threatened injury;

(c) the *social utility* of the defendant's conduct; and

(d) the *cost* of eliminating the risk.[102]

Clearly, some modification is called for in relation to the first of these elements: in contempt cases the risk is not of an *accident* but of interference with the administration of justice. In other respects the elements seems applicable without further modification. Thus, for example, for a newspaper during the currency of criminal proceedings for attempted murder to publish the fact that the accused had earlier been convicted for murder would clearly have a high *probability* of interference to the administration of justice (element(a)), the *gravity* of the threatened injury would be high (element (b)), there would in almost no case be any *social utility* for publishing this information, (element (c)) since it interferes with the rights of the defendant and the disposition of the proceedings and there would have been no *cost* in eliminating the risk (element (d)). This would be an easy case - too easy, perhaps, to assess properly the adequacy of giving specific statutory expression to these elements.

It should be noted that none of these four elements contains any particular

101 Cf *Purtill v Athlone UDC* [1968] IR 205, at 212-213 (Sup Ct, *per* Walsh J, 1967):

> "What amounts to sufficient care must vary remarkably with the circumstances, the nature of the danger, and the age and knowledge of the person likely to be injured."

See also *Donaldson v Irish Motor Racing Club*. Unreported, Sup Ct 1 February 1957 (66-1956) *per* Kingsmill Moore J (p9 of judgment):

> "[W]hat is reasonable care depends on all the circumstances, including the probability of an occurrence causing danger, the probability of injury ensuing if such an occurrence takes place, the practicability of precautions, the legal categories involved, and other matters too diverse and numerous to be catalogued."

And see *Callaghan v Killarney Race Co* [1958] IR 366, at 375 (Sup Ct, *per* Kingsmill Moore J, 1956):

> "In judging what a reasonable and prudent man would think necessary more than one element has to be considered. The rarity of the occurrence must be balanced against the gravity of the injury which is likely to ensue if the occurrence comes about, and some consideration must be paid to the practicability of precautions suggested."

102 See *McMahon & Binchy*, 110ff.

determined "weight" relative to any of the others:

> "At the end of the day, the determination of what constitutes unreasonable conduct involves a *value*-judgement. These four factors highlight the factual considerations on which that value-judgment is to be based but they do not of themselves contain the resolution of the negligence issue."[103]

It is interesting to contrast the approach adopted in Britain in the *Contempt of Court Act 1981*. The Act incorporates what it characterises as "the strict liability rule", which it defines as:

> "the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so".[104]

In fact, to describe a rule of this nature as one of "strict liability" is of debatable accuracy. The only characteristic relating to *mens rea* which it identifies is a negative one - namely, the absence of a requirement of intent. A rule lacking this requirement is not necessarily one of strict liability: it might incorporate a requirement of negligence or of recklessness.

In this context, section 2(2) makes it clear that the essence of the test is one of negligence: the "strict liability" rule applies only to a publication *which creates a substantial risk* that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

The Act goes on to provide a defence of "innocent publication or distribution" as follows:

> "(1) A person is not guilty of contempt of court under the strict liability rule as the publisher of any matter to which that rule applies if at the time of publication (having taken all reasonable care) he does not know and has no reason to suspect the relevant proceedings are active.
>
> (2) A person is not guilty of contempt of court under the strict liability rule as the distributor of a publication containing any such matter if at the time of distribution (having taken all reasonable care) he does not know that it contains such matter and has no reason to suspect that it is likely to do so.

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103 *Id*, 111. The temptation to concentrate exclusively on the first of these elements is an ever-recurrent one in torts litigation. As recently as 1988 the Supreme Court had to re-assert the incorrectness of this approach: *Kelly v St Lawrence's Hospital* [1988] IR 402, analysed by R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 410-412 (1989).

104 Section 1.

(3) The burden of proof of any fact tending to establish a defence afforded by this section to any person lies upon that person ...."[105]

Finally, for present purposes, section 6 provides that nothing in the foregoing provisions of the Act:

"(a) prejudices any defence available at common law to a charge of contempt of court under the strict liability rule;

(b) implies that any publication is punishable as contempt of court under that rule which would not be so punishable apart from those provisions;

(c) restricts liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice."

The limits of these provisions are worth noting. A reasonable, though mistaken, belief by a publisher on some question *other than* whether proceedings are active is not protected by section 3. Moreover, the commentators are agreed that section 6 offers the publisher little room for manoeuvre since the common law "admits to few defences".[106] Such defences as may exist relate primarily to the *actus reus* rather than *mens rea*. Perhaps duress may be a defence in this context.[107]

The Law Reform Commission of Canada, in their *Report on Contempt of Court*, favoured a negligence-based test. Section 4(1) of draft legislative provisions appended to the Report provided that:

"[e]very one commits an offence who, while judicial proceedings are pending ...

(b) publishes or causes to be published anything he knows or ought to know may interfere with such proceedings."

The annotation to the provision noted that the words "he knows or ought to know" "import negligence as a sufficient requirement for liability".[108]

The Law Reform Commission of Australia were of the view that there was no deterrent aim to be served by imposing contempt liability on publications in the complete absence of fault on the publisher's part. This might "only lead to justifiable resentment, indeed 'contempt' of the law, by the media".[109]

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105 Section 3.
106 *Borrie & Lowe*, 126. See also *id*, 114-116.
107 See *Miller*, 145.
108 P55 of the Report.
109 *Report on Contempt of Court*, para 262.

As regards publications tending to influence a current or forthcoming trial, it recommended that it should be a defence for any defendant (corporate or individual) who was deemed to be responsible for a publication which was in contempt to establish on the balance of probabilities that he or she had no knowledge of the relevant facts, "for example, that a trial was pending and that, having regard to available resources, all reasonable care was taken to ascertain such facts."[110]

Our Tentative Conclusions

We must now state our provisional conclusions as to what the *mens rea* requirement should be in respect of the offence of *sub judice* contempt. We had little difficulty in rejecting a solution restricted to intention or recklessness. This would in our view place a premium on negligence and would represent a severe danger to the administration of justice and the protection of the rights of those whose interests are affected by criminal or civil litigation.

Our provisional conclusion is that in regard to the offence of sub judice *contempt with respect to proceedings which are active, the law should impose the onus of proof on the publisher that he or she was not negligent. Negligence, so far as a publisher*[111] *is concerned, would relate, not merely to the question whether the relevant proceedings are active, but also to whether what is published creates a risk (other than a remote one) of serious prejudice to specific legal proceedings. Under our proposal it would be necessary for the prosecution to show first that the defendant published material which in fact created such a risk and secondly that he or she did so when the relevant proceedings were active. The onus would then shift onto the defendant to prove, on the balance of probabilities,*[112] *that he or she was not negligent in either of the two respects we have mentioned.*[113]

We consider that the result of making negligence the linchpin of liability, is that the offence of contempt by publication has a coherence and balance which are fair to all relevant interests.

Distributors

We are of the view that the tentative recommendations which we have just made in respect of the *sub judice* rule in general would yield a just solution in relation to distributors, for whom strict liability would be too onerous and unfair a test. We therefore see no reason to propose any specific rule of liability to deal with distributors.

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110 *Id.*

111 We consider the position of distributors immediately hereafter and come to the conclusion that the same test should apply to them.

112 Cf *Miller*, 286-287.

113 We reserve until later consideration of the question whether other defences should be available to the publisher.

The Public Interest
We must now consider whether a publication which offends against the *sub judice* rule in that it creates a risk of prejudice contrary to the test we have proposed should nonetheless be permitted on the basis of public interest.

The first type of situation we have in mind should give rise to no great controversy. If a dangerous suspected criminal is on the run, after a warrant has been issued for his arrest, it seems beyond argument that the media should be able to protect the public by publishing his photograph and other details as to identification and the likelihood of his violently resisting recapture. The only issue of debate concerns the specificity of those details so far as they prejudice the prospects of a fair trial. Should it be permissible for the media to give details of the man's previous convictions? If he is a multiple killer or rapist, for example, the prejudicial effect of such a disclosure is likely to be high. One solution might appear to be to permit the media to emphasise strongly the man's probable dangerousness, and the Gardai's belief in the basis for such apprehension, but not to permit the media to give specific details of previous convictions. The difficulty with this solution is that it may not afford adequate protection to the public. One suspects that more locks would be placed on doors at night if the public were told that a multiple killer was at loose in Dublin than that a "very dangerous man" was at loose.

In England the matter has been left unresolved by the 1981 legislation,[114] so that prosecutorial discretion and common sense, rather than an express statutory defence, ensure the media are protected in such cases. The Law Reform Commission of Australia proposed that a defence should be created in express terms, rather than left to the discretion of the authorities not to prosecute. The defence should be confined to publications which are reasonably necessary or desirable to achieve these purposes.[115] The Commission considered that there was "no justification, for example, for including a long list of prior convictions if this adds nothing in terms of facilitating arrest or protecting the public, to the information that the person concerned is at large".[116]

We agree with this approach. In our view, the defence should be drafted in terms of reasonable necessity alone.

More difficult issues of policy relate to the general public interest. As we have seen, there is some support in other common law jurisdictions for the view that "[t]he discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or denunciation may, as an incidental but not intended by-product, cause a risk of prejudice to a person who happens to be a litigant

114 See *Miller*, 232, 237.
115 Law Reform Commission of Australia's *Report on Contempt of Court*, para 330.
116 *Id*.

at the time".[117] This immediately raises a series of supplementary questions. Should it be essential that the discussion already be in progress at the time of the trial? Is it really acceptable that a person's right to a fair trial should be prejudiced in the interests of discussion of the public affairs, merely because the prejudice is incidental rather than intended? Should this result be defended even where the subject, while unquestionably one in the realm of public affairs, is not of great importance - such as, for example, the question whether Nelson Pillar should be restored to O'Connell Street?

It is useful to look first at the experience in England in dealing with this issue by statutory provision, and then to examine Australian proposals before returning to an analysis of the questions of principle and policy which the issue raises.

In England, the Phillimore Committee recommended[118] that a defence should be introduced on the lines of that articulated in the *Bread Manufacturers*[119] case. They were opposed, however to a *general* defence of public benefit.[120]

Section 5 of the 1981 Act deals with the matter as follows:

> "A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to that discussion."[121]

As regards the ingredients of the section it is to be noted that "there must at least be a 'discussion' which presumably means an examination by argument or debate. The word 'discussion' is not apt to cover bare accusations which are not linked to a wider theme".[122] As regards "public affairs or other matters of public interest", the English courts have held that discussions on the moral justification of the mercy killing of seriously handicapped babies[123] and on the question of security at Buckingham Palace[124] fall within the scope of this term. *Miller* states that other probable examples from areas in which criminal proceedings may be in progress:

> "include such matters as the causes of the appalling spate of cases of

117 *Ex p Bread Manufacturers Ltd, Re Truth and Sportsman Ltd*, 37 SR (NSW) 242, at 249 (*per* Jordan CJ, 1937). As to criminal cases, see *Registrar, Court of Appeal v Willesee*, [1985] 3 NSWLR 65 (CA).

118 *Phillimore Report*, para 142.

119 *Supra*.

120 *Id*, paras 143-145.

121 See *Borrie & Lowe*, 123-124, *Miller*, 230-237.

122 *Miller*, 232.

123 *AG v English* [1983] 1 AC 116.

124 *AG v Times Newspapers*, The Times, 12 February 1983 (QBD Div Ct). See further *Miller*, 156-160, 233, *Borrie & Lowe*, 121-122, 124.

cruelty to and sexual abuse of children, violence and the infliction of injuries in inner-city riots and on picket lines, the fraudulent manipulation of company affairs, and perhaps equality of treatment where official secrets are divulged.[125] In cases of doubt appropriate analogies may be found, for example in the defence to defamation proceedings of fair comment on matters of public interest. Of course there will be many matters in which the public has an avid interest (for example, the background of persons charged with sensational crimes and the private lives of film stars and other celebrities) which do not qualify as matters of general public interest. The two should not be confused, although it must be tempting for the Press to fail to make the distinction."[126]

The "good faith" requirement in the section ensures that a newspaper engaging in a vendetta or "simply using more general background discussion as a cloak to continue its invective"[127] will not be protected. In *AG v English*,[128] Lord Diplock interpreted the phrase "merely incidental to the discussion" to mean "no more than the incidental consequence of expounding its main theme".

The Law Reform Commission of Australia, in their Discussion Paper No. 26, *Contempt and the Media*, proposed a qualification to the general pattern of liability in situations where prejudicial material formed an integral part of a discussion of general issues of public interest.

They considered that, in a narrow range of situations, the importance of maintaining media discussions of matters of public interest might outweigh considerations of prejudice to the extent that even a prejudicial publication which was not "innocent" (in the sense of falling outside the scope of the general principle of liability proposed by the Commission for *sub judice* contempt) should nonetheless be protected by a "public interest" defence. The Commission proposed that a publication should not attract liability if the following conditions were satisfied:

(a) the publication constituted a discussion of general issues of public interest and importance;

(b) the value of the discussion would be seriously impaired if the material creating a substantial risk of serious prejudice to the relevant trial were omitted; and

(c) (in cases where the publication occurred during the relevant trial) the

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125 In a supporting footnote, *Miller* states: "*Quaere* whether it is possible for the prosecution or litigation itself to be the matter of general public interest?" He cites Sir Simon Browne QC, *arguendo*, in *AG v English*, [1983] 1 AC, at 134.

126 *Miller*, 233.

127 *Id*, 234.

128 [1983] 1 AC, at 143.

value of the discussion would be seriously impaired if the publication were delayed until after the jury's verdict at the trial.[129]

The Commission noted that their proposal was "distinctly narrower"[130] than the common law public interest defence. Their principal reason for proposing these limitations was that they did not believe that the dressing-up of material in the form of a "public interest" discussion should serve, virtually automatically, to exonerate prejudice which results from careless failure on the part of the media to make themselves aware of current trials, let alone prejudice of a trial whose existence was known to them:

> "No doubt when an article or a program dealing with current affairs, particularly on a nation-wide basis, is being prepared, there may be risks of unintentional prejudice to trials of which those involved in the publication are not aware. If they make reasonable efforts to check whether their material may create a serious prejudice to the trial but fail to discover this, it seems proper to the Commission that they should be protected by the defence ... of 'innocent publication'. A separate 'public interest' defence is thus only relevant where 'innocent publication' is not available: that is, where prejudice is intended, or occurs to the knowledge of the people involved, or could have been discovered and guarded against if they had exercised reasonable care. In these circumstances, having regard to the importance of a fair trial for the accused and the Crown, and to the damage done if the trial has to be aborted ..., the Commission considers that the importance of the matter being discussed, the value of the prejudicial material to the discussion being conducted, the implications of delaying the discussion until after it has been concluded are all highly relevant factors. The media should, in effect, be required to show that the discussion *is* important, that the material *does* form an integral part of the discussion and that it is not feasible to delay publication until after a trial which has already begun has reached the stage of a jury verdict. This last requirement would generally exonerate a publication where the probable length of the trial was a matter of weeks or months, but not where ... a postponement of only a day or two was called for."[131]

In their subsequent *Report on Contempt of Court*[132] the Commission adhered to this proposal and analysis.

We now turn to examine the issues of principle. The central question is whether the fact that a discussion (or other publication) is on a matter of public interest can, on that account, justify the person who engages in that conduct in prejudicing legal proceedings. In favour of the view that it can,

129 Para 69 of DP No. 26 (March 1986).
130 *Id*, para 82.
131 *Id*.
132 See para 332 of the Report.

in at least some cases, it may be argued that the public's concern in having matters of public interest aired is so fundamental as to override the entitlement of those engaged in civil or criminal proceedings not to have the proceedings prejudiced. If discussion on matters of public interest had to be suspended during the hearing of legal proceedings this could result in an effective removal of important issues of public concern from the realm of public debate. To this argument it may be replied that concern for the protection of discussion on issues of public interest does not justify doing injustice to anyone by prejudicing legal proceedings. Moreover, it may be doubted whether protecting legal proceedings from *sub judice* contempt would result in any serious restrictions on the public discussion of matters of public interest.

A second question relates to the notion of the public interest. A wide variety of matters can fall within the scope of this concept; some are of profound importance, others more trivial.

Yet if a public interest defence operates without regard to the importance of the matter, this may result in completely disproportionate injustice.

As regards the solution adopted by section 5 of the 1981 Act, the notion of the risk of prejudice being merely "incidental to the discussion" bears close examination. As we have seen, Lord Diplock has interpreted this as meaning: "no more than an incidental consequence of expounding its main theme".[133] *Miller* comments that "[i]t seems clear that a consequence cannot be 'merely incidental' if it is intended,[134] but beyond this much will depend on the relationship between the prejudicial references and the main theme of the discussion".[135] These statements could mislead the unwary into imagining that the risk of prejudice would have to be something outside the publisher's ken; but this is far from the case. In fact[136] the publisher, consistent with availing himself of the section 5 defence, may have been fully aware of the prejudice that is likely (or indeed certain) to result from his publication. Thus it seems that only where it can be shown that the publisher actually intended this result, in the sense of acting with the purpose of bringing it about, will liability be imposed. Certainty on his part that it will result will not suffice.

As a matter of practical reality it is worth recording just how difficult it would be to prove the existence of such an intention in these circumstances. If there is a licence to publish an article discussing a matter of public interest, which clearly prejudices legal proceedings, how is an affected litigant to find out the true motives of the publisher? A denial of *animus* will provide the *mala fide* publisher with a cast iron defence (unless he is foolish enough to have left a

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133 *AG v English*, [1983] 1 AC, at 143.

134 Citing *AG v Times Newspapers Ltd*, [1974] AC 273, at 321 (*per* Lord Simon).

135 *Miller*, 234.

136 As the Law Reform Commission of Australia appreciated: DP No. 26, para 82, *Report on Contempt of Court*, para 332.

paper trail). Publishers would thus be given a powerful engine for prejudicing court proceedings. Just as the public have the right to adequate discussion of issues of public interest, consistent with the principles of justice, so it may be argued there is an important social interest in the law not facilitating unduly the power of any person or group to engage in prejudicial publications without sanction.

Our Tentative Conclusions

We found this issue a most difficult one to resolve. At its core is a judgment of value, which cannot be sidestepped by complex formulae.

The central question is whether the interests of persons involved in criminal or civil litigation are secondary to the social benefits deriving from public discussion of matters of public interest. We answer that question in the negative. In doing so we should point out that we see no significant inhibition on public discussion of these matters by the absence of a special defence. There is no such defence in the present law, and its absence has not given rise to any sustained criticism. Under our proposals in relation to *sub judice* contempt, the position, from the standpoint of the media, will be eased further, in that liability will attach only where the publisher ought reasonably to have appreciated that the publication created a risk (other than a remote one) of causing serious prejudice to particular legal proceedings. The fact that legal proceedings are in progress in no sense means that there can be no public discussion of issues of public interest relevant to that case. All that it means is that this discussion must be conducted in a manner which does not offend the proposed *sub judice* rule. In rare circumstances, this will represent a significant restriction, but this is a very small price to pay for securing justice to those engaged in criminal and civil legal proceedings. *Accordingly, we recommend that it should not be a defence to sub judice contempt that the offending material was published incidentally to a discussion of public affairs.*

Immunity for Reporting Parliamentary Proceedings?[137]

The present law is uncertain and, in contrast to defamation, it would appear that no privilege, absolute or qualified, attaches to this type of publication. The Law Reform Commission of Australia recommended[138] that there should be an express statutory defence for fair and accurate reports published contemporaneously with, or within a reasonable time after, the proceedings. They considered that, because the Houses of Parliament observed a broad *sub judice* convention, which imposed wider prohibitions on the discussion of matters before the courts than those recommended in the Commission's Report, there was little likelihood that this defence would ever have to be invoked in the *sub judice* context.

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137 See *Miller*, 279; the Law Reform Commission of Australia's *Report on Contempt of Court*, para 269.

138 *Op cit*, para 329.

On the other hand, it seems wise to note *Miller's*[139] caution:

> "The obvious benefits of allowing reporting of Parliamentary proceedings suggest that it should. However, this would allow an easy route to the effective end of breach of confidence proceedings whenever a member of Parliament, who may be inexperienced or simply irresponsible, uses or abuses Parliamentary proceedings to disclose the subject-matter of the confidence."[140]

To meet *Miller's* concerns, the best answer seems to us to be for the legislation to allow publication, on the lines of the Law Reform Commission of Australia's proposals, subject to a power on the part of the Ceann Comhairle of the Dail or Chairman of the Seanad to prohibit publication of any specific portion of the proceedings on the basis that it may offend against the *sub judice* rule. *Publication in defiance of that prohibition should constitute an offence. We so recommend.*

Persons Legally Responsible for Publication

We now must consider which persons should be legally responsible for publishing material which constitutes *sub judice* contempt. Some cases present no difficulty. If a newspaper columnist writes a piece under his or her by-line, which is published without modification, why should he or she not be held responsible? But other cases are less clear. For example, should editors be invariably liable for everything which appears in their paper? Should the proprietors also be liable in every case? And on what basis - personal or vicarious? And what of the case of a reporter who transmits copy which, with some editing, appears in the paper?

Several approaches may be considered in turn. Some are mutually inconsistent; some not.

1. Imposing liability on the company alone

One approach would impose liability on the company alone. In favour of this, it may be argued that it is the practice for newspaper companies and radio and television organisations to pay the aggregate of the fines imposed on themselves and their employees.[141] There is then an element of fantasy in the court's fixing a fine to be imposed on an employee on the basis of factors impinging on personal liability (including the financial resources of the employee) when in fact the employee is not affected but a (possibly very rich) company is. Secondly, it may be considered inappropriate to impose liability on the employee in these cases since the employee is likely to be subject to

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139 *Id.*

140 *Miller*, 279.

141 Cf the Law Reform Commission of Australia's *Report on Contempt of Court*, para 261 (1987).

sanctions *within* his or her employment, such as loss of promotion or transfer to another section of work.[142]

As against this, editors might not like to lose their present responsibility in this context: although at first sight an exemption from liability might seem welcome to them, on reflection they might consider that they would lose more in stature than they would gain in peace of mind (relative to the courts if not their employers).[143]

Moreover, if only the company and not its employees were liable, this would present a difficulty where the company was insolvent or had minimal assets and paid-up capital.[144]

2. *Making the editor liable in all cases*

It would be possible to make the editor[145] liable in all cases where material that offends the *sub judice* rule is published in his or her paper. The basis of doing so would be that the editor is, as it were, the captain of the ship: to impose responsibility on him or her encourages the enterprise to address the issue of contempt in the context of editorial control, it avoids diffusion of responsibility among so many people that no one feels really responsible and it has the beneficial effect of adding to the authority of editorial decision-making.

Against this it may be argued that to make the editor liable for contempt when he or she may have acted with the greatest of care and the true fault lies with someone else offends against justice. The idea that, even in theory, an editor might be sentenced to imprisonment for the wrong of another person seems impossible to defend. This consideration brings us to the heart of the issue, since it makes it plain that it is impossible to consider in isolation the questions of the definition of "publication", the test of liability for contempt, the persons on whom legal responsibility should rest and the punishment that may be imposed. Resolution of each of these four questions cannot be satisfactorily achieved without regard to the implications of a particular solution to one of these questions for the other three questions.

Central to the question of editorial responsibility is the issue of vicarious liability. Would it be fair to impose vicarious liability on an editor for the wrong of a fellow-journalist which the editor could not reasonably have

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142 *Id.*

143 In Australia, when the Law Reform Commission of Australia put this proposal to a number of editors, "[p]erhaps surprisingly, a common, though not universal, response was that the responsibility of editors or producers for the whole matter should not thus be ignored by the law. (One producer suggested rather cynically that, because the corporation paid the fine anyway, it was a case of 'martyrdom without pain')": *id.*

144 *Id.*

145 A comparable position could no doubt be identified, by way of analogy, in relation to radio and television stations, though the parallel is clearly not exact.

discovered? It may be argued that, while the analogy of the captain of the ship justifies imposing on an editor personal liability of a fairly stringent nature, it does not warrant the imposition of vicarious liability. The scope of vicarious liability in criminal law,[146] as opposed to tort,[147] is very narrow and the very idea of vicarious criminal liability is controversial on philosophical and moral grounds.[148] Moreover, an editor is in no sense the employer of a fellow-journalist. Whether the "control" test endorsed by our courts in torts litigation[149] should find a parallel in the context of criminal contempt may be doubted. Whereas there may be some justice in the "control" test's enabling a plaintiff to reach a fund of insurance to which he or she would not otherwise be entitled in torts litigation,[150] there is no similar argument, in justice or policy, in relation to criminal contempt.

3. *Making the reporter liable*

The question of making the reporter liable for criminal contempt is somewhat more complicated than may at first appear. Obviously there is little difficulty where the reporter's copy is published without alteration under his or her by-line; but in many cases the relationship between reporter and reader will be a good deal less direct. The reporter may have handed (or telephoned or faxed) in a piece which was never intended to go straight to print. It may form the research basis on an article to be written by another reporter or compiled, through sub-editing and substantial re-writing, in conjunction with pieces from other journalists, into an amalgam which reflects some of the information and comment provided originally by the reporter. In such cases can it properly be said that the reporter has "published" the material which appears in the newspaper? If not, is he or she to be treated as an aider and abetter or accessory?

In our view, the answer should scarcely be determined *a priori* by a definition of "publication". Instead we consider that the issues of principle and policy as regards liability for this type of input by reporters must separately be addressed. Rather than have the matter determined by artificial rules, we consider that the court should be able to look at the reality of the contribution made by reporters in such cases.

Our Tentative Conclusions

Our tentative conclusions are in favour of a test of legal responsibility which would centre on three separate (though at times overlapping) criteria: *authorship, control* and *proprietorship.*

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146 See *Smith & Hogan* 162ff.

147 See *McMahon & Binchy*, ch 43.

148 See G. Williams, *Criminal Law: The General Part*, ch.7 (2nd ed, 1961).

149 *Moynihan v Moynihan*, [1975] IR 1 (Sup Ct). See *McMahon & Binchy*, 749-751.

150 *McMahon & Binchy*, 748.

Authorship
What we have in mind is that, in determining whom to hold responsible for a contempt in breach of the *sub judice* principle, the court would seek to establish first who was the author of the contemptuous publication. *Where the piece appeared in the newspaper, unamended, there would be normally no difficulty in holding the author responsible for what he or she has written. Clearly, in exceptional cases, the author should be excused, as, for example, where he or she had no reason to expect that the material would be published without further communication between the publisher and himself or herself. In cases where the offending material which is published derives from information supplied by a person (whether a journalist or otherwise), we are tentatively of the view that such a person should be capable of being held responsible for sub judice contempt if he or she, in all the circumstances, ought reasonably to have anticipated the publication of the information without correction.* Thus, it would not automatically be a defence for a reporter to say: "I merely supplied the copy: it was up to the editor to decide what to do with it". A more complicated position arises where a published piece reflects in part incorrect information supplied by one person and in part incorrect information supplied by another person. There are parallels in other areas of the law.[151] *All that can be done is for the legislation to provide that a person may be found guilty of sub judice contempt even though what is published represents an amalgam or cumulation of contemptuous material contributed by himself or herself and another person if, in isolation, the contemptuous material for which he or she is responsible would constitute sub judice contempt.*[152]

Control
We consider that those in control of newspapers and other media should be capable of being criminally responsible for sub judice contempt to the extent that, by the exercise of that control, they ought to have prevented the publication of the offending material. Thus editors would normally be capable of being held responsible for the negligent discharge of their duties. It is to be noted that the basis of liability here is personal rather than vicarious. The control test would ensure that no lacuna would arise where, on occasions, the control was being exercised by a deputy. The notion of liability being generated and fashioned by the degree of control exercised is a familiar one in other areas of the law.[153]

Proprietorship
We consider it just that the proprietors of newspapers should be liable for sub

151 Cf *Lambton v Mellish* [1984] 3 Ch 163; *Civil Liability Act 1961*, section 12(2).

152 An analogy, though perhaps not the closest one, may be drawn here with the question of proof of malice through an accumulation of specific items of evidence: cf *Hynes-O'Sullivan v O'Driscoll*, [1988] IR 436 (Sup Ct), noted on this point by R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 444-445 (1989).

153 E.g. occupiers' liability: cf *Wheat v Lacon*, [1966] AC 552.

judice contempts published in their newspapers. This liability would be vicarious.[154] *On that account we consider it proper that no sentence of imprisonment should be made against personal owners: only fines would be possible.* We welcome views as to the position in relation to other media, such as radio and television, and in particular whether it would be constitutionally permissible, or desirable from the standpoint of social policy, to distinguish between public and private broadcasters.

Payments to Witnesses

We now must consider the problem of payments by the media to witnesses. The potential for injustice is plain. The actual reality and extent of that injustice has yet to be measured. At present, as we have seen, the law of contempt exercises a somewhat uncertain policing jurisdiction in relation to such practices. What we must decide is (i) whether the law of contempt should be left in its present state; (ii) whether it should be clarified and if necessary strengthened; (iii) whether there should be a new criminal offence, in replacement of, or as an adjunct to, the law of contempt.

As an introduction to our analysis we may quote a passage on the subject from the Phillimore Committee's Report.

Though they made no substantive recommendations on the question, what the Phillimore Committee had to say on payment to witnesses is of comparative interest:

> "The object of the press in making the offer contingent [upon the outcome of the trial] would be to ensure that it did not buy a worthless asset. If in a criminal case, for example, the trial ended in an acquittal, the story could well be unpublishable for fear of defamation proceedings.
>
> The purchaser would probably not intend to pervert the course of justice, nor even necessarily foresee this as a likely consequence (unless the offer was very large, in which case intention or foresight might legitimately be inferred) but the offer could clearly have serious effects upon the way the witness gave his evidence and, if the position was revealed at trial, upon the witness's credibility and the outcome of the trial ....
>
> [W]e regard the potential dangers as sufficiently grave to warrant further inquiry as to its prevalence and, if found necessary, legislation to restrain or wholly prohibit this practice. *We recommend that such inquiry should be carried out.* There would, however, be difficulties in framing legislation to prohibit the practice. Clearly it would be going

154 As well as personal, of course, in cases where the proprietors exercise such control as to fall within the scope of liability proposed under that rubric.

too far to prohibit all offers to witnesses, especially those which were not contingent upon the outcome of the case.

Much would depend on the size and circumstances of the offer, and there would be obvious difficulties of proof if prohibition were confined to contingency payments, since the contingency aspect could easily be concealed. We are satisfied, however, that any prohibition which may be imposed should not be part of the law of contempt, but rather a separate criminal offence. It would not normally require to be dealt with as a matter of urgency, and any inquiry which was necessary would probably have to be prolonged and detailed ..."[155]

We will pick up some of these themes in our discussion of the three options below:

(i) Leaving the present law of contempt unchanged

A strong argument can be made in favour of leaving the present law unchanged. Its very uncertainty, and the paucity of cases on the subject here and in other jurisdictions, may well be evidence that the law is working satisfactorily. If it were not, one might have expected that proceedings would have been taken frequently and would have given rise to heated contention, yet this has not tended to be the position.

As against this, it may be replied that prosecutorial or judicial inaction is no guarantee that the media will behave with propriety. There is clear evidence of a decline in standards in this area, so far as some other jurisdictions (including Britain) are concerned. We are not aware of a problem here, but it would be fair to say that the media are not generally anxious to disclose to their audience and readership what they pay, to which witnesses, or on what conditions these payments are made.

(ii) Clarifying, and perhaps strengthening, the present law of contempt

Another approach would be to clarify, and perhaps strengthen, the present law of contempt. The advantage of doing so would be twofold: first it would prevent the making of at least some payments which carry a real risk of interfering with the administration of justice and the rights of parties involved in criminal or civil litigation; secondly, it might be considered to be of assistance to the media in enabling them to have a payments policy in accordance with the clearer legal guidance which the reformulated rules would provide.

As against this there would be a danger that clarification would be bought at the price of sacrificing judicial flexibility - not a flexibility which disguises an inherent uncertainty of definition, but one that is capable of responding to all

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155 *Phillimore Report*, paras 78-79.

the individual circumstances of the particular case.

(iii) Creating a new offence, in replacement of, or as an adjunct to, the law of contempt

The final option is to create a new offence, in replacement of, or as an adjunct to, the law of contempt. As we have seen, the Phillimore Committee considered tentatively that a solution on these lines might be possible. The central argument in favour of this option, apart from the benefit of clarification and specificity which it (as well as the second option) would confer, is that this kind of conduct has, as it were, the aura of "ordinary" criminality, regardless of the need or ability to prove that damage to the administration of justice was inflicted or risked. The practice of making these payments may be considered to be anti-social in all cases, save perhaps a small minority where the payments represent a form of charity to the witness.[156] or the payment of expenses incurred in giving an interview or otherwise consulting with the media.

If there were to be an offence, how should it be drafted? One approach would be to make criminal liability depend on, *inter alia,* (i) an element of enhancement[157] of payment contingent on the outcome of the case; and (ii) a certain minimum amount paid. The purpose of limitations on these lines would, of course, be to ensure that payments which did not seriously interfere with the administration of justice, or the rights of any party, should not occasion criminal liability. The disadvantage is that it introduces elements of arbitrariness into the law. One particular payment with no element of contingent enhancement could interfere more seriously with the administration of justice, or the rights or a party, than another particular payment where there was an element of contingent enhancement. Equally, a payment of a relatively small sum of money might bend[158] the evidence of one witness far more effectively than the payment of a fortune to another.

There is, however, a way of avoiding these difficulties. The offence can be defined in terms of payments which, in their particular circumstances, raise a substantial risk of injury to the administration of justice or the constitutional or other rights[159] of any party.

Our Tentative Conclusion

Our tentative conclusion is that the third option should be favoured, and that it

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156 It would be naive not to appreciate that many payments could be represented as having a charitable motivation. It is of the nature of the media that bad news sells, and bad news very often leaves victims in its wake. The plight of victims should not act as a cover to disguise the motivation of certain parts of the media to tap their newsworthiness.

157 *A fortiori* where payment is entirely conditional on a particular outcome in the case.

158 Or, in the circumstances of the particular case, risk bending that evidence.

159 The legislation should prescribe that the rights thus put at risk should be ones concerned with the judicial process.

should be an offence to make or offer payment to any person who is, or is likely to be, a party or a witness in legal proceedings where, in the particular circumstances, the making or offer of such payment creates a substantial risk of injury to the administration of justice or to the constitutional or other rights of any person. We also tentatively propose that the new offence should replace rather than act as an adjunct to the law of contempt on this matter, which would be rendered redundant by the establishment of such an offence. Making reasonable payments for expenses sustained by the witness or party in the giving of the interview or otherwise consulting with the media should not fall within the scope of the offence; but the fact that the payment is one which would be made to other persons for a similar contribution should not, of itself, afford a defence. Thus, for example, if a television programme gave an "appearance" fee of £500 to a witness or party, the fact that it was a practice to make similar payments to other participants would not, on that account alone afford a defence.

Publicity of Judicial Proceedings

We now must consider whether the present limitations on publishing certain information concerning judicial proceedings are satisfactory. As we have seen, the *Criminal Justice Act 1967* introduced significant restrictions in respect of preliminary proceedings for indictable offences. We will analyse four possible options in respect of the restrictions in the 1967 Act: (i) to remove them completely; (ii) to replace them by a discretionary power on the part of the District Justice to restrict publication of particular matters; (iii) to provide by legislation that publication of specific categories of evidence be restricted; and (iv) to leave the present restrictions unchanged.

(1) Complete removal of the present restrictions

Under the first option, the restrictions contained in the 1967 Act would be completely removed. Three principal arguments may be made in favour of it.

(a) Constitutional necessity

It may be argued that Article 40.6.1° renders the limitations on reporting in the 1967 Act unconstitutional.

Mr Matthew Russell, writing in 1968[160] observed that:

> "It can be argued that the guarantee of freedom of expression of convictions and opinions which is contained in [Article 40.6.1.1° of] the Constitution gives to the press the right to publish reports of proceedings in court irrespective of the wishes of the Oireachtas. The only qualification upon this right relates to the publication of matters which could undermine public order or morality or the authority of the State. This qualification can hardly be said to apply to the publication

160 Russell, *Contempt of Court*, 3 Ir Jur (ns) 1, at 12-17 (1968).

of court proceedings, unless one regards such publications as calculated to undermine the authority of the State, one of whose organs is the judiciary. Whatever about the validity of this argument as a justification for a statute prohibiting the publication of matters which scandalise the courts, it becomes rather tenuous when applied to publishing what heretofore has never been regarded by the courts as calculated to undermine their authority and which even now is only to be treated 'as if' it were contempt of court. Again, it would require an inelegant straining of the ordinary meaning of 'public order' to justify the prohibition, since this qualification would seem clearly to relate to the preservation of the peace rather than the general administration of justice. Nor would it be realistic to suggest that the words 'convictions and opinions' in the Constitution do not include statements of fact, and that reports of proceedings in court are, therefore, excluded from the guarantee; the acceptance of that proposition would mean that the Constitution permitted in times of peace the establishment of a permanent political censorship which, provided that it confined itself to the suppression of news items of fact, would be subject to no restrictions whatever."[161]

(b) *Public information and public disquiet*

The present restrictions can deny valuable information to the public, which in turn can lead to public disquiet. As the Law Reform Commission of Australia point out:

> " In cases where an accused person, having been committed for trial following the hearing of evidence in open court, pleaded guilty at the trial itself, the evidence relating to the offence would never see the light of day. It is unrealistic to suppose that, because the prohibition would be lifted once the plea of guilty was entered, the media would be likely to publish this evidence. It would be 'stale news'. Moreover, because the media may have assumed that a full-scale trial, which could be fully reported, would occur, they may not have made any attempt to cover the committal proceedings.
>
> More seriously, there would be no public reporting of the evidence at committal proceedings in cases where, after the accused had been committed for trial, the [prosecution] authorities entered a [*nolle prosequi*], or indeed simply failed to take any further steps to prosecute the matter on indictment. This leaves virtually no scope for the public to assess the merits of the decision not to go ahead with the trial by

161 *Id*, at 17. It should be pointed out that, since this comment was written, it has been held by Costello J in *Attorney General v Paperlink* ((1984) ILRM 373) that article 40.6.1 does not protect factual statements. The latter may, however, attract protection as an exercise of the right of a citizen to communicate, which the learned judge held to be one of the personal unspecified rights protected by article 40.3.1.

indictment."[162]

With our experience of restrictions on these lines for over two decades, we can test the accuracy of this argument. It seems to us correctly to state the risks, though of course that is far from the same thing as saying that these risks are sufficiently important to outweigh the competing interests, principally that of justice to the accused. We recall a prosecution in 1982 which caused much public discussion. The accused there pleaded guilty to one charge of murder and not guilty to another. The Director of Public Prosecutions later entered a *nolle prosequi* in respect of the latter prosecution. During the few days following the accused's plea of guilty to the former charge, the newspapers, far from treating the case as "stale news", carried accounts of the "background story" of the prosecution to which the accused had pleaded guilty; many of these accounts appeared to have had a common provenance, in view of their very close similarity with each other. The *nolle prosequi* provoked much controversy, to which, of course, the Director had no opportunity to provide a fully informative reply.

A related matter may here be mentioned. The Law Reform Commission of Australia record the argument that, if restrictions (again equivalent to those in the 1967 legislation here) were imposed in Australia,

> "there would no longer be any incentive on the part of the media to report committal proceedings at all. It is probable that journalists would never visit magistrates' courts. There would cease to be any significant scrutiny by the media of the workings of a major segment of our system of administration of justice."[163]

There does not seem to us to be great merit in this argument. District Court proceedings, including preliminary hearings in more newsworthy cases, are well covered by the national and local media. There have, moreover, been penetrating socio-legal portraits of these proceedings, notably by Ms Nell McCafferty some years ago.

(c) *Stimulating further evidence*

It may be considered that unrestricted publication of preliminary hearings could have the beneficial effect of encouraging witnesses to come forward with new and better evidence. The empirical data do not give much encouragement, however: in England the Tucker Committee's enquiries yielded only twenty one such cases in a period of many years.[164]

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162 Australian Law Reform Commission, Discussion Paper No.26, *Contempt and the Media*, para. 80 (1986).

163 *Op. cit.*, para 80.

164 Tucker Report, para. 45-9, cited in ALRC Discussion Paper No. 26, para.80.

(2) A discretionary power to restrict publication of particular matters
Under this option, the general principle should be one of disclosure, but the District Justice would have power to restrict publication of particular matters in any case, where justice required this. The advantage of this option would be that evidence the publication of which would not reasonably be expected to damage the rights of the accused should be capable of publication: What reason in principle can be suggested for not doing so? Thus the right to publish would be given its proper scope - not so wide as to intrude on the defendant's rights and not so restricted as to be beyond the point of a rational basis for exclusion.

The objection to this approach is twofold. First, it may be contended that the 1967 Act has successfully drawn the line at the point where prejudice may reasonably be expected. It permits the publication of a small number of facts; it draws the line there because of a sound and defensible judgment that, beyond that point, the possibility of prejudice in any case is too real to ignore. This judgment is based on the realities of the preliminary proceedings. Although the defendant may cross-examine any witness, he almost invariably does not; thus the defence case is often not perceptible at all to those who learn of the full contents of these proceedings. If only the prosecution case is heard, and if it is let go substantially or entirely unchallenged, many readers could be prejudiced into believing the defendant guilty, through no fault of their own.

The second objection to this option is that, even if it is not true that publicity would in every case carry an unacceptable risk of prejudice, the task of drawing the line in each preliminary hearing would be too heavy a burden to impose on the District Justice. Rather than merely attending to the question whether a *prima facie* case had been established, the District Justice would also have to make difficult assessments as to which pieces of evidence carried no substantial risk of prejudice if published. Questions of the admissibility and relevance of evidence would have to be addressed. Moreover, in such a new regime the defendant might feel it incumbent on him or her to put on record the substance of his or her defence and to cross-examine witnesses in detail so as to mitigate the potential prejudice in favour of the prosecution. The result might be to transform the preliminary hearings into a mini-trial, which is not their essential purpose.

(3) Restriction by legislation of publication of specific categories of evidence
Under this option the proposed legislation would restrict publication of specific categories of evidence, such as evidence of admission or confessions. The problem with this approach is that it is somewhat arbitrary in its operation: it may fail to exclude evidence which, while not falling into an obvious category for exclusion, is nonetheless highly prejudicial to the accused in the circumstances of the particular case. Unless it were to be combined, cumulatively, in its operation with the second option, just discussed, it would

be likely to work injustice.

(4) Leaving the present restrictions unchanged
A number of considerations lean in favour of the option of leaving the present restrictions unchanged. First, we have heard of no serious criticism of the operation[165] of these restrictions over more than two decades. Secondly, the restrictions are thoughtfully compiled, and contain considerable sensitivity to need to do justice to the defendant. Thirdly, arising from our consideration of the earlier options, it is clear that, if the reporting of any evidence is allowed, there is an inevitable possibility in any case that the District Justice may permit the publication of evidence which proves at trial to be inadmissible[166] though there is no way for the District Justice to appreciate this, even exercising the greatest of scrutiny. Finally, as has also been indicated, preliminary hearings of their nature are concerned with the question whether the prosecution has established a *prima facie* case: they are not concerned with investigating the defence case save to the extent that it may emerge through cross-examination of prosecution witnesses. Reporting such proceedings will often give to general readers the impression that the case against the defendant is far stronger than it is in fact.

Our Tentative Conclusion
Our tentative conclusion is that the present restrictions on publication, contained in the Criminal Justice Act 1967, should be retained. Our analysis leads us strongly to this view.

Suppression and Postponement of Reporting
We now must consider whether, in addition to retaining the restrictions of the 1967 Act, the proposed legislation should contain any provision empowering the court to suppress or postpone the reporting of matters taking place in open court. At first sight, this proposal might appear to have little attraction, since it would seem to involve an unwarranted intrusion into the rights of communication. Nevertheless, on further reflection it may be seen to have a good deal in its favour.

First, it is worth noting that there are at present no restrictions on the reporting of bail applications; these can involve material highly prejudicial to an accused. A recent newspaper report,[167] for example, headed "Man held in custody on threat evidence", turned out, not to involve a prosecution for making threats, but charges of common assault and malicious damage. The

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165 Mr Russell's criticisms were of a principled nature, made before the Act had been in operation for any substantial period.

166 Or which is not addressed by the prosecution or defence on account of a change of strategy: cf the ALRC Discussion Paper No. 26, para 80.

167 Irish Times, 31 May 1990.

report stated that a defendant was remanded in custody "after witnesses had told the District Justice that the defendant had threatened to kill their children". Only at the end of the report was it made clear that the defendant had withdrawn his bail application before he was thus remanded. The report also stated that the defendant had been charged with assaulting a named victim "and breaking his jaw". A detective sergeant had objected to bail. The report stated that the detective sergeant had "said that [the defendant] had been involved in a number of assaults and that all the travellers in Tallaght were 'terrified' of him". The report also stated that a (named) witness had given evidence that the defendant "had threatened to kill her and to burn her children in their beds. [Her] family had moved their caravan [elsewhere] as a result."

Having read this account of the bail application, it would be difficult not to keep in one's mind some details of this fairly strong reportage. It is far from inconceivable that a juror trying that case (if it were to be an indictable one, which went to jury trial) would in fact recall some of these details, none of which (so far as can be gleaned from the report) relate to the charges against the defendant and all of which were damaging to him.

In this context, it is worth noting the Law Reform Commission of Australia's discussion of the matter:

> "The general approach is to authorise restrictions on the publication of evidence which is likely to be inadmissible at the forthcoming trial, where the resulting prejudice would be serious, not trivial, and the risk of such prejudice arising would be substantial. An instance is the recommendation that a suppression order may be granted in respect of reasons advanced against granting bail. This is because bail may often be legitimately opposed by the police on the basis of evidence which, although relevant to the question of whether it is safe to grant bail, is distinctly more prejudicial than probative on the question of liability for the offence charged. The police may allege, or the magistrate may state (in giving reasons), that the accused is likely to terrorise or bribe key witnesses, or has been known in the past to 'jump bail', or is a shiftless individual with no job and no permanent place of abode. It is unduly prejudicial to the accused that there should be no way of preventing the reporting of material of this nature - much of which may be scarcely substantiated - solely because there is a public interest in knowing all that is said at bail proceedings."[168]

As against this, in might be argued that an accused who seeks bail brings upon his own head reporting of this kind. If he is so likely to interfere with

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168 ALRC Discussion Paper No. 26, para 78.

witnesses (or to fail to turn up for his trial)[169] that he is refused bail, he has no-one to blame but himself when this fact is published. But it seems to us that this rejoinder suffers from two flaws, both fatal. First, it does not follow from the District Justice's refusal of bail that a defendant would in fact have actually interfered with witnesses or even that there was a real risk that he would do so. Necessarily, the District Justice relies on his or her estimate of the evidence on this matter, which frequently will depend largely on what a Garda will have to say.[170]

Secondly, the prejudicial evidence generated by bail applications (successful[171] or unsuccessful) may concern matters entirely independent of, and irrelevant to, the facts grounding the charge.

The desirability of restrictions on publication is not limited to the context of bail applications. A case may arise where a person (whether a party or witness) gives evidence in legal proceedings which impinges on another person who is involved in proceedings which are still outstanding and which are highly prejudicial to those other proceedings.[172] Restriction of publication of the evidence in the first proceedings may be considered necessary in the

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169 It will be recalled that in 1988, the Supreme Court, in *The People v Ryan* [1989] ILRM 333, reiterating the position it had adopted in *The People (AG) v O'Callaghan* [1966] IR 501, held that the likelihood of an accused's committing criminal offences before his trial was not a proper ground on which bail might be refused. See R Byrne & W Binchy, *Annual Review of Irish Law 1988*, 144-147 (1989).

170 It is worth noting that, in *People v Ryan, supra*, at 338, Finlay CJ presented the following series of questions as an implied reason against holding in favour of the Director of Public Prosecutions' contention that the likelihood of the accused's committing further offences was a proper ground for refusing bail:

> "The courts cannot create offences of crimes, though the Oireachtas may. Are they, however, to be permitted to detain a person because he is suspected of an intention, which even if proved in a full criminal trial, could not lead to his punishment? If such a power did exist in the courts, why should its exercise be confined to cases where the suspect is an applicant for bail? Why should the courts' prevention of the apprehended harm cease in the event of the determination without a sentence of imprisonment of the original charge, which charge may in its character and seriousness bear no resemblance at all to the feared offence? How can such an intention be proved, and by what standard of proof must it be established? Could there be any grounds on which an accused person suspected of such an intention would be afforded less comprehensive notice of the evidence to be offered against him of the grounds for such suspicion and less opportunity to prepare and be represented to contest such allegations than he is afforded in relation to the presenting of a criminal charge against him? Would every application for bail accordingly in which this ground was advanced as the substantial ground of opposition, take on the nature and necessary requisites of a criminal trial?
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> "These queries not only indicate practical problems but more importantly highlight the nature of the jurisdiction which it is sought to invoke without legislation."

171 A considerable amount of prejudicial evidence might be given in a bail application *unsuccessfully* contested by the Gardai.

172 Cf *Poulson*, The Times 4 January 1974, cited and discussed by *Miller*, 331-332.

interests of justice.

In Britain, the problem was addressed in the *Contempt of Court Act 1981*. Section 4(2) provides as follows:

> "In any ... [legal] proceedings [held in public] the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for the purpose."[173]

This power, as may be seen, applies in relation both to criminal and civil proceedings, though, of the nature of things, it is exercised in relation to the former far more frequently than the latter.

Our Tentative Conclusions

Our tentative conclusion is that the legislation should include a provision on the lines of section 4(2) of the 1981 Act. The case in favour of a discretionary power of postponement of publication seems to us overwhelming.

Two supplementary questions arise: the first concerns the *sanction* for disobedience of an order for postponement; the second, integrally related to the first, concerns the question of *mens rea*. *Our tentative preference would be that the sanction should be a criminal offence with a maximum penalty of imprisonment for two years or a fine of £20,000, or both; liability should depend on knowledge or recklessness as to the existence of the order.*

173 See generally *Miller*, 332-338.

CHAPTER 13: OTHER ACTS INTERFERING WITH THE ADMINISTRATION OF JUSTICE

In this chapter we examine how best the law of contempt should be reformulated or supplemented so far as it deals with acts, other than publication, scandalising or *in facie* contempt, which interfere with the administration of justice.

Has contempt any useful role in this area?

As a threshold question we must consider whether the law of contempt serves any useful role in relation to conduct of this nature. An attractive case may be made that there is no need for contempt proceedings as the criminal law duplicates virtually the entire spectrum. Apart from specific offences,[1] such as assault, demanding with menaces, forgery, perjury, embracery, false imprisonment and interfering with witnesses by threats or persuasion, there are other offences of a generic and malleable nature, notably that of perverting the course of justice. As the English Law Commission explains, the early connection between conspiracy and interfering with the administration of justice resulted in the general practice in later years to prosecute as a conspiracy most conduct that was concerned with obstruction of the course of justice; the textbook writers reflect this practice:

> "Nevertheless it seems to be clear that at common law wrongful obstruction of the course of justice is now an offence without any element of conspiracy. This offence, and the subject matter of the conspiracy offences, is referred to in a number of ways. It may be called interfering with the administration of justice, or obstructing the administration of, or the course of, justice. It may be called defeating the due course of justice, or defeating the ends of justice, or even

1 Cf, e.g., the *Juries Act 1976*, Part V.

effecting a public mischief."[2]

The breadth of the offence is formidable: it "penalises any conduct which wrongly interferes, directly or indirectly, with the initiation, progress or outcome of any criminal or civil proceedings, including arbitration proceedings".[3] The offence may be committed before, during or after the proceedings, if the conduct affects their result.

With such wide-ranging offences, in respect of which we have heard no criticism,[4] what is the need for duplication through contempt proceedings? Three arguments in favour of preserving a role for contempt suggest themselves.

The *first* is that the summary procedure most effectively deals with cases of interference with the administration of justice, especially when proceedings are actually in progress. A swift response can keep the proceedings on track.[5]

The *second* argument, related to the first, is that persons contemplating interference are likely to be more effectively deterred from engaging in such conduct by the threat of being dealt with summarily by the judge *in situ*. Rightly or wrongly, they may apprehend that the judge will take particular offence at having his or her proceedings subverted and that this may be reflected in the sentence imposed. The prospect of a jury trial some months later may provoke less fear and in some cases be accompanied by the hope that the relevant witnesses against the transgressor may be "persuaded" to alter

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2 Eng Law Comm WP No. 62, *Criminal Law: Offences Relating to the Administration of Justice*, para 10 (1975).

3 *Id*, para 11.

4 We do not here address the question of conspiracy offences, in relation to which there has been some public discussion. As the English Law Commission makes clear, the offence of perverting the course of justice, though frequently charged in its manifestation as a conspiracy, contains no necessary element of conspiracy.

5 Cf *In re Kelly and Deighan*, [1984] ILRM 424, where Costello J held that attempting to induce a witness not to attend court to give evidence constitutes *in facie* contempt. He considered that it would "lead to a possible breakdown of the administration of justice, if a witness who felt he had been suborned, who felt threatened as a result of what was said, could not come in to court and make his complaint and have the matter dealt with immediately. If this cannot be done, it seemed to me the administration of justice could be very adversely affected". (*Id* at 430). The Supreme Court reversed, on the basis that the evidence did not support the need for immediate disposition. See also *The State (DPP) v Walsh*, [1981] IR 412, at 427 (Sup Ct, *per* O'Higgins, CJ dissenting). Cf the Law Reform Commission of Australia's *Report on Contempt of Court*, para. 156 (1987):

> "[One] advantage of the contempt procedure is the speed with which a matter can be processed. The absence of committal proceedings means that there is only one hearing and the case usually comes to trial expeditiously. Once the case comes to court, the use of affidavits is less cumbersome than dispositions and oral evidence, since no time is spent on examination-in-chief... Where the alleged contempt threatens the integrity of proceedings already in train - for instance, where pressure or inducement is brought to bear upon a participant - a speedy determination may be especially important".

their evidence.

The *third* argument is that contempt of court gains its strength and coherence from applying to the full spectrum of conduct which interferes with the administration of justice. Many aspects of this conduct fall within the scope of the criminal law: assault *in facie curiae*, certain cases of scandalising or publications which constitute criminal libel, for example. Unless there is merit in a general principle that conduct which is otherwise criminal should, on that account alone, not be punishable as contempt, it may be argued that the acts which we are considering in the present chapter should continue to constitute contempt.

Three arguments may be put forward against retaining contempt proceedings where they duplicate other criminal offences, in respect of conduct considered in this chapter. The *first* centres on the lack of *need* for contempt proceedings in these cases. An occasional would-be contemnor may be distinctively deterred from engaging in criminal conduct by fear of the summary contempt procedure in circumstances where he would otherwise have gone ahead, but it may be doubted whether such fine-tuned deterrence arises in many cases. It may be suggested that most would-be contemnors are primarily deterred by the prospects of being caught rather than of being punished by one legal process rather than another.

Secondly, while of course the courts must be fully protected and the administration of justice zealously guarded, it may be doubted whether the summary contempt procedure in the present context is more effective than a prosecution for perverting the course of justice, for example. The general public may well have greater respect for a conviction brought in by a jury after due deliberation on the evidence rather than for the swift response of a judge. In by no means every case is there some pressing urgency for disposition of the proceedings against the alleged transgressor.

Thirdly, and perhaps most importantly, the constitutional position, so far as it may be gleaned, suggests that the summary procedure should not be generally available to deal with most, if not all, conduct of the type falling under consideration in the present chapter. If this is so, the argument against contempt proceedings on the basis of redundancy is considerably reinforced. Unfortunately, as we have seen, the constitutional position is far from certain. The crucial question centres on the analysis of Henchy J in *The State (DPP) v Walsh*.[6] That decision, it will be recalled, concerned scandalising. Nevertheless, Henchy J's analysis was of such a generality as to apply to all cases of criminal contempt, though he allowed that some of his conclusions as to criminal contempt of court generally "may be said to be *obiter dicta* because this appeal admits of a decision based on the special and peculiar considerations, of both law and fact, which distinguish this case"[7]

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6 [1981] IR 412 (Sup Ct).
7 *Id*, at 440.

In *Walsh*, Henchy J said, apparently in respect of all cases of criminal contempt, that it was "for a judge and not for a jury to say if the established facts constitute a major criminal contempt."[8] Thus, in cases of alleged interference in the administration of justice falling within the scope of the present chapter, contempt proceedings would be bifurcated affairs, with the jury deciding issues of fact and the judge determining whether, on the facts established, the defendant was guilty of contempt. This may seem to many people to be an odd result. If, in respect of precisely the same conduct, a prosecution for perverting the course of justice were brought against the accused, the judge would have no such interventionist role. We are unaware of any suggestion that, in prosecutions of this kind, juries have proved themselves incapable or unwilling to discharge their duties conscientiously. Nor have we heard it suggested that jury trial in respect of these prosecutions has in any way weakened the administration of justice.[9] It could well be that, if the Supreme Court addresses the subject of criminal contempt in the context of conduct falling within the scope of the present chapter, it will modify the general principles set forth in Henchy J's judgment: it is easier to understand his argument in favour of an interventionist role for the judge so far as determining whether established facts constitute contempt where the alleged contempt is scandalising rather than threatening or bribing a witness, litigant or judge, for example. In the former case, the question is usually (though not invariably) one essentially of law rather than fact, and the question as to where the legal parameters are to be drawn may be considered to impinge on the preservation of the dignity and efficacy of the judicial process. In the latter case, the question is usually (though again not invariably) one essentially of fact rather than law, since there is scarcely any doubt that a wide range of conduct -involving threats, bribes and assault, for example - amounts, if proven to have occurred, to an interference with the judicial process.[10]

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8 *Id.*

9 Of course, the fact that contempt proceedings are available may conceivably be a necessary bulwark in this regard. Who is to say what the position over the years would have been without such an alternative option?

10 It is nonetheless interesting to note that the Law Reform Commission of Australia, in their *Report on Contempt of Court*, paras. 157-158 (1987), canvassed an argument (which they ultimately did not accept) which has a distinctive ring of the point of view favoured by Henchy, J. in *Walsh:*

> "Another argument in favour of the contempt mode in that because the court is dealing with the integrity of the administration of the law, it is desirable that senior judges set an authoritative standard for other cases. A verdict of a jury lacks this instant authority. It is the outcome of deliberations by twelve non-lawyers who almost invariably lack knowledge and experience of the way in which legal proceedings are conducted, and therefore have no 'feel' for concepts such as 'tendency to interfere with the administration of justice' or 'attempting to pervert' the course of justice. Such doubts about the capabilities of jurors in such cases were borne out, to some degree, by the accounts given to the media by jurors in the first trial of the late Justice Murphy in Sydney in 1985, or charges laid under s.43 of the Crimes Act 1914 (Cth). These accounts gave good cause to believe that the jurors had great difficulty understanding the trial

It is worth considering in this context the implication of the decision in *In re Kelly and Deighan*.[11] There Costello J held that attempting to induce a witness not to attend court to give evidence constituted *in facie* contempt.[12] Presumably this was on the basis that, if failure to attend court may constitute *in facie* contempt, so also should inducing a person not to attend court. As we have indicated earlier, we doubt if the concept of *in facie* contempt can easily be extended so far. It is true, however, that, O'Higgins CJ, in his dissenting judgment in *Walsh*[13], took the view that the question whether a juror had been suborned should be decided by the judge alone, but the Chief Justice gave no clear rationale for allocating this function to the judge rather than the jury.

Fourthly, it may be doubted whether, in most cases of interference, a speedy summary disposal of the case is essential in the interests of justice. It is true that, in *In re Kelly and Deighan*,[14] Costello J considered that it was, but there is surely merit in the argument to the contrary put forward by the Law Reform Commission of Australia:

> "[I]t is not essential that an alleged act of interference with proceedings is tried as quickly as possible under a summary procedure, so long as measures sufficient to protect the proceedings are take forthwith. In a case of alleged threats against witnesses or jurors, for instance, it may be enough for the court to grant an injunction against further threats, or if the case calls for more drastic intervention, to have the accused person charged with an appropriate offence and remanded either in custody or on bail. Bail may be made subject to the condition that the

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> judge's direction as to the meaning of 'attempt to pervert the course of justice".
>
> A further advantage of contempt proceedings is that, in contrast to juries, the judges give reasons for their decisions. A body of precedent clarifying and elucidating the principles governing liability can therefore be built up".

As against this the Report presents a potent reply (*id*), in support of jury trial in this context:

> "Unlike offences against property or the person, the gist of contempt law is protection of the administration of justice. It may be argued that judges are more likely to have a subtle personal involvement in the outcome of this type of criminal proceedings than with any other. But, in the absence of the jury from this branch of contempt, ordinary people are absent from policy-making. The jury system helps to legitimise the criminal justice system by providing a link between that system and the community. Through the jury, individual citizens have a direct influence on the process of criminal justice and its values. The importance of this is underlined by the nature of this branch of contempt. Much of the behaviour called into question - for example, threatening to sack an employee who is called as a witness, or distributing pamphlets in the court precincts - is a type that non-lawyers can readily understand. Their contribution to legal decision-making in this area can be most valuable."

11 [1984] ILRM 424 (High Ct, Costello J, 1983).
12 *Id*, at 430.
13 *The State (Walsh) v DPP*, [1981] IR 412 (Sup Ct).
14 *Supra*.

accused should not approach the relevant witnesses or jurors."[15]

Fifthly, it is worth noting what a defendant sacrifices, apart from the obvious denial of the right to jury trial in relation to a non-minor offence, when he is subjected to the summary procedure of a contempt hearing. The prosecution evidence may rest on affidavits: moreover he will have no opportunity to have the case tested by a District Justice under the *Criminal Procedure Act 1967* to see whether a *prima facie* case has been disclosed. He also loses the right to cross-examine the prosecution witnesses exhaustively, thus depriving him of considerable strategic benefits which would otherwise be his due.[16]

We conclude that the balance of the argument lies in favour of abolishing criminal contempt proceedings so far as they relate to conduct the subject of the present chapter. They should continue to be subject to prosecution to the extent that they are contrary to the criminal law. There is no compelling need to resort to the summary procedure, and, if an indictment before a jury is envisaged, there is no reason for depriving the jury of its normal function in determining issues of guilt and innocence rather than merely issues of fact.

Changes in Existing Law

If, however, we ultimately take the view in our Report that there should remain a contempt jurisdiction to deal with at least certain types of conduct dealt with in this chapter, several questions arise as to its potential scope and content. We now address these in turn.

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15 *Report on Contempt of Court*, para. 161 (1987).

16 As the Law Reform Commission of Australia point out in their *Report*, para. 165,

> "The committal proceedings assist the accused in a number of ways and are often used as a kind of 'dress rehearsal' for the trial. They give the accused person notice, not only of the charge against him or her but also of the evidence which may be called at the trial to support the charge. He or she is entitled to be present throughout the hearing and to be legally represented by solicitor or counsel, who may cross-examine witnesses for the prosecution with a view to exploring all possible avenues of defence. Counsel may conduct an exhaustive cross-examination without penalty, because answers unfavourable to the defendant will not be heard by a jury. If the cross-examination shows the prosecution case to be a weak one, the case may be dismissed and the defendant discharged. Even if the defendant is committed for trial, he or she has had the advantage of hearing the prosecution witnesses and of observing their demeanour. Close examination of the prosecution witnesses may also be used to 'freeze' the testimony of witnesses on critical issues, providing a basis for cross-examination on any discrepancies that may arise at the trial. Finally, the evidence of the prosecution witnesses may be tested prior to trial by further investigations. If a prosecution witness is shown at the preliminary examination to be a strong witness and further investigation fails to expose any weaknesses in his testimony, the defendant knows that he or she may prejudice his case by attacking that witness strongly at the trial."

1. What level of interference with the administration of justice should be required?

We consider it desirable that, if contempt of this category is to remain, the legislation should clarify the requisite level of interference with the administration of justice. The test we have earlier recommended in relation to the *sub judice* rule seems to us a suitable one in the present context. *This is that the impugned conduct should create a risk, other than a remote one, of interference with the administration of justice. We so recommend.*

2. Should the contempt jurisdiction exclude cases of interference after legal proceedings have terminated?

As we have seen, contempt is not limited to cases of interference with pending or current proceedings: a person may be guilty of contempt who punishes or seeks to punish a juror, witness or judge, for example, for having acted in a particular manner in proceedings that are complete. A credible argument can be made in favour of excluding this latter category of cases from the scope of contempt. If no proceedings are "at risk", and if the case is not one of scandalising, it may be considered to be stretching things to characterise the misconduct as a contempt. Unquestionably it should be punished by the law, but is it not sufficient to prosecute the transgressor for a criminal offence such as perverting the course of justice?

As against this, it may be argued that the protection of the administration of justice is a sufficiently strong and wide-ranging goal to justify, if not require, the retention of a contempt jurisdiction in respect of conduct that takes place after legal proceedings have been completed. It may seem somewhat artificial to justify this jurisdiction on the basis of the disincentive it may represent to witnesses or jurors in future litigation in which they may possibly participate. The more convincing rationale is that the administration of justice is an ongoing process, and that the mere fact that a particular case may have been completed does not prevent retribution after the event from damaging the administration of justice.

On balance, we consider that, if contempt proceedings are to have a role in this area, they should extend to cases where legal proceedings have been completed. To exclude victimisation of jurors or witnesses after proceedings have terminated would be artificial and would not be fully consistent with the goal of protecting the administration of justice.

3. Should the contempt jurisdiction exclude cases of interference before legal proceedings have begun?

We now must consider the question at the other end of the spectrum: should the contempt jurisdiction exclude cases of interference before legal proceedings have *begun*?

In England the Phillimore Committee dealt in part with the issue as follows:

"It is hard to imagine a case in which the main criterion, i.e. that of urgency, for the use of the summary procedure would exist before the proceedings in question had started. Deliberate intimidation of a prospective party or witness, for example, at such an early stage, could adequately be dealt with by ordinary criminal processes. Moreover, it may be doubted whether, as a matter of logic, contempt of court can be committed if no court is yet seised of the case ..."[17]

The Committee went on to refer to the Australian decision of *James v Robinson*,[18] and in particular the following passage from Windeyer J's judgment:

"Mr Wilson, appearing for the Crown as *amicus curiae*, ... pointed to the desirability of defining this form of contempt solely by the character of the publication and its likely effect on expected curial proceedings rather than by the fixing of a point of time before which words published would not be a contempt and after which they would be. But we are concerned with a criminal offence, and one triable otherwise than by the ordinary processes of the criminal law. Its limits are not at large. That the harmful consequences of a publication made before proceedings are commenced may be no less than if it were made afterwards does, naturally, seem a ground for saying that it too should be unlawful. And it well may be. But it is not punishable by summary procedure as a contempt: that is all that I mean to decide. Contempt of court is historically, and by its name and nature, concerned with the position of courts, with proceedings in court and with the protection of parties to proceedings in court."[19]

The Phillimore Committee responded:

"We are attracted by the logic of that view. The court was speaking of publications, but the principle can be applied to all contempts in relation to particular proceedings. The point is, of course, of less importance where the obstruction or perversion of the course of justice is intentional, since the only practical effect is that the matter cannot be dealt with by the summary contempt procedure, but must be left to ordinary criminal processes; it does not affect the issue of liability. As Mr Justice Windeyer pointed out in the passage we have just quoted, conduct before proceedings begin may be harmful, and may be unlawful, but it is not (or should not be) punishable by summary procedure as a contempt. The question of the period of application of the law is of much greater importance in relation to the stricter form of contempt discussed [later] ... We recommend here that the law should be clarified so that conduct intended to pervert or obstruct the course of justice

17 *Phillimore Report*, para 71.

18 109 Comm LR 593 (High Ct of Austr, 1963).

19 *Id*, at 617.

should only be capable of being dealt with summarily as a contempt of court if the proceedings to which the conduct relates have started and have not been completed."[20]

Our own provisional view is somewhat different. Two separate issues but related, are raised in regard to this matter which are easy to confuse: the first is whether the *summary procedure* is appropriate to deal with pre-litigation interference, and the second is whether there should be a contempt jurisdiction at all to deal with this type of interference. *We are of the opinion that, if contempt proceedings are to have any role in relation to conduct falling within the scope of this chapter, there can be no objection in principle to their applying to pre-litigation conduct. The question at all stages should be whether the conduct creates a risk, other than a remote one, of interference with the administration of justice.* Obviously, its proximity or distance from forthcoming or apprehended litigation will be taken into account in determining the existence and extent of such damage or threat; but in a case where such damage or threat is established, there seems to us to be no reason to exclude the application of the law of contempt by reason of this factor. Equally, there would seem no coherent principle which would justify distinguishing between the summary procedure and trial by indictment by reference to this factor. Indeed the question in such a case may more frequently raise an issue of law than in a case where legal proceedings are in progress at the time of the impugned conduct.

4. The requisite mental component

We now must consider the question of *mens rea*. If interference, other than by publication, with the administration of justice is to remain contempt of court, what should be the requisite mental ingredient?

Three possibilites suggest themselves: (1) strict liability; (ii) a *mens rea* requirement of intention or recklessness and (iii) a negligence - based test. The question arises as to whether there is any principled basis for treating conduct other than publication differently, so far as *mens rea* is concerned, from conduct consisting of publication. If, as we have proposed, the test for publication should be a negligence - based one, is there any good reason for applying a different test to conduct other than publication? Both types of conduct interfere with the course of justice, so why should there be differing *mens rea* requirements? It may be argued that the view that the principle of equality requires the application of a single *mens rea* test is mistaken. Those engaging in publication cannot easily be compared with persons who, by some mischance, such as carelessly running over a witness on his way into court,[21] interfere with the administration of justice. Publishing is an activity with

20 *Phillimore Report*, para 72.

21 Or even engages in intentional conduct relative to the other, such as striking him or falsely imprisoning him for a reason entirely unconnected with legal proceedings which may be about to take place.

foreseeable risks relating to the administration of justice. It may be considered reasonable to impose on publishers the obligation of taking due care. The myriad ways of interfering with the administration of justice, other than through publication, suggest to us that a simple negligence - based test, and *a fortiori* one of strict liability, would be inappropriate. *Accordingly, we tentatively propose that the mens rea test in respect of such conduct should require proof of intention or recklessness. The intention or recklessness should relate both to the physical act in question (locking up a witness, for example) and the consequential intended interference, or risk, other than a remote one, of interference with the administration of justice.*

5. ***Reprisals against parties***

Whether or not the law of contempt is to be abolished in this area, the question arises as to whether it should be unlawful to take or threaten reprisals against a party to civil proceedings to the same extent as we propose it should be unlawful to make a threaten reprisals to others involved in the legal process. That parties are in a somewhat different position from others cannot be denied. As the Law Reform Comission of Australia points out,

> "[w]itnesses, judges, jurors, legal practitioners and court officers are all subject to mandatory duties in relation to proceedings, so that any pressure, inducement or persuasion seeking to deflect them from performing these duties in *prima facie* unlawful. On the other hand parties to court proceedings are, generally speaking, free to initiate or desist from participation at will. The law countenances the application of pressures to desist, in so far as it encourages settlement in order to relieve pressure on the court system."[22]

Should these differences resnlt in the non-application or partial application of the general principles of criminal liability in the specific context of reprisals against parties? The Law Reform Commission of Australia thought that they should. They argued in favour of a *via media,* modelled on race discrimination legislation,[23] which would impose liability for reprisals against a party to court proceedings only where either the conduct was unlawful in

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22 Law Reform Commission of Australia's *Report on Contempt of Court,* para. 191 (1987). See also the English Law Commission WP No. 62, *Offences Relating to the Administration of Justice,* para. 73 (1975):

> "An offer of money by one party in a case to the other, on condition that the latter withdraws his proceedings is part of the procedure by which innumerable court action are settled. Where a dispute, though ostensibly between only two parties, may affect others in its result, it is not uncommon for a third party to offer some consideration to one or other of the parties to put an end to litigation. Influence or inducement of this nature is certainly not within the law of contempt. In the same way it is very common practice in commercial litigation to use as a bargaining factor to induce one party to settle or withdraw a claim, a separate obligation upon which a legitimate claim can be based."

23 Racial Discrimination Act 1975 (Cth), sections 11-15.

its own right or the party was adversely affected in relation to employment, accommodation, the provision of goods, services or facilities, access to places or vehicles or the membership of associations.[24] The Commission considered that application of general principles of criminal liability would be too wide:

> "It could, for instance cover an otherwise wholly lawful discussion by a business company not to do further business with another company against which it had just fought an unsuccessful legal battle, or a decision by a parent to disinherit a child following a legal dispute within the family. On the other hand, to restrict an offence dealing with reprisals against parties to conduct which was unlawful on other grounds - for example, an assault or an intentional breach of contract - would seem too narrow".[25]

While we see the attraction in this type of compromise solution, we do not favour it, for two reasons. First, because it does not in our view properly address the difficulty. The problem is not one of what *kind of injury* by way of reprisal should generate criminal liability, but rather the *circumstances of, and particular motivation for, the reprisal.* If the defendant is guilty under the latter criterion, it is irrelevant whether the reprisal was to fire the litigant or to cut him from a will. Secondly, the fact that unquestionably there are some cases where reprisals against parties are arguably legitimate should not divert attention from the fact that equally unquestionably there are other cases where reprisals against parties are totally illegitimate and deserving of a criminal sanction. The problem is one of how to distinguish on a principled basis between these two types of case. At the end of the day, we consider that there is little point in the legislation's seeking in conceptual terms to distinguish between legitimate and illegitimate reprisals. *We are of the view that the best approach would be to make it an offence to take or threaten reprisals against a party, intending thereby to punish him,*[26] *without reasonable excuse, for having instituted, defended or persisted in civil legal proceedings.* We are satisfied that such a criterion will enable the prosecuting authorities to exercise a broad discretion, as well as allowing a defendant to argue that he or she was justified in responding as he did to the maintenance of litigation by the party in question.

6. Monetary compensation

We now must consider whether contemptuous conduct of the type falling within the scope of this chapter which injures a person, as well as creating a risk, other than a remote one of interfering with the administration of justice, should entitle the victim to monetary compensation. The question is a good

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24 *Report on Contempt of Court*, para. 202.

25 *Id.*

26 Cf. clause 16 of the draft *Administration of Justice (Offences) Bill*, in Appendix A of the English Law Commission's Report, *Criminal Law: Offences Relating to Interference with the Administration of Justice* (Law Com No. 96, 1979).

deal wider than might at first appear.

Perhaps a useful starting point is the controversial decision of *Chapman v Honig*,[27] where the English Court of Appeal, by a majority,[28] held that a contemptuous reprisal by a landlord against a tenant who had given evidence in a case against him did not amount to a tort. The landlord had given the tenant notice to quit, as the tenancy agreement allowed. The landlord was free from liability, said Pearson LJ, because "the same act cannot be as between the parties both a lawful exercise of a contractual right and at the same time unlawful as being tortious and giving rise to an action for damages."[29]

The case in favour of allowing witnesses sue is an attractive one. In England, the Phillimore Committee recommended that it should be open to the court[30] to award compensation to a juror or witness against whom reprisals have been taken.[31] The Committee offered no analysis in support of its recommendations, other than to refer to Lord Denning MR's dissenting judgement in *Chapman v Honig*,[32] and to the fact that section 4 of the *Witnesses (Public Inquiries) Protection Act 1892* provides the facility for compensation for witnesses at public inquiries who have been victimised.

We fully appreciate the attraction of this approach. Before concluding whether it is desirable to recommend its adoption, it is worth pointing out that a range of questions may be posed about the possible scope of the proposed right of action. If a witness intentionally gave false evidence, should he nonetheless have a claim to compensation? If the alleged contemnor believed, wrongly but on reasonable grounds, that a witness's evidence was false, should this afford a defence? Should the action be formulated as a statutory tort, subject to the principles of the *Civil Liability Act 1961* relating to such matters as contributory negligence, waiver of action[33] and contribution. What should the measure of damages be? Should the *injuria* be actionable *sine damno*? Should punitive damages be capable of being awarded? Should

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27 [1963] 2 QB 502.

28 Pearson and Davies LJJ; Lord Denning MR dissenting.

29 [1963] 2 QB, at 521.

30 Apparently the court before which the defendant has been convicted of the offence of taking reprisals. Though the Committee recommended (para 157) that to take *or threaten* reprisals against a witness after the conclusion of proceedings should be an indictable offence, its recommendation, insofar as it relates to compensation for jurors, refers (para 158) only to the case of "reprisals *taken* against a juror ...". The overall thrust of the recommendation in para 158, however, and the Summary of Conclusions and Recommendations, para (20), indicate that the Committee considered that compensation should be available in cases of either taking or threatening reprisals against a juror or witness.

31 Para 158. The Law Reform Commission of Australia also favoured a right to compensation: *Report on Contempt of Court*, para 203 (1987).

32 *Supra*.

33 Cf section 34(2)(b) of the *Court Liability Act 1961*. See further *McMahon & Binchy*, 367-372, *Ryan v Ireland* [1989] IR 177 (Sup Ct).

the action be subject to a specific period of limitation? How should the action harmonise with any possible claim for infringement of constitutional rights?

We ask these questions, not because we consider them particularly difficult to resolve or because cumulatively they make the proposal unattractive, but in order to stimulate discussion. *We tentatively propose that there should be a right to damages; that the court should be given a discretion as to whether to make an award and, if so, its amount, having regard to all the circumstances of the case, including the conduct of the wrongdoer and of the victim. This entitlement would be without prejudice to any claim the victim may have against the wrongdoer for interference with his or her constitutional rights, or for tort or other legal wrong, but, in determining any such claim that may exist, the court should have regard to the possibility, or fact, of an award, or its refusal, under the new entitlement we have proposed. Moreover, in any such claim for a legal wrong, any amount awarded by the court in the exercise of its proposed new entitlement should be deducted from the damages awarded in that claim.*

We propose that the entitlement to award damages should be introduced whether the law of contempt continues to operate in this area or is abolished (as we have proposed). In the latter event, the conduct generating an entitlement to award damages should be such as constitutes an offence.

We would welcome views on two questions: (1) whether the entitlement to award damages should be premised on (a) the initiation of proceedings for contempt, or for a criminal offence, as the case may be; (b) a conviction in such proceedings; or (c) neither an initiation of, nor conviction in, such proceedings. (2) Whether, in the event of either (a) or (b) applying in relation to the first question, the judge before whom the proceedings were heard should determine the question of entitlement to damages. In favour of the same judge doing so is, of course, the argument of convenience: the judge will be fully apprised of the facts in detail; to require separate proceedings would add to the cost, inconvenience and time of the victim and the courts. Nevertheless it is worth noting that constitutional issues affect the improper merging of criminal and civil proceedings: at the least the "minor offence" doctrine can create difficulties.[34]

Pressure on Parties in Industrial Relations Context

In formulating our proposals in relation to the exertion of pressure on parties to litigation, we are conscious of the fact that, in practice, they may have wide-ranging implications in the context of industrial relations. Where, for example, employees are engaging in conduct which constitutes a tort[35] (such as inducing a breach of contract or intimidation) their employers or other affected parties may seek to bring proceedings against them, for damages or

34 Cf *Cullen v AG*, [1979] IR 394, criticised by *Casey*, 252-253.

35 See *Kerr & White*, 223ff, *McMahon & Binchy*, ch 32.

an injunction. It may be that other persons - co-workers, for example - attempt to dissuade the plaintiffs from continuing with their proceedings by acts which themselves may be tortious and (whether or not they are so) which arguably amount to such improper pressure as to constitute an offence. Whether or not this is a desirable result is a matter raising broad issues of social policy on which we do not consider it appropriate for us to express any view.

We are conscious of the fact that proceedings may be "instituted in a political and industrial environment which is liable to obscure their nature as judicial proceedings in a court of law".[36] Whether this should be a reason for qualifying the full rigour of the criminal law in this context is a matter for political resolution. The impact of our proposals in this area should be noted by interested parties.

JURY SECRECY

We must now consider whether it is desirable to seek to preserve secrecy for the deliberation process in which juries engage and, if so, whether that goal should be served by means of contempt proceedings. First we consider the case in favour of doing this; we then consider the case against; finally we state our tentative conclusions on the issue.

The case in favour of jury secrecy[37]

The case in favour of jury secrecy rests on four principal arguments: the need of jurors for security and privacy, the desirability of finality, the need to preserve public confidence in the jury system and the need to preserve the jury's "dispensing power".

1. Jurors' need for security and privacy

In favour of jury secrecy it may be argued that many jurors have a need for the security and privacy which it involves. The task of adjudicating criminal responsibility or of civil liability[38] can be a frightening one. The defendant in a criminal case may, for example, be a violent man who could possibly exact or threaten reprisals against a juror if he learned that that the juror had played a large role in securing his conviction.[39] While of course there is always a risk of reprisals against jurors for their verdict, the prospect is likely to be increased where one or more of the twelve can be shown to have played a distinctive part in bringing about the verdict. There is also a risk that the

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36 *Australian Building Construction Employees and Builders Labourers Federation v Vines*, 63 FLR 253, at 281 (*per* Evatt and Deane, JJ), cited by the Law Reform Commission of Australia in para. 197 of their Report.

37 See the Law Reform Commission of Australia's *Report on Contempt* paras 352-355.

38 Or the matter of quantum of compensation in civil cases.

39 Cf the Law Reform Commission of Australia's Report, para. 355.

fear of disclosure as to how a jury came to its verdict might affect jurors dealing with a sensitive case (such as a prosecution for a sexual offence or a prosecution of a person of a particular ethnic or religious group).

2. The desirability of finality

It may be argued that the need for finality of verdicts requires jury secrecy. If disclosures were permitted, this would often cast an unjustifiable shadow of doubt over the correctness of the verdict.[40] Either there would be appeals in such circumstances, which would be so considerable in number as to clog the court list, or the verdict would be left stand unappealed, which would lead to general public dissatisfaction with the law - a factor we examine in more detail presently.

As against this it may be replied that, if the court list is clogged with meritorious appeals which would otherwise not have been possible, this is scarcely a reason for dismay. If disclosure were to lead to improper verdicts being quashed this would seem to represent a considerable improvement. It may, however, be doubted whether many such appeals would emerge. In jurisdictions where disclosure is possible, there is no evidence of any large number of such appeals being taken. This is, of course, a refutation, *a contrario,* of the argument based on the desirability of finality.

It is here worth considering a rule which has been carried to considerable lengths in some other jurisdictions, since it has an important bearing on the question of jury secrecy in the context of contempt. Courts have held that generally a juror may not give evidence in any proceedings - including an appeal from the jury's verdict - as to what took place in the jury room and why the jury came to its verdict. Only the most limited exceptions to this exclusionary rule are permitted.

We need not here consider the rationale for this rule.[41] Perhaps the most convincing is that jurors would otherwise be subject to improper pressure, especially from convicted persons or their surrogates, to invent reasons for overturning a verdict.

If jurors were permitted to disclose what took place in the jury room, the exclusionary rule would come under great pressure. It would be very hard for an appellate court to continue to refuse to recognise such evidence as capable of affording grounds for appeal.[42]

*3. **Preserving public confidence in the jury system***

It may be argued (as the Law Reform Commission of Australia noted) that:

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40 Cf The Law Reform Commission of Australia's Report, para. 353.

41 Cf *id,* para 351.

42 Cf. *id.,* para. 353.

"if the finality of verdicts is to be frequently thrown into question by highly-publicised accounts of jury deliberations, undue exposure and emphasis will be afforded to what are, in the main, inevitable shortcomings in the nature of jury decision-making. In the long run, the public may lose confidence in the system and, without appreciating that other ways of reaching verdicts will inevitably be flawed also, may bring sufficient pressure to bear on governments to abolish the system wholly or substantially."[43]

In Ireland, where jury trial in non-minor criminal cases is a constitutional necessity,[44] this argument raises the question of the possibility of pressures for constitutional amendment. In reply to this argument it may be said that a public confidence in the jury system which depends on ignorance of how it truly operates is one which deserves no protection.[45]

4. Preserving the jury's "dispensing power"[46]

It is sometimes said that the jury has what is described as a "dispensing power" to acquit defendants where unquestionably their conduct falls within the definition of the offence. Thus, for example, persons charged with manslaughter before the creation of the offence of dangerous driving causing death were frequently acquitted even though it was clear they had driven with the requisite degree of negligence. It is not a particularly happy description, since it implies a recognition by the law that juries have the right to acquit in such cases, whereas the true position is that they have the power, but not the right, so to do. The fact is, of course, that a jury who are satisfied beyond reasonable doubt that all the ingredients of an offence have been committed are not entitled to acquit the defendant simply because they dislike the relevant law. Indeed, where they do so they are clearly violating their solemn

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43 Law Reform Commission of Australia's Report, para. 352.

44 Article 38.5.

45 Moreover, it may be doubted whether a rule of jury secrecy could preserve public confidence against the background of contemporary realities in relation to the media. As Joseph Jaconelli (*Some Thoughts on Jury Secrecy*, [1989] Legal Studies 91, at 99-100) points out:

> "For as long as the mass media have existed they have been interested in the correctness or otherwise of the outcome of particular trials. It is commonplace to read articles or see programmes which, after going over the ground of famous cases, leave the distinct impression that a faulty verdict was entered. Where the accused is still alive and, even more so, when he is still serving a prison sentence, these items are of more than historical or speculative interest. If the accounts rendered of the trials are believed to be accurate and impartial, the implication is that (for whatever reason) the jury in the trial reached a perverse verdict. One's view of such exercises may be that they are mischievous, as undermining public confidence in the criminal justice system. Or one might view them as serving an important function. However, even on the former approach, the forbidding of disclosures by ex-jurors will serve little, if anything at all, to remove the deleterious impact of such exercises."

46 See the Australian Law Reform Commission's Report, para. 354.

oath to give a true verdict according to the evidence and hence the description sometimes given to such verdicts as examples of "pious perjury", though, again, one may question the propriety of the adjective.

Acquittals of this nature, however, undoubtedly indicated that juries generally did not perceive a conviction of manslaughter as appropriate for this kind of conduct. In England the acquittal of the detendant in *R v Ponting*[47] is generally considered to have been in the face of the trial judge's direction on the law. It may be argued that, if disclosure of jury deliberations is possible, juries "will lack the autonomy required to enable them to carry out this limited but important function of rectifying injustices in the criminal law in accordance with the perception of common people."[48]

As against this, three arguments may be given in reply. First, it may be doubted whether in fact the power of disclosure would have such a profound effect on the jury's so called dispensing power. It seems unlikely that jurors who are sufficiently independent minded or, more accurately, contemptuous of their oaths to be disposed to proceed on these lines would be cowed by the fear of disclosure. Secondly, and as a matter of principle, it is worth challenging the perception of the jury's dispensing power as inevitably one of rectifying injustices in the legal rules. On the contrary, as we have seen in relation to cases of manslaughter prosecutions for dangerous driving causing death, the power may be exercised for reasons unconnected with considerations of justice. It may be presumed that juries acquitting defendants thus charged were exercising what they regarded as the power of mercy, thinking to themselves,"There but for the Grace of God go I". The dispensing power may be important in enabling society to reflect on the appropriateness of a particular law or of its application in particular circumstances. Thus, for example, the apparent reluctance of some jurors in recent times to convict of murder may encourage public discussion on whether the present automatic life sentence for murder is appropriate. But this is not to suggest for a moment that there should be any automatic conclusion, or even rebuttable presumption, that the exercise of a dispensing power in any particular context necessarily reveals an injustice or inappropriateness in the existing law.

Thirdly, as already hinted, it is surely questionable whether the law should seek to accommodate the violation by juries of their oaths. While in a democratic society the law should undoubtedly reflect changing views on what is right and wrong, the appropriate method of bringing pressure to bear on the legislature is by the expression of views in the media and elsewhere and, ultimately, by the use of the ballot box and not by the recording of perverse verdicts.

The question remains as to whether disclosure of how the dispensing power is exercised would be a good or bad thing. In favour of the view that it would

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47 [1985] Crim LR 318.

48 Law Reform Commission of Australia's *Report*, para. 354.

be an improvement on the present approach, it may be argued that at present it is possible only to guess in any case as to whether an acquittal was based on such a dispensing power. Of course in some instances it will be perfectly plain that it was; but in others the public, legislators and prosecutors can merely speculate. If they could learn the true position then they could also be able to address the question whether a particular law is operating unjustly and if so whether it should be changed or prosecuting policy altered.

The case against jury secrecy[49]

Three principal arguments against jury secrecy may be considered. These are that secrecy prevents the rectification of miscarriages of justice, that freedom to disclose would be unlikely to have the profoundly detrimental effects envisaged by its opponents, and that secrecy prevents valuable research which could result in important improvements in the law.

1. Rectification of miscarriages of justice[50]

We have already noted this problem. If appeals are subject to a broad exclusionary rule as regards what took place in the jury room, and if jurors are not in any event otherwise permitted to disclose what went on there, this must result, in some cases, in injustice. As the Law Reform Commission of Australia has observed:

> "At worst, such a rule may prevent investigation of the fact that an innocent person has been convicted of a major crime and sentenced to a long term of imprisonment in consequence of a verdict procured by bribery or threats within the jury room, or gross misconduct of jurors (for example, tossing a coin to decide the verdict, or agreeing to decide without proper discussion because they want to finish the job and get home as quickly as possible). Of course, such matters will never come to light if, irrespective of the law, the jurors all maintain a resolve to keep them secret. But a juror may 'repent' and become determined to have matters put right, or may reveal the crucial facts to another person who is equally determined to do this. A general prohibition on jury-room disclosures would stand in the way".[51]

Against this it may be replied that, while it is unquestionably true that the secrecy rule can lead to the failure to rectify miscarriages of justice, abolition of the secrecy rule would inevitably create a new injustice of potentially far more wide-ranging proportions. If retrospective "jury-knobbling" were possible - and this possibility is what abolition of the secrecy rule involves - some unscrupulous defendants would at least contemplate engaging in that type of conduct; moreover, the fact that they *might* do so would inevitably be known

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49 See *id*, paras 356-360.

50 See id., para. 357.

51 *Id*.

to juries, thus subjecting them to a further pressure to deviate from their duty.

2. Lack of detrimental effects from disclosure
This argument is to the effect that fears about detrimental effects resulting from replacement of the requirement of secrecy by an entitlement to disclose are out of proportion to the risk. As the Law Reform Commission of Australia stated:

> "While uncertainty in the common law may at times have inhibited jurors and media organisations from disclosing and publishing accounts of jury deliberations, there have been a number of instances of disclosure and publication over the years without any demonstrable harm resulting. Accordingly, it cannot be said that the proponents of legal controls have discharged the onus of proving affirmatively that such restrictions on freedom of speech and publication are justified."[52]

3. Restricting valuable research on the operation of the jury
If there is total jury secrecy then of course the opportunity for conducting research on how juries actually operate is greatly restricted. This research can reveal, for example, how laws are understood and are applied as well as the effect of rules of criminal procedure (such as the addresses of counsel on the jury and the judge's instructions), and the effect of rules of evidence (such as the rule against hearsay). All of this research has a value which impinges on justice. If, for example, it were shown that juries do not take seriously the prescription to acquit unless the prosecution has proved the case beyond a reasonable doubt, this would have important implications for the criminal process.

The reply to this argument is not to contest the merits of such research (provided it is conducted responsibly) but to point out that a general principle of jury secrecy is perfectly compatible with a specific exception to provide for bona fide research projects.

Our Tentative Conclusions
We now must consider what is the best way to proceed. As we perceive the issue, it would be quite wrong to regard it as of all-or-nothing status. In other words it is possible to respect the notion of even a considerable range of secrecy, while at the same time accepting that in certain circumstances this principle should give way to that of disclosure in the interests of justice. It is also possible to accept that secrecy should be encouraged by the law, without automatically conceding that it should be backed by the sanction of contempt proceedings. Thirdly, it may be worth seeking to distinguish the degree of secrecy that may be desirable in specific contexts: there is, for

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52 *Id.*, para. 356.

example, quite a significant difference between disclosing the fact that an acquittal was by way of a majority[53] and disclosing the identity of the jurors who wanted to convict. The first piece of information may cast a shadow over the reputation of the acquitted defendant; the second may endanger the physical safety of the jurors who have been thus identified. Fourthly, it may be useful to distinguish between disclosure by a juror to a narrow circle such as a spouse, friends or even a newspaper reporter, and publication of the contents of that disclosure by the media. Fifthly, there may be merit in developing the notion of a temporal limit on disclosure (or publication) rather than one lasting for all the time.

(1) No absolute rule of secrecy

It seems to us clear beyond argument that there can be no absolute rule of secrecy. The qualifications of the rule are, however, less certain.

(i) *Offences committed in the jury-room*

We are of the view that disclosure must be permissible so far as it relates to offences committed in the jury-room. If, for example, a juror threatens or attempts to bribe another juror, it is necessary to be able to investigate and punish his conduct.

(ii) *Miscarriages of justice*

It seems to us equally clear that miscarriages of justice in the jury-room must be capable of being brought to light. If, for example, a jury decided a case on the toss of a coin, it is essential that this injustice should not be buried for ever. It is easy to prescribe for disclosure in such a clear case; what is far more controversial is the appropriate range of reference of the concept of a miscarriage of justice. As we have seen, there is an exclusionary rule which, in some other countries, is drawn narrowly. *We consider that the question of proper disclosure of miscarriages of justice is intimately linked with the question of the proper extent of the exclusionary rule. We do not, however, consider it appropriate in this Consultation Paper on Contempt of Court to address the important question of the proper extent of the exclusionary rule: that is a matter properly dealt with in the context of reform of the law of criminal procedure. What we believe is the best course in the present context is to recommend, tentatively, that the law of contempt should not penalise any disclosure relating to miscarriages of justice in the jury-room where that disclosure would not offend against the exclusionary rule.* We appreciate that there may be deserving cases falling outside this

53 This information is prohibited by the *Criminal Justice Act 1984*, section 25(4).

rule, the propriety of disclosure of which nonetheless could strongly be asserted. We do not consider, however, that these should on that account fall outside the scope of contempt: if they were to do so, an impossible tension would be created in relation to the exclusionary rule. It remains for a future occasion to address the question of the proper dimensions of the range of disclosure so far as the exclusionary rule is concerned; but we are satisfied that the law of contempt in this area must be secondary to, and dependent on, the scope of the exclusionary rule. Later we address the subsidiary question of how, and to whom, permissible disclosures of miscarriages of justice should be made.

(iii) *Jury research*

We are of the view that a blanket prohibition on research on the jury would be unwise. Much can be learned from such research which will improve the quality of justice in civil and criminal proceedings. We are equally clear that some controls over this research are necessary. We doubt whether any elaborate system of rules is appropriate. Accordingly, following the lead of the Law Reform Commission of Canada,[54] *we tentatively recommend that the approval of the Chief Justice, the President of the High Court, the President of the Circuit Court or the President of the District Court should be a pre-condition of the carrying out of such research, subject to such conditions as he may specify. The intentional or reckless breach of any of these conditions by any person engaged in that research should constitute contempt of court. We do not consider that the principle of vicarious liability should apply.* We are conscious of the possible criticism of this approach on the lines that it is giving to these Judges what is in effect a law-making power of potentially arbitrary dimensions, but we are satisfied that, in the light of the jurisprudence thus far in the Irish courts on the question of contempt of court, such a provision would survive constitutional scrutiny.

(2) Protection of jury secrecy by means other than contempt proceedings

We should at this point consider the question whether jury secrecy might be protected by means other than contempt proceedings. It is clear that contempt proceedings under the present law will not be appropriate in relation to *all* disclosures;[55] indeed, although in England in *A.G. v New Statesman & Nation Publishing Co.*[56] the court held that disclosures having a sufficiently detrimental effect on the administration of justice could constitute

54 In their *Report on Contempt of Court.*

55 Cf *AG v New Statesman & Nation Publishing Co* [1981] QB1.

56 *Supra.*

contempt, the English courts[57] before then had tended to fall short of making such a characterisation. If matters were capable until so recently of being dealt with as involving no more than a sanctionless rule of conduct, might it not be argued that it would be better to keep the law of contempt out of the area completely? Certainly in Ireland there does not appear to have been any significant problem in this area: why should the criminal law of contempt extend over an aspect of conduct where the only case for making the extension is based on theory rather than experience on the ground?

We fully appreciate the force of this argument, but *we are of the tentative view that, in view of the real danger to justice posed by a sanctionless rule in this area, the subject is one that should properly be dealt with by the law of contempt.* It is one thing for the courts to exercise very considerable restraint bordering on an effective refusal to invoke the law of contempt; it would be quite another thing for the legislature, after having duly addressed the issue, to fail to bring the subject of jury secrecy under the law of contempt. That failure could well be interpreted as an implicit authorisation for conduct of this nature. The fact that, so far as we are aware, there has been only one reported Irish decision on the matter, over a hundred years ago, suggests to us that the law of contempt should continue to have a "long stop" role.

(3) Degrees of secrecy in specific contexts

We now must consider whether the jury secrecy rule should be absolute so far as the context of potential disclosure is concerned. Clearly some levels of disclosure can have different probable effects. Thus, as we have mentioned, disclosure of the fact that an acquittal was by way of a majority note can have a (mildly[58]) damaging effect on the reputation of the acquitted defendant, whereas disclosure of the identity of the jurors who convicted a defendant by a majority verdict[59] can place the safety of these jurors at risk. Thus the question of what goals the secrecy rule is seeking to achieve has to be addressed.

Obviously protection of the jury is a major element - protection here embracing not merely the physical safety of jurors but also their psychological tranquillity, so that they can get on with the process of deciding cases without the extra pressures to which disclosure, or the fear of disclosure, would subject them. It must also be desirable to protect the parties to litigation from the risk of detriment and to the extent that a secrecy rule can do this it should be permitted to operate.

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57 Cf eg *Ellis v Deheer*, [1922] 2 KB 113, *R v Armstrong*, [1922] 2 KB 555.

58 Since an acquittal by a majority is possible only after the jury have failed to come to a unanimous verdict after at least two hours' deliberation and the trial judge has told them of their entitlement to bring in a majority verdict, it is fair to say that any acquittal brought in after such an instruction carries the overt possibility that it was in fact a majority one. Nevertheless, the legislation makes this a matter for speculation.

59 A conviction by majority verdict must be accompanied by a statement of the numbers of the majority and minority. Thus, the defendant will know whether it was 10-2 or 11-1.

We therefore take the view that it should be contempt of court intentionally or recklessly to disclose the voting score in the case of an acquittal after the judge has informed the jury of their right to come to a majority verdict or to disclose any other information, again intentionally or recklessly, about what took place in the jury room where this creates a risk of detriment to the liberty, reputation or physical or financial interests of a party to litigation. This recommendation will operate in conjunction with the *sub judice* rule.

(4) Disclosure and publication

It is worth considering whether the law of contempt should limit itself to cases of publication of jury secrets to the public or a section of the public and leave other more private disclosures alone. The arguments in favour of doing so are threefold. First, jurors may be less informed as to the damage to justice which disclosure can involve; they may regard it as quite reasonable to mention to their relations[60] and friends what took place in the jury room. Newspaper editors and other media personnel may be expected to have a greater appreciation of the dangers. Secondly, the likelihood of injustice is of course far greater when publication to the public or a section of the public is involved. Thirdly, interpersonal disclosure is in some circumstances naturally to be expected, whereas publication on a wider scale is not. A man who acted as a juror in an important trial will often want to tell his wife what took place in the jury-room. Legal controls on such disclosure may be considered to be asking too much of human nature.

We appreciate the force of these arguments but our tentative view is that they are not sufficiently strong to warrant limiting the operation of the law of contempt of court to cases which involve publication to the public or a section of the public. While it is true that some jurors may be ignorant as to the risks of injustice which disclosure may involve, not all are. Equally it may be the case that a disclosure without publicity to a large number of people may be capable of doing considerable injustice in a particular instance. Moreover, there is always the possibility that a disclosure by a juror in private to a single person will in turn be passed on by the recipient to another, and so on until it cumulatively gains a wide currency. (There may be truth in the saying that no secret is shared by three people). Of course cases such as this could be dealt with on the basis of the foreseeability of more widespread disclosure but the law would be likely to be complicated and to some degree uncertain.[61]

(5) Temporal limits on disclosure

It is worth considering whether temporal limits on disclosure are desirable. The case in favour of such limits is twofold: that an unlimited restriction is

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60 The fact that absolute privilege attaches to inter-spousal communications in the context of defamation is worth noting in the present context.

61 Cf. the difficulties in relation to defamation: Cf *M'Loughlin v Welsh*, 10 Ir LR 19 (QB, 1846), *Speight v Gosnay*, 60 LJQB 231 (1891).

unnecessary for the protection of justice and that a temporal limit on disclosure (or even wider publication) may be necessary in the interests of justice.

In favour of the first argument it may be contended that the risk to jurors themselves or to the administration of justice, or of justice to parties involved in litigation, reduces as time passes, so that after three years (to take a specific point), it is so negligible as to be discounted. We do not agree. Of course the risk in most cases decreases with the passage of time, but we can see no point beyond which it reduces to zero. For example, a man convicted of murder by a majority verdict and sentenced to life imprisonment, may be consumed by hatred against a particular juror who, let us assume, argued persuasively for a conviction. If the identity of that juror is revealed (by another juror) nine years after the conviction - when the man is about to be released - the juror thus exposed may quite understandably fear reprisal. Moreover, if the possibility of ultimate disclosure were established by a temporal limitation, this fact would be known to most jurors and would be likely to have some inhibiting effect on their deliberations. True, it would scarcely be as potent as a complete liberty to disclose, with no temporal limitations, but we have little doubt that it would have sufficient effect to defeat the case for time limits so far as it rests on this first argument.

The second argument rests on the possibility that in some instances justice may require disclosure. For example, a juror may disclose to the prosecution authorities that some irregularity occurred in the jury room which would warrant the prosecution of another juror; if the prosecution authorities do nothing, should not the juror who has made the disclosure be free to tell the media? We see the force of this argument but also its weaknesses. The failure of the prosecuting authorities to prosecute may be based, not on indolence, but on a sound judgment that a prosecution would fail or otherwise be inappropriate. The opinion of the juror on this matter would often be based on less facts and, of course, his judgment would not be that of a professional lawyer. Having said this, we would have to concede that, theoretically, in a small number of residual cases, there might be a problem. We do not, however, consider it sufficient to warrant disclosure to third parties or, *a fortiori*, the media.

Our tentative conclusion, therefore, is that there should be no temporal limits on the obligation not to make improper dislcosures regarding the jury. We are satisfied that general principles of prosecutorial discretion are properly capable of dealing sensibly with cases of disclosure long after the event.

CHAPTER 14: REFORM PROPOSALS IN RELATION TO CIVIL CONTEMPT

In this chapter we consider the law of civil contempt. We discuss the question whether it should be changed. As an introduction to our analysis we examine the underlying rationales for civil contempt. We then go on to consider the question of sanctions: whether it would be better to abolish imprisonment or supplement it by alternative sanctions; and whether the legislation should specify a maximum term. We next address the question whether the present rules relating to waiver and discontinuance should be modified. Finally, we consider the law of civil contempt in relation to family litigation.

RATIONALES FOR CIVIL CONTEMPT

We must first examine the rationales for civil contempt proceedings underlying the present law. There appear to be two main rationales: coercion and punishment.[1]

1. *Coercion*

The purpose of a coercive, as opposed to a punitive, sanction is that it is exclusively forward-looking:

> "The magnitude of its pressure is measured not by what has been done ... but by the resistance to be overcome. Once the will of the person subject to treatment is bent, coercion ceases. The judge jailing the reluctant party engages in an active struggle with the will of the latter, and as soon as he changes his attitude he is freed, even though the

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1 See ALRC Research Paper No. 6, *Non-Compliance with Court Orders and Undertakings*, chs 3-4 (1986).

injury which caused the proceedings has meanwhile become incapable of reparation."[2]

Four arguments in favour of the coercive rationale may be considered.

First, it may be argued that civil contempt of court is an appropriate remedy only where the desired result cannot be achieved by other means.[3] On this basis,[4] in cases where contempt *is* the appropriate remedy, the situation is such that the defendant's active cooperation is a vital ingredient. Only he can bring about the desired result, whether by his acts or his omissions. If his will is opposed to doing what he must, then some mechanism is necessary to bend it.

Secondly, it may be argued that the dignity of the courts and the administration of justice has to be protected.[5] If court orders may be flouted, that dignity may be considered to be endangered.

Thirdly, and related to the second argument, it may be contended that the efficacy of court orders is essential: the failure of court orders to be effective would have detrimental social effects. Litigants would have less incentive to comply with court orders, and it may be feared that litigants would be encouraged to resort to extra-judicial remedies, such as kidnapping, threats (or acts) of violence and theft. Resort to extra-judicial remedies is not unheard of over the years, especially where there is a perception among those taking these steps that a moral or legal claim will not be enforceable effectively. This tendency would surely increase if the coercive sanction were removed from the enforcement of court orders.

A *fourth* argument in favour of the coercive sanction derives from the historical development of chancery jurisdiction:

> "[T]he use of contempt sanctions to enforce orders originated in the Court of Chancery. Until the English Reformation, the Lord Chancellor was generally an ecclesiastic, and his coercive techniques owed much to the Ecclesiastical Courts where disobedient parties were excommunicated until they obeyed. The religious heritage of the Court of Chancery is preserved today in the terminology of this type of contempt: a contemnor 'purges' his contempt; even after the order has been obeyed, a prison term might be necessary by way of 'expiation'.[6] Furthermore, the Lord Chancellor issued orders in his role as the conscience of the King and of the nation, and they were orders that the

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2 Pekelis, *Legal Techniques and Political Ideology*, 41 Mich L Rev 665, at 673 (1943), quoted by ALRC Research paper No. 6 p23 (1986).

3 Cf *Danchevsky v Danchevsky* [1975] Fam 17. 236, at 239.

4 Cf *Ross Co Ltd v Swan*, [1981] ILRM 416 (High Ct, O'Hanlon J).

5 Cf *The State (DPP) v Walsh*, [1981] IR 412 (Sup Ct).

6 Citing *Australian Consolidated Press Ltd v Morgan* (1964) 112 CLR 483, at 499 (Windeyer J).

defendant do what reason and conscience demanded of a person in that position. The order represented not only what was just and equitable as between the parties in the circumstances, which may have included fraud, undue influence, duress or other circumstances justifying the intervention of the court, but what was right, Disobedience was not merely an affront to the King, but to God and to conscience; it was an offence not only against the State, but against morality. The interest of the Court of Chancery went beyond securing the rights of the disadvantaged party; it included ensuring, by the use of coercive sanctions if necessary, that the defendant perform his or her moral obligations."[7]

Is there any contemporary attraction in the ideas underlying the historical exercise of the Lord Chancellor's jurisdiction? Against this suggestion, it has been argued that,

> "[I]f one accepts that compelling obedience to a court is no longer a moral imperative, and that courts are not the arbiters of the moral rights and duties of the persons who appear before them, the historical rationale of the imposition of coercive sanctions for non-compliance is not acceptable. The imposition of coercive sanctions is justifiable, if at all, not in terms of the unconscionability of the behaviour of the contemnor, nor in terms of the inherent 'good' or 'right' of doing the act ordered to be done, or the 'wrong' of continuing to do the act ordered to be abstained from, but in terms of upholding the legal rights of the aggrieved party. Coercive sanctions are imposed in the interest of the aggrieved party and for the purpose of enforcing his or her individual rights. They are not imposed in the interest of the contemnor that he or she should be given the opportunity of atoning for the wrong committed. Nor are they imposed primarily in the interest of society: punitive sanctions fulfil this goal. If they are imposed in the interest of the aggrieved party alone, and if one recognises that the aggrieved party's interests extend no further than the enforcement of his or her rights under the order, then it must be accepted that coercive sanctions are justifiable only when they are necessary as the only means of enforcing an order, and when they are an effective means of doing so."[8]

In reply, it may be argued that, even today, the notion that people should be held to their undertakings underlies the enforcement of the civil law. As McCarthy J observed in *Kutchera v Buckingham International Holdings Ltd*,[9]

> "in actions concerning commercial contracts the first principle of public policy should be that the parties should be held to their terms .... Whilst that remains the policy [of the courts], there may be

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7 ALRC Research Paper No. 6, para 26 (1986).

8 *Id*, para 27.

9 [1988] IR 61, at 82-83 (Sup Ct).

circumstances of a compelling nature in the light of which the court may permit a party to renege upon his bargain. In my view, no such reason has been established in the instant case."

On the basis of these four considerations, it seems beyond argument that there must be some element of coercion in the enforcement of orders of the court. The precise circumstances in which resort should be had to contempt proceedings, and the precise nature of the orders that the court might make in such cases, are, of course, questions that will require separate consideration.

2. *Punishment*

As an introduction to our analysis, the following passage sets out the nature of the problem clearly:

> "A punitive sanction may be distinguished from a coercive sanction in that, unlike a coercive sanction which is imposed to prevent certain behaviour, a punitive sanction is imposed as a consequence of behaviour. It is imposed retrospectively, not prospectively, and with reference to past, and not future, conduct. Consequently, the sanction will not be expressed to last until the occurrence of a specific event, but will be fixed in advance, for example, a fixed term of imprisonment or a fine. A punitive sanction imposed for contempt consisting of disobedience of an order is, then, similar to a penal sanction imposed in consequence of a breach of the criminal law. In assessing the length of a prison sentence to be imposed as punishment for disobedience, or the magnitude of a fine, the court considers those factors taken into account by a court imposing sentence for a criminal offence, for example, the degree of culpability of the contemnor, the harm suffered by the aggrieved party, and the public interest involved. The sanction serves the same purposes as one imposed for a breach of the criminal law, in particular, retribution and deterrence, specific and general. Consequently, if the imposition of punitive sanctions is to be justified, it must be justified not in terms of the enforcement of particular orders in the interests of the aggrieved party, but in terms of the public interest in the enforceability of orders in general and the maintenance of an effective system of dispute settlement."[10]

Two arguments may be made in support of a punitive rationale underlying at least some proceedings for civil contempt.

First, it may be argued that the effectiveness of court orders requires, not merely that persons, if necessary, be coerced into obeying them, but, in cases where coercion is not, or is no longer, in issue, those proposing to engage in conduct in defiance of a court order, should be dissuaded from doing so by the sanction of punishment:

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10 ALRC Research Paper No. 6, para 36.

> "In circumstances where enforcement is no longer relevant, either because the order has since been complied with, or is no longer capable of being complied with, the imposition of a punitive sanction vindicates the claims of the plaintiff, marks the disapproval of the court, and acts as a deterrent to the particular defendant and to future litigants. The enforcement role of the court is thus strengthened: litigants, present and future, are made aware that court orders will be enforced or, where enforcement is not possible, that wilful non-compliance will be punished."[11]

The second argument is based on the need to preserve the dignity of the courts: just as it has been suggested[12] that a stubborn refusal by a person to comply with a court order requires the coercive sanction of contempt proceedings, so, it may be argued, the courts also need to be able to punish a person who has sought to frustrate a court order by conduct that has already occurred. Anything less would lead to a decline in public confidence in the legal system in the long run.[13]

This argument has not met with universal support. Thus, it has been contended that:

> "it is open to question whether even highly publicised disobedience by large numbers of people over a long period of time - for example, mass picketing during an industrial dispute, or persistent and continued disobedience of an order by an individual - is likely to affect adversely public confidence in the court which made the order, still less the legal system as a whole. In any case, it must be remembered that only a small minority of unsuccessful litigants fail to comply with orders made against them, and it is a rare case indeed that non-compliance is accompanied by overt and deliberate defiance of the court. To this extent, a rationale of punishment for disobedience based on upholding the authority of the court in the face of defiance is too limited. More significantly, it may be said that pursuit of this aim has no place in what is essentially an enforcement procedure instituted by a private party for his or her own benefit. In such proceedings, the focus of the court's attention should be on achieving for the applicant his or her remedy. Where this is no longer possible, either because the order has since been complied with, or is no longer capable of being complied with, and a punitive sanction is considered appropriate, it is because the rights of future successful litigants may be in jeopardy, irrespective of whether the authority or reputation of the court has been challenged. The public interest to be served is not maintaining the authority of the court, but ensuring that, as far as possible, the legitimate expectations of litigants are satisfied. The need to uphold the authority of the court

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11 ALRC Research paper No. 6, para 42.

12 Earlier in the chapter.

13 Cf *The State (DPP) v Walsh*, *supra*.

is a relevant consideration only in so far as is necessary in the interests of present and future litigants. Upholding the court's authority should be a means to an end, not an end in itself."[14]

We are not impressed with this attempted rebuttal. As to its first part, we think it beyond question that highly publicised acts of disobedience to court orders by large numbers of people over a long period of time would indeed be likely in some cases to affect more adversely public confidence in the court than might enforcement of the order; moreover, the relative infrequency of such conduct under present law is surely attributable in part to the existence of the penal sanction. As to the second part of this attempted rebuttal, we consider that it loses sight of the fact that, even when seeking to enforce the rights of private litigants, the court's dignity and authority are at stake.

Having considered these two arguments in support of the punitive rationale for contempt proceedings in certain circumstances, we conclude that they have much force.

SANCTIONS FOR CIVIL CONTEMPT

Under present law, as we have seen, imprisonment is the major sanction for breach of an order of the court. We now must consider whether the present rules in relation to imprisonment might be improved. Several options present themselves for analysis. Let us consider them in turn.

A. IMPRISONMENT

1. Abolition

The first, and most radical, option would be to abolish imprisonment as a response to a contemptuous breach of a court order. In favour of this approach it may be argued that, at all events in cases where the imprisonment is designed to serve an exclusively coercive function, it represents *too severe* a sanction. Most people would be shocked if it were proposed that a disobedient litigant should be physically assaulted until his will broke. Imprisonment is a less severe sanction but it nonetheless is a most intrusive one, interfering not only with the liberty of the person affected but also his relationship with his family[15] his financial position and his reputation. It may be doubted whether the public have any clear understanding of the distinction between imprisonment for civil contempt in a coercive context and imprisonment for criminal contempt or for another criminal offence. The person imprisoned will be regarded as having engaged in anti-social conduct. Yet, as we will discuss in greater detail below, the reason why waiver and

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14 ALRC Research Paper No. 6, para 41.

15 Cf *Murray v Ireland*, [1985] IR 532 (High Ct, Costello, J) (affirmed Supreme Court, unreported, 14 February 1991); *The State (Gallagher) v Governor of Portlaoise Prison*, [1987] ILRM 45 (High Ct, Lynch J, 1984).

discontinuance are permissible is that proceedings for civil contempt have not such a dominant public or social dimension as to dispense with their primary function as a support for individual entitlements (and related wishes).

Secondly, it may be argued that imprisonment hurts not merely the contemnor, but also his family and friends, financially and emotionally. Where the contempt relates to a family dispute (such as in relation to custody of children), imprisonment can exacerbate the hostility between spouses and encourage feelings of guilt and conflicts of loyalties among children. It is true that any sanction will have an overflow effect on others - a fine, for example, may bankrupt the contemnor and lead to the financial ruin of his family, the sale of the home, and consequential disturbance in family life. Nevertheless, imprisonment may be considered to be far more likely to result in serious damage to persons other than the contemnor.

The case in favour of retaining imprisonment as a sanction for civil contempt is that, while it is not suitable for certain instances of recalcitrance, it has a necessary role in bending the will of most of those persons who can not be brought to order by lesser sanctions. Of course there is a small core of contemnors for whom even prison is not a fully effective sanction: we will consider what best can be done with them presently. But it is clear, in this country and in other common law jurisdictions, that imprisonment or the serious and fully credible threat of imprisonment, operates successfully in most cases.

Where imprisonment is not serving an exclusively coercive function, the arguments in relation to its use in civil cases are somewhat different. We think it more appropriate to deal with them in the context of the more fundamental issue of whether civil contempt proceedings should continue to have any punitive functions.

We are tentatively of the view that it would be wrong to exclude imprisonment as a sanction in civil contempt proceedings and accordingly we recommend its retention.

2. Should Imprisonment Continue to be Open-Ended?

We now must consider whether imprisonment for civil contempt, so far as it has a coercive goal, should continue to be open-ended.

The case in favour of replacing open-ended imprisonment by imprisonment for a fixed term (subject to earlier release on the contemnor's purging his contempt) rests on three main arguments: that it best achieves the coercive goal, that it protects the standing of the courts and that it is the most just solution relative to the defiant contemnor. Let us examine each of these arguments in turn.

(a) How best to achieve the coercive goal?

It might be thought self-evident that open-ended imprisonment best achieves the coercive goal, in that it furnishes the contemnor his own key. His stubbornness may give way after the experience of a night in a prison-cell, it may last a week, a year, or even longer, but he is the only person in the world who can know how long it will take. It has, however, been suggested[16] that contemnors who disobey orders in civil proceedings fall into two main categories: "those who obstinately refuse to obey in any circumstances, and those who can be persuaded to obey by the threat of committal or by, at most, a fairly short stay in prison." If this is so, it might seem reasonable to replace open-ended imprisonment by a fixed term -even a short fixed term - since this will have sufficient coercive force on the second category of contemnor, while no term - fixed or open-ended - will have any effect on the obstinate contemnor.

As against this, it may be argued that, while perhaps contemnors may show *tendencies* towards the type of categorisation suggested above, there are cases which fall between the two categories. In these instances, a seemingly immovable contemnor has moved after a period in prison. The task of identifying contemnors in advance would be a difficult one. Moreover, the replacement of open-ended imprisonment could have the effect of encouraging some contemnors who would otherwise have ultimately conceded to hold out in their defiance.

(b) How can the court's standing be best protected?

From time to time an obstinate contemnor is released, not because he has purged his contempt, but because the court, realising that the coercive intent of imprisonment has failed, considers it appropriate to release him, whether on humanitarian grounds or simply because of the futility of leaving him incarcerated, having regard to the nature of his contempt and the implications for others. The Phillimore Committee argued as follows:

> "Obstinate contemnors have to be released eventually, despite non-compliance. A fixed term would save the appearance of a climb-down by the court and would obviate the need for an application for release and uncertainty as to the appropriate timing of it".[17]

The phenomenon of a court's climb-down is particularly apparent to the public where a person seeks a form of martyrdom by refusing to give an undertaking that he will comply with an order. This may be in the context of a private dispute, where public sympathy may sometimes swing behind a "small man" in his battle with a large, faceless, institution, such as a government department or a statutory authority.[18] Here there may be no

16 By the Phillimore Committee, in para. 172 of its Report.

17 *Id.*

18 Cf. the Law Reform Commission of Australia's *Report on Contempt of Court*, para. 542.

issue of principle at stake (save in the mind of the contemnor[19]) and public sympathy will depend exclusively on the relative powerlessness of the contemnor, with which and whom the public identifies. In other cases, the contemnor will be raising an issue of public debate. He may be arguing that the order prohibiting his conduct is (contrary to the court's averment) unconstitutional, or, more radically, that while no constitutional issue arises, he should be permitted to engage in this conduct, in breach of the order, on other moral grounds. Even more fundamentally, he may assert the right not to comply with a court order because it conflicts with his conscience, in the sense that, solely by virtue of the fact that according to his value system this conduct is permissible or required, his conduct on that account must be permitted, even in the face of a court order. Of course, the level of public interest in any of these claims in any particular case of defiance will depend on a number of contingent factors, such as the nature of the order and the breach, the identity and personal and social circumstances of the contemnor and the political relevance of the issues at stake or in the background.

Understandably, a judge faced with an application for committal for contempt in such a case may not relish the dilemma of either imprisoning the contemnor or bowing to his principled obstinacy. If the judge imprisons the contemnor and time passes, public controversy may increase; there may be heated debates in the Oireachtas and in the media; the contemnor may be periodically brought before the court to see if he has purged his contempt; each announcement of continuing defiance may further fuel controversy. If eventually the court decides to release the contemnor without his having purged his contempt, the authority and standing of the court may be considered to have been severely damaged. A fixed-term solution may seem an extremely useful protection for the dignity of the court in public martyrdom cases.[20]

As against this, it may be said in reply that the fixed term strategy does not in fact protect the court's authority and standing. In the type of case we have just considered, the sentencing of a martyr to a fixed term of imprisonment may be just as productive of public controversy as an open-ended order. As time passes, and the date for release gets closer, the issue may be kept alive in a way which would not always happen in respect of open-ended contempt. Moreover, when eventually the contemnor comes out of prison, unrepentant, this may be more damaging to public confidence in judicial authority than if he had been let out by the judge. Not all releases in open-ended cases are perceived as involving a climbdown by the court. Some may be seen to involve a tempering of justice with mercy or a commendable recognition of common sense realities. There is, moreover, the prospect that a contemnor,

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19 The contemnor's characterisation of an issue as one of principle should not always be taken at face value. Of course in many cases there is an issue of principle, however unlikely and unattractive to most reasonable people, at stake. But in some cases, the alleged principle is so incoherent and the contemnor is so clearly affected by other factors (frequently of an emotional nature) that in truth no real issue of principle is at stake.

20 Cf. the Law Reform Commission of Australia's *Report on the Law of Contempt*, para. 542.

having served his fixed term, will come out of prison ready to repeat the conduct which led to his original imprisonment. The strategy of fixed term imprisonment may thus in some cases not protect courts from continuing embarrassment and difficulty.

(c) ***Justice for the contemnor***
It is sometimes argued that considerations of justice for the contemnor require a fixed term rather than open-ended imprisonment. Thus, the Law Reform Commission of Australia state:

> "In considering the impact of an open-ended prison sentence, it is important to bear in mind that many sentences actually served for serious criminal offences such as robbery or manslaughter, are often no more than one or two years in duration, particularly if it is a first offence. The sentence imposed by the court may be substantially shortened by remissions and by a grant of parole. There is a grave risk that, because a contemnor who stubbornly refuses to obey an order has provoked a direct confrontation with the court, a judicial determination to come out on top may cause the contemnor to suffer a sentence which is manifestly out of proportion with the sentences actually experienced by major criminal offenders."[21]

This argument may be questioned. It is a matter of pure contingency that a particular sanction, voluntarily undergone by the contemnor in court proceedings, may bear any particular comparison, in terms of its quantum, with a sanction imposed in criminal proceedings to achieve an entirely different purpose (which is related, among many competing factors,[22] to the gravity of the offence and the culpability of the offender). It is true, of course, that a long self-imposed imprisonment, however different it may be from a prison sentence of the same length in criminal proceedings, is something which inspires a humanitarian desire among most people to resolve the situation, but no assistance in analysis can be derived from coincidences of time periods, any more than comparisons of the respective amounts of damages in torts and contracts litigation contributes to clarity of thought as to the appropriateness of these amounts in either area of the law.

There is also a practical, but important, difficulty with the argument in favour of fixed terms of imprisonment based on considerations of justice to contemnors. This relates to the *length* of the term. As we have seen, the rationale in favour of a fixed term postulated by the Phillimore Committee was that contemnors fall into two categories: those who will never give in and those who can be persuaded to obey by the threat of committal "or by, at

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21 *Id*, para 543.
22 As well as retribution, sentencing may reflect the goals of deterrence, rehabilitation or containment, for example.

most, a fairly short stay in prison".[23] Assuming the truth of this somewhat debatable contention, where does it leave the question of the duration of the fixed term?

Presumably the answer is that the term should be short - thus explaining the period of two years chosen by the English legislation of 1981.[24] But would that be just in a case where the contempt was to be a very serious nature, involving prejudice to the life, safety, health or property rights of another person?[25] The idea that such a contemnor would face only a maximum two years' imprisonment (or other defined short period) by reason merely of a guess as to the general likelihood of contemnors' giving in within this period seems unattractive.

Our Tentative Conclusions

We have come to the tentative conclusion that the balance of the argument is against the introduction of a fixed term of imprisonment to deal with the coercive function of civil contempt. It would introduce an added potential for injustice for no substantial gain. Its asserted merits in relation to assisting the standing of judges are speculative and unconvincing. While we have not heard criticism of the practical operation of section 14(1) of the 1981 legislation in England, we do not consider this to be of great significance, since no research has been published on the subject, so far as we are aware.

We considered, but rejected, the option of a fixed term sanction where the contemnor would not be permitted to be released from prison on purging his contempt. He would be told by the court that he would immediately be sentenced to (say) two years' imprisonment - to be served as any defendant in any other criminal proceedings would have to serve the sentence[26] - unless he purged his contempt there and then. Thus the threat of imprisonment would remain coercive rather than punitive in its rationale, but the court would immediately discover whether or not the coercion was successful. It would be interesting to discover whether such a strategy would be effective, but we are of the view that even an experiment on these lines would be so unjust to a contemnor that it has to be rejected. It would amount to cruelty or inhumanity by placing a contemnor under too stark a choice.

It is perhaps worth pondering on why one should shy away from a sanction on these grounds. Surely, it may be said, the whole purpose of coercion is to coerce. If (as is the experience) the threat of imprisonment on a day-by-

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23 Phillimore Report, para. 172.

24 *Contempt of Court Act 1981*, section 4(1).

25 Of course, in some cases such conduct or threatened conduct would also constitute a crime, but in far from every case would there be an alternative remedy in criminal law, especially where the contemnor had yet done the threatened criminal act and refused to give an undertaking that he would not do it: cf *Ryan v DPP*, [1989] IR 399 (Sup Ct, 1988).

26 Subject to the normal rules as to commutation and parole.

day basis, with the option for the defendant to purge his contempt at any time, is not entirely effective, the answer may be to make the threatened sanction more severe. The prospect of a fixed term sentence (with no possibility of the defendant's purging his contempt) may well do this. Why, therefore, should it be rejected? The answer may be reached gradually. It surely must be accepted that the threat of life imprisonment, seriously and credibly made, would not be an appropriate coercive sanction for breach of most, if not all, court orders.

Where the threat is to imprison for even (say) five years, the intuitive response is again likely to be that people should not be subjected to so stark a choice. Why? Because it is a denial of respect for human freedom of choice to load the dice to the point that the victim of the threat simply has to comply. This gets us to the heart of the concept of coercion. A truly coerced act is not a free human act: it lacks the quality of moral significance. A contemnor is one who shows disrespect for the law[27]; but that does not justify subjecting him to threats which remove from his conduct the quality of moral significance. Our legal system is premised on freedom of the will: to coerce so as to destroy this freedom would be to transform our legal system into one of totalitarian blackmail.[28]

The reply to this analysis may be that it is wrong to conceive of the proper role of coercion in civil contempt proceedings as being to give the contemnor a reasonable chance to escape. The idea that coercion can be legitimate only when there is a realistic prospect of the inefficacy of the threat may seem to some people to be eccentric. Nonetheless, it is our conviction that the coercive aspect in civil contempt proceedings must retain an element of generous free choice for the contemnor. The present approach, whereby imprisonment unfolds gradually, on a day-by-day basis, with the contemnor retaining the key to his freedom, seems to us to incorporate that requirement of freedom in a satisfactory way.

We should also refer to another difficulty with the idea of a fixed term with no possibility of the contemnor's purging his contempt. If such an approach were permissible, the question of the *duration* of the term would necessarily arise. One solution would be to threaten a massive term of imprisonment

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27 We do not here address the question of a *conscientious* breach of a civil order, where the person breaching the order seeks to invoke a higher legal norm - the Constitution or natural law, which underlies many of the fundamental rights provisions in the Constitution, as well as the entitlement of a defendant to just procedures in criminal cases.

28 One is here reminded of *Zarine v Owners of SS "Ramara"*, [1942] IR 148 (High Ct, Hanna, J, 1941), a decision on sovereign immunity. The captains of certain Estonian and Latvian vessels which were in port in Cork had signed "certificates of delivery" of their vessels to agents of the government of the USSR following the invasion of these countries by the USSR and the nationalisation of private property, including the marine fleet. The captains had done so after having been apprised of a law which stated that captains disobeying the orders of the Government would be regarded as traitors "whereby members of their families and near relations are made responsible". (See further *Binchy, (Conflicts)*, 176-178).

such as fifteen years in the expectation that this would be likely to bring most contemnors to their senses regardless of whether their default was in relation to a serious or trivial matter. The problem with a uniformly terrifying threat such as this is, of course, that of lack of proportionality, which would almost certainly be unconstitutional.[29] Yet if the court sought to introduce an element of proportionality, the efficacy of the threat would inevitably be weakened.

B. Fines

In England and Australia over the past couple of decades there has been an increasing resort to fines as an alternative or supplement to committal or sequestration.[30] This option has existed for many years in the United States.[31] Fines were initially perceived as serving an exclusively punitive function for breaches which had already occurred at the time the court ordered the payment of the fine; gradually there has been a tendency to use the fine as a coercive remedy whereby the court intimates to the transgressor or would-be transgressor that if he or she engages, or continues to engage, in conduct in breach of an order, the court will fine him or her at a specified *per diem* rate.

We now must consider the merits and drawbacks of fines as a sanction for civil contempt. As regards cases of a completed breach of a court order, where the court's subsequent intervention is punitive rather from coercive, the utility of fines seems beyond argument. The coercive function raises somewhat different issues. Its exercise in this context tends in general to be gradual rather than immediate. Thus, the threat of imprisonment as a sanction for disobedience to a court order is, of its nature, a threat of a slowly unfolding sanction. Just as the experience of being in prison is intended to act progressively on a contemnor so as gradually to force him or her to purge his or her contempt, so fines may be designed to have a similarly progressive effect. Fines may be considered a suitable sanction where the contemnor is not a good candidate for imprisonment, on humanitarian or health grounds, for example, or where one of the contemnors is a corporate entity such as a company or a union. The fear of bankruptcy may be of more potent force than the prospect of one or two of their members going to gaol for what is likely to be a short period in circumstances where the political fallout may on balance be beneficial.

Nevertheless the policy issues are more subtle than might at first appear. As the Law Reform Commission of Australia point out, an accruing fine:

> "has a dual nature: it is both coercive and penal. It is coercive when

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29 Cf. the discussion in *The People (AG) v Giles* [1974] IR 422 (Sup Ct).

30 See *Borrie & Lowe*, 448-450, *Miller*, 32-33, 445-446, the Law Reform Commission of Australia's *Report on Contempt of Court*, paras. 506, 548-551 (1987).

31 See Dobbs, *Contempt of Court: A Survey*, 56 Cornell L. Rev 183, at 275-278 (1971).

it is threatened, but penal when it is applied. On this basis, it is distinguishable from the traditional coercive sanctions of indefinite imprisonment and sequestration, which are coercive both when the court orders the sanction and at the time of actual application. The crucial difference with an accruing fine is that, by the time of the collection of the amounts that have accrued, the original order will most likely have been complied with. At that point, the fine is essentially penal and incurred in respect of past disobedience. A coercive penalty is assessed with reference to the strength of the opposition to be coercive; a punitive penalty with reference to the culpability of the person to be punished .... What was appropriate, having regard to the considerations relevant to coercion may, in retrospect, be found to be quite inappropriate having regard to the considerations relevant to punishment."[32]

We appreciate the force of this analysis, but we agree with the Commission that, if accruing fines are to retain any prospect of efficacy, the court simply has to enforce the fines it ordered even if the dispute is over.[33]

Our conclusion therefore is that the courts should have power to order fines, whether as punitive or coercive sanctions, and whether on an accruing basis or otherwise. We so recommend.

Mens rea

We now must consider the question whether the legislation should include some delimitation of the mental state necessary to render a person liable for civil contempt. At present there is no very clear rule; the courts have been anxious to prevent defendants from escaping liability on the basis of their professed ignorance of the fact that their conduct amounted to contempt.

Four possibilities may be considered. First, the law could require that a person should be liable if he intentionally broke a court order in the sense that he was aware of the order (in either a specific or a general sense[34]) and acted (or failed to act) with the intention of breaking it. Secondly, liability could rest on recklessness (perhaps as an alternative to intentional breach). Thirdly, a person could be held responsible when he ought to have been aware that his conduct (or inaction) constituted (or, more broadly, risked constituting) a breach.

Fourthly, a regime of strict liability could be imposed where the lack of reasonable possibility of knowing or suspecting that one's conduct (or inaction) amounted to a breach of an order would not afford an excuse.

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32 Law Reform Commission of Australia, *Report on Contempt of Court*, para. 550 (1987).

33 *Id*, para. 551.

34 Cf. *James McMahon Ltd v Dunne*, 99 ILTR 45 (High Ct, Budd J, 1964), *J.T. Stratford & Son Ltd v Lindley*, [1965] AC 269 (HL (Eng)).

Our preference is in favour of the third of these options. It probably comes closest to the test which in practice the courts apply. A fortiori, liability should attach where the defendant acted, or failed to act, with the intention of breaching the order. We so recommend.

Defence of reasonable excuse

We now must consider whether the legislation should include a specific defence of reasonable excuse. In practice, courts will listen to what defendants have to say in explanation of why they acted contrary to the terms of the order; undoubtedly the existence of a reasonable excuse will greatly encourage the court not to make a finding of liability; but should the legislation provide that reasonable excuse *must* afford a defence in every case?

It is difficult at first sight to see why it should not. The idea that a defendant who has a reasonable excuse for acting as he or she did should nonetheless be held in contempt seems contrary to basic notions of justice. A practical drawback must, however, be confronted. In the context of custody and access to children and, to a lesser extent, maintenance, a person accused of contempt may claim that he or she acted contrary to a court order because of a *bona fide* belief that the plaintiff spouse or parent had acted or was likely to act in a manner detrimental to the child's interests. Such a claim is easily made; it would be unfortunate if it were to afford an unjustified means of excuse for breaching court orders. *We consider that the legislation should provide a general defence of reasonable excuse without further specificity save that it should also provide that the defence of reasonable excuse should not be available when the defendant's excuse relates to a matter on which he or she could reasonably have invoked the authority of the court in such circumstances as would have been likely to make it unnecessary for him or her to breach the order.* Thus, if, for example, a spouse could reasonably have applied to the court under the *Guardianship of Infants Act 1964* or of the *Family Law (Maintenance of Spouses and Children) Act 1976* for a variation or discharge of an order, he or she will not be heard to defend conduct in breach of that order on the basis of the defence of reasonable excuse.

Waiver and discontinuance

We must now consider whether the present rules relating to waiver and discontinuance should be modified. At present, where there is a breach of a court order, or of an undertaking made to the court, in civil proceedings, the party in whose favour the order was made or undertaken given is free to decide whether or not to invoke the contempt machinery. Having invoked it, he or she is free to call a halt to it before the court has dealt with the contemnor. As we have seen, the position in some other common law jurisdictions is moving away from such an absolute liberty.[35] First we examine

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35 Notably England (*Heatons Transport (St Helens) Ltd v Transport and General Workers Union*, [1972] ICR 285) and Canada (*Poje v AG for British Columbia*, [1953] 2 DLR 785).

the case for abolishing the entitlement to waive or discontinue contempt applications. Then we consider the case in favour of the *status quo*. Finally, in the light of these competing standpoints, we seek to arrive at tentative conclusions as to the best solution to the problem.

The case for abolition

The principal argument in favour of abolishing waiver and discontinuance is that the civil contempt machinery, while unquestionably benefitting the interests of individual litigants, also serves another important goal - of protecting the integrity of the judicial process. Every uncorrected act of disobedience to a court order saps the effectiveness of the system as a whole. This may be particularly so in cases of considerable public notoriety but it is also true in relation to other cases, since, apart from affecting the judges, parties and witnesses involved, they will be known to a wider circle of lawyers and the associates and relations of the participants. In particular areas of the law, the fact that contemnors are unpunished can encourage disobedience in others.[36]

The case in favour of the status quo

First it may be argued that, while all aspects of the legal process may be considered to reflect a concern for the efficacy of judicial sanctions, it would be wrong to concentrate on this element when the context is in fact concerned primarily with the facilitation and protection of private entitlements and expectations.[37] Civil contempt is not in most cases designed as an exercise in buttressing the efficacy of the judicial system.

Secondly, it may be argued that, if a person is free not to *initiate* legal proceedings when he or she has suffered a legal wrong, the same freedom should apply to his or her decision not to press those proceedings to the ultimate conclusion through resort to contempt proceedings.[38] As against this, it may perhaps be replied that, while of course there should be no insistence that all wrongs should be righted, there is a general social concern in the protection of legal interests and that it would be mistaken to assert that the sole matter of importance is the victim's attitude. This concern crystallises when litigation begins: at that point the victim engages in an activity with social dimensions, which are not completely dispensable at his or her whim. Society loses something when a litigant who has raised important issues,

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36 We would not wish to overstate this effect, since a would-be contemnor would have no guarantee that the other party would waive or discontinue. Nevertheless the phenomenon of widespread uncorrected contempt in relation to maintenance defaults or breaches of the terms of custody orders, for example, attributable to a general unwillingness to press an application for contempt, would be likely to encourage a general culture of disobedience.

37 A parallel may be drawn here with Hart's critique of Kelson's over-concentration on the role of sanction in the law: cf. H. Hart, *The Concept of Law* (1961).

38 Cf. the Australian Law Reform Commission *Report on Contempt*, para. 532 (1987).

possibly of general societal interest, withdraws from the process, whether through settlement[39] or otherwise.

Thirdly, it may be argued that a rule of law which insisted on a party's invocation of the contempt machinery to the bitter end would be likely to damage on-going relationships.[40] Family members, even if in serious dispute, may have relationships with each other which are likely to extend for many years into the future - as, for example, where the guardianship of a child is in issue. Similarly employer - employee relationships and, more broadly, employer - trades union relationships are not generally intended to founder on the first dispute.[41]

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39 Cf. Fiss, *Against Settlement*, 93 Yale LJ 1073, at 1085-1086 (1984) (footnote reference omitted):

> "The dispute-resolution story makes settlement appear as a perfect substitute for judgment ... by trivializing the remedial dimensions of a lawsuit, and also by reducing the social function of the lawsuit to one of resolving private disputes: In that story, settlement appears to achieve exactly the same purpose as judgment - peace between the parties - but at considerably less expense to society. The two quarrelling neighbours turn to a court in order to resolve their dispute, and society makes courts available because it wants to aid in the achievement of their private ends or to secure the peace.
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> In my view, however, the purpose of adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.
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> In our political system, courts are reactive institutions. They do not search out interpretive occasions, but instead wait for others to bring matters to their attention. They also rely for the most part on others to investigate and present the law and facts. A settlement will thereby deprive a court of the occasion, and perhaps even the ability, to render an interpretation. A court cannot proceed (or not proceed very far) in the face of a settlement. To be against settlement is not to urge that parties be 'forced' to litigate, since that would interfere with their autonomy and distort the adjudicative process; the parties will be inclined to make the court believe that their bargain is justice. To be against settlement is only to suggest that when parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality. Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself is a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal."

40 Cf. the Law Reform Commission of Australia's *Report on Contempt*, para. 532.

41 Cf. Effron, *Alternatives to Litigation: Factors in Choosing*, 52 Modern L Rev 480, at 484-486 (1989).

Finally, as a practical matter, if the victim of a breach of an order is not anxious to proceed with contempt proceedings, it will, in some cases at least, be difficult to obtain sufficient evidence of the breach without his or her co-operation.[42]

Our Tentative Conclusions

We have come to the tentative conclusion that there should be no change in the existing law on this aspect of the subject. The argument in principle does not seem to us to weigh sufficiently in favour of change, and the several arguments relating to the practical implications of a change in the law have considerable force. We considered, but rejected, a qualified change which would prohibit waiver or discontinuance in certain specified instances, such as where the order was made with respect to a child for the child's benefit[43] or in cases of flagrant disobedience.[44] We can see the initial attraction of such exceptions, but we think that, on balance, they would not be an improvement on the present law. As a matter of strict law, it may well be the case that children who are third party beneficiaries have *locus standi* in contempt proceedings, but, whether or not they do, the question of the adequacy of the protection of their interests ranges well beyond the narrow, and somewhat secondary, question of enforcement of orders through contempt proceedings.[45]

CONTEMPT IN RELATION TO FAMILY LITIGATION

Family litigation raises particular difficulties, in principle and in practice, in relation to contempt of court. The potential for contempt carries distinctive risks in this context. Several factors have been identified. First, defendants in family litigation are often required by court order to engage in ongoing conduct at specific times[46] or not to engage in certain acts.[47] When a

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42 Cf. the Law Reform Commission of Australia's *Report on Contempt*, para. 532.

43 Cf. the *Married Women's Status Act 1957*, section 8(1), which creates, in effect a *jus quaesitum tertio* in favour of children in relation to contracts made for their benefit. As to the scope of this provision, see *Burke v Dublin Corporation*, Sup Ct, 26 July 1990. Whether there is any privity of contract rule in Ireland is a matter of uncertainty. See *id*; cf R Byrne & W Binchy, *Annual Review of Irish Law 1987*, 113-114 (1988).

44 A matter addressed by the *Phillimore Committee Report*.

45 It is, perhaps, worth noting that the question of the relative rights of parent and child to *initiate* proceedings in respect of an alleged interference with the rights of the child or an alleged breach of an obligation in respect of the child is a matter of some sensitivity. Thus, the *Family Law (Maintenance of Spouses and Children) Act 1976* made a distinction between families where spouses were living together and where they were not. In the former case, the legislation provided that an for a maintenance order should be available only to a spouse (even where the order related to a child) but, where the spouses were living apart, third party applications were made possible. Applications under the *Guardianship of Infants Act 1964* may be brought by spouses and not children; similarly with regard to barring order applications under the *Family Law (Protection of Spouses and Children) Act 1981*.

46 For example, to make periodical maintenance payments, or to exercise or permit access rights at specified times.

47 For example, not to assault or molest another member of the family.

defendant fails or bluntly refuses to comply with one of these orders, the court may have little option but to resort to its contempt powers.[48] Secondly, unlike commercial or torts litigation, which frequently involves once-off compliance by the loser, family litigation often involves responsibilities extending over many years into the future[49]: maintenance or custody cases usually have this element.

Thirdly, family disputes can have an element of bitterness which does not characterise other disputes leading to litigation:

> "The orders made by the court at the end of the case can amount to a significant personal defeat for the losing spouse. They will normally relate to matters about which he or she has deep and intense feelings: for example, an order that a person should lose custody of a child, or should pay periodical maintenance to a hostile spouse, or should leave the matrimonial home. Even when orders of this nature are made with the consent of the spouses, rather than by a judge adjudicating on their respective claims, there often remains an underlying resentment, which may find expression later in failure to comply".[50]

Internationally, courts dealing with family law have faced a dilemma to which there is no easy solution. Firm enforcement of orders may increase levels of resentment on the part of the disobedient party; the sanction of imprisonment may, moreover, damage the welfare of the family as a whole. On the other hand, reluctance to enforce these orders may place the other family members at serious physical, moral or economic risk, as well as encouraging spouses already disposed to disobey to take advantage of the court's lenience.

Another matter which may be mentioned at the threshold of our analysis is the troublesome question of sex discrimination. Although family legislation[51] has for many years been drafted on the basis of sex equality, the social realities are such that most wives have custody of children in cases of parental separation and most husbands work outside the home as the only or major breadwinner. In these circumstances, any reluctance to enforce with vigour court orders in respect of particular types of family litigation may be perceived as sexist. For example, if the court does not thus enforce maintenance orders this may be criticised for being unduly favourable to men; if it fails to enforce

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48 Cf. Law Reform Commission of Australia's *Report on Contempt*, para. 585.

49 Cf. *id.*

50 *Id.*

51 E.g. the *Guardianship of Infants Act 1964*, the *Succession Act 1965*, the *Family Law (Maintenance of Spouse and Children) Act 1976*, the *Family Home Protection Act 1976*, the *Family Law (Protection of Spouses and Children) Act 1981*, the *Family Law Act 1981*, and the *Judicial Separation and Family Law Reform Act 1989*. Cf. Binchy, *Family Law Reform in Ireland: Some Comparative Aspects*, 25 Int. & Comp. L.Q. (1976), Binchy, *The Sex of a Parent as a Factor in Custody Disputes*, 77 Incorp. L. Soc. of Ireland Gazette 269 (1983). *The Status of Children Act 1987* retains distinctions based on sex so far as the entitlement to guardianship is concerned.

orders for the provision of access, it may be criticised for favouring women, who will more frequently than men be guilty of this type of disobedience because they will usually be custodians.

A further difficulty may be mentioned. The thrust of the recent legislation on judicial separation[52] has been to encourage reconciliation, mediation and private resolution of family difficulties. The court is charged with the responsibility of giving effect to this goal.[53] Spouses may thus be surprised when this "softly, softly" approach is sharply contrasted with the threat (or reality) of imprisonment for breaking an order of the court. They may feel aggrieved that they had been encouraged to think of themselves as having a major, authorised, role in generating their own solutions for the future, when the court retained sharp teeth behind a mask of non-judgmental solicitude.

Having mentioned these difficulties we turn to consider whether any changes to the present law of contempt in relation to family litigation are desirable.

Should Contempt Proceedings in Family Litigation be Abolished?

First we consider the radical proposition that contempt proceedings in family litigation should be abolished. The principal argument in favour of doing so is that they are counterproductive to the welfare of the family as a whole. They necessarily involve an accusation of default to which frequently a reply by way of justification and counter-accusation will be attempted by the spouse whose imprisonment in sought. This process can involve hurtful and damaging recriminations. The prospects of future harmony between the spouses will be reduced and the likelihood increased of worsening the anger and tension which may affect the relationship between the parents and their children [54]

Secondly, again in contrast to many commercial disputes or torts litigation, the issue of contempt in family cases cannot be looked at in isolation:

> "The question whether the alleged breach of an order actually occurred is usually only one aspect - often not the central aspect - of a broad, continuing dispute between the parties. To focus on it exclusively is to distort the issue."[55]

Finally, and perhaps by way of disclosing more clearly the philosophic norms underlying the first two arguments, it may be said that:

> "[a]t a fundamental level, it is inappropriate for a court dealing with intense personal relationships and human emotions to use severe penal sanctions such as imprisonment, which are suitable only for those who

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52 *Family Law Reform Act and Judicial Separation Act 1989.*

53 Cf. *id.*, sections 5 and 6.

54 Cf the Law Reform Commission of Australia's Report, para. 603.

55 *Id.*

commit serious criminal offences. If the family court cannot secure compliance with its orders by other less savage means, it should acknowledge the fact that, at the end of the day, the role of the law in regulating personal relationships is subject to major limitations."[56]

To these arguments two points may be made by way of reply. The first is one of practical common-sense. If court orders are not enforceable, they will tend not to be obeyed. Why should a defendant obey a sanctionless command? If he or she chooses to act in accordance with the content of that command, this will often not be obedience but merely the result of a coincidence of views as to what should be done. The second point is one of principle. If there are to be no contempt proceedings because orders that are enforced are damaging to family life, then there is little logic in retaining in our legal system the legal principles which are the justification for the making of the orders. In other words, so far as the case in favour of abolishing contempt proceedings has a claim to attention, it amounts in substance to the argument that imposing enforceable legal obligations on family members in relation to the care, maintenance and protection of other family members is, on balance, undesirable. This argument may seem so radical as to be incapable of being put forward with any degree of seriousness by anyone. Yet internationally such an argument is increasingly heard, in both specific and general contexts.

In the specific context, some proponents of change internationally have argued that imposing ongoing maintenance obligations on divorced fathers relative to the children of their first marriage is wrong, because, among other reasons, it may increase fathers' feeling of resentment to their children.[57] In the general context, some have proposed mediation and other forms of non-judicial dispute resolution as the sole means of regulating family relationships, thus removing the quality of legal bindingness from legal rights and responsibilities as between family members.

We are of the view that the arguments in both of these contexts are unacceptable. They involve the withdrawal of social support, through law, of justice in family life. Spouses, parents and children are capable of behaving unjustly at times towards each other. A man may beat up his wife periodically: for the law to withhold due protection to the wife because "it may damage the prospects of a reconciliation"[58] or may make the man resentful would be to treat the wife unjustly. A parent who fails to maintain his or her child is behaving unjustly towards the child, and the law should not neglect the child's claim in justice to the law's protection.

There is a wider issue at stake. Society has a rightful interest and

56 *Id.*

57 This is the position of more radical proponents of the rights of "second families" after divorce.

58 Empirical studies of matrimonial violence indicate that in some cases the violence functions as part of a cyclical pathological process of alienation and reconciliation between spouses.

responsibility in ensuring that unjust behaviour in family life is not treated as a private matter. The law should be concerned to protect family members against assault, sexual abuse, neglect and other injustices. If society leaves family life exclusively to interpersonal regulation, and if its laws fail to discourage and respond to unjust behaviour within families, this is damaging to family life in society.

We do not wish to be misunderstood on this issue: our concern is to isolate, identify and refute the philosophic presuppositions underlying the argument that family litigation should not include contempt powers. We are fully conscious of the desirability of the courts' being sensitive to the wider ramifications of any orders they may make so far as the continuity and quality of family relationships are concerned.

The Australian Compromise Proposal

It may assist the analysis to refer to a compromise proposal which the Law Reform Commission of Australia tentatively advanced in its Discussion Paper on Contempt[59] but rejected in its subsequent Report. The Commission took the view that the competing considerations of effectiveness of court orders and concern for the sensitivities of the parties could be resolved by rendering more explicit in the legislation the criteria on which the court might exercise its discretion to abstain from proceeding to determine liability or impose penalties for non-compliance, on the basis that overriding considerations justified this course. These criteria consisted of the following:

> the nature of the order that had been breached;
>
> concerns as to the integrity of the family, the welfare of the children, and the relationship and possible reconciliation of the spouses;
>
> the extent to which hearing the application, or imposing a penalty, would be detrimental to these concerns;
>
> whether the order which was alleged to have been breached had subsequently been complied with;
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> whether the applicant had been alleged to have not complied with any order;
>
> whether the alleged contemnor had sought to justify his or her alleged breach on the basis of changed circumstances since the making of the order, especially those relating to the welfare of children of the marriage;
>
> the extent to which the alleged breach could be described as overtly and

59 ALRC DP 24, *Contempt and Family Law*, para. 27.

publicly directed towards the court;

the availability of other methods of enforcing the order;

the nature and outcome of any other proceedings (especially criminal proceedings) relating to the alleged disobedience; and

the frequency of the alleged disobedience and the degree of injury suffered by the applicant.[60]

It is interesting to find that the overall tenor of responses in submissions and consultations was negative. In their subsequent Report, the Commission recorded that:

> "[t]he chief objection was that the express conferral of a discretion on the court, not merely to refrain from imposing any sanction but actually to refuse to hear and determine contempt proceedings, would be likely to encourage the Family Court to maintain, if not enhance, a 'soft' attitude towards disobedience. 'Shunting'[61] might no longer be an informal process, but would instead take place under cover of legal authority: in the words of a speaker at the public hearings, the proposed discretionary provisions would be 'just setting out a list of excuses which the judges had to memorise in continuing to rationalise their existing timidity'. By condoning non-compliance to the extent of not even investigating and determining the truth of an allegation that it had occurred, the Family Court would appear to be conveying the message that its orders, unlike those of other courts, did not really have binding force. In the opinion of these critics, it was essential that, at the very least, there should be a formal finding on the issue of non-compliance, even if there were good grounds for the court to refrain from imposing a sanction. Anything short of this would reinforce a public assumption that the Family Court's orders were not worth the paper they were written on."[62]

The present position in Ireland, so far as we are aware, is not the same as was the position in Australia at the time of the publication of the Discussion Paper there. We have not been told of any widespread judicial reluctance to exercise the contempt powers in cases which call out for their use. Thus we can look with some degree of dispassion at the Law Reform Commission of Australia's proposal. Our own view is similar to that of the Commission in its Report. We do not see any benefit in a solution on the lines proposed

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60 See the Law Reform Commission of Australia's Report, para 606.

61 That is, the process of actively encouraging spouses who make contempt applications to postpone the hearing and to attempt to resolve the dispute with the allegedly offending spouse through some alternative means, usually involving counselling and negotiation: cf. *id*, para. 599.

62 *Report on Contempt*, para. 607.

in their Discussion Paper. Our courts already possess a full discretion when deciding whether or not to attach or commit for contempt. It is worth noting that in *Ross v Swan*[63], O'Hanlon J invoked the English decision of *Danchevsky v Danchevsky*[64] in support of the approach that the court should be reluctant to use its contempt powers when the object of the litigation can be achieved by other means. *Danchevsky* was a family law case and is of considerable relevance to the matter here discussed. The wife had left the matrimonial home, accompanied by her children, and had later been granted a divorce. She obtained a declaration from the registrar that the family home was held by herself and her husband jointly in equal shares, and an order for its sale. Nevertheless the husband refused to recognise that the marriage had been dissolved; he made it clear that he was going to ignore the order for sale and that he was going to remain in the home. He offered his wife use of half of it if she wished. Thereafter the court ordered that the husband should give up possession and co-operate in the sale. The husband failed to comply with this order, and the wife applied for his committal to prison. On the refusal of the husband to give an undertaking to comply with the order, he was committed for not less than three months, unless he should agree to comply with the order.

The husband's appeal to the Court of Appeal was successful. Lord Denning MR said:

> "Take first the committal order for an indefinite term ... [The Rules] contemplate an indefinite order by which a man stays in prison indefinitely until he purges his contempt ... But that is not the only kind of order available. Both the County Court and the High Court have power to make an order to imprison for a fixed term ... It is often a question which order should be made. It seems to me that when the object of the committal is punishment for a past offence, then, if he is to be imprisoned at all, the appropriate order is a fixed term. When it is a matter of getting a person to do something in the future - and there is a reasonable prospect of him doing it - then it may be quite appropriate to have an indefinite order against him and to commit him until he does do it. But if there is no such prospect - as here - there should not be an indefinite term. If he is to be imprisoned at all, it should be a fixed term for his past disobedience ..."[65]

The Master of the Rolls went on to say:

> "What then should have been done? The object was to see that the order of the court was obeyed - that the house was sold for the benefit of both parties. To achieve this, it was not necessary to send the man to prison. Whenever there is a reasonable alternative available instead

63 [1981] ILRM 416.
64 [1974] 3 All ER 934 (CA).
65 *Id.*, at 937.

of committal to prison, that alternative must be taken. In this case there was a reasonable alternative available. It was this: to enforce the order for possession by a warrant for possession, to sell the house, and to make the conveyance of the property by means of an instrument to be signed and executed by a third party on the direction of the court ...

Counsel for the wife submitted that the committal for three months was done to punish the husband - to punish him for his disobedience in the past in not giving up possession. I do not think this was an appropriate case for punishment, certainly not for imprisonment. The husband was obstinate and misguided. But he was sincere. The right way of dealing with the matter was to take steps to enforce the order of the court, but not to imprison him. That would do no good to him or to anyone. It would put him out of work and make him unable to pay maintenance for the children or do anything".[66]

With a discretion of this breadth already part of our law, there seems to us no particular benefit in having the legislation list criteria which may be relevant in guiding the court in the exercise of its discretion. An exhaustive list would clearly be mistaken; equally a weighted, albeit open-ended, list seems on balance to be unhelpful. In truth, cases vary so much that the decision whether or not to imprison must inevitably be governed by the totality of circumstances in the particular instance. Sometimes the case may call for a stern response; other times a gentler strategy may seem desirable.

Enforcement of Maintenance Obligations

We must consider briefly the question of the propriety of imprisonment as a means of enforcing maintenance orders. Under present law, section 8 of the *Enforcement of Court Order Act 1940,* as amended by section 29 of the *Family Law (Maintenance of Spouses and Children) Act 1976,* enables a defaulter whose failure to pay is due to his "wilful refusal or ... culpable neglect" to be imprisoned for up to three months.[67]

Our concern here is to address the single, narrow, issue of the retention of this power. We are fully conscious that the questions of the nature and scope

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66 *Id.* In *ED v FD,* High Ct, 23 October 1980 (1979-265P), Costello J exercised his discretion not to commit a husband who had threatened to reduce his income deliberately but swore that he had not in fact carried out this threat. The husband had abandoned his wife and had gone to England where he developed a very successful career. He had let arrears accumulate on the home where his wife and children lived. Costello J decided not to commit the husband because it appeared that "somewhat belatedly" he was taking steps to adopt a more realistic life-style and face up to his family responsibilities. It is difficult to see how the exercise of discretion in cases such as this would benefit from the listing in the legislation of specific criteria.

67 See P Ward, *The Financial Consequences of Marital Breakdown,* 8-9 (Combat Poverty Agency, 1990).

of maintenance obligations and of their enforcement in general raise complex issues of social policy ranging well beyond the scope of this Paper. In a forthcoming work on Family Courts we hope to deal with aspects of enforcement in a far broader context.

The Case in Favour of Retaining Power to Imprison Deliberate Maintenance Defaulters

Several arguments may be made in favour of retaining the power to imprison deliberate maintenance defaulters.

(1) The specially damaging effect of maintenance default

Maintenance debts are not like commercial debts. Families inevitably need an effective economic base; without it there is nowhere to turn except to the State or to charity. A family, especially where there are children, cannot wind itself up, like a company can. It may go through a formal process, such as a separation agreement or a judicial separation, but thereafter the family members are still alive and just as much in need of financial support. Maintenance default can blight the educational prospects of the children and in more extreme cases lead to physical illness and malnutrition.

(2) The moral responsibility of marriage and parenthood

Marriage and parenthood are social functions, each involving responsibilities. These responsibilities in the case of marriage inhere in the freely chosen act of irrevocable commitment during the joint lives of the spouses. In choosing thus to commit themselves, the spouses exercise a freedom of the will which goes to the core of their humanity.[68] Central to marriage is its altruistic element. The responsibility to look after one's spouse (and, of course, children) is not some troublesome obligation imposed *ab extra* by society or a judge; on the contrary it springs morally from the very marital commitment itself. Naturally, its precise content in any case may be a matter for debate and disagreement; but what is beyond argument is that a spouse who *ought* to support the family but *will* not is a person who is in breach of a serious moral commitment.[69] For the law to ignore or trivialise this misconduct is, it may be argued, unjust.

(3) Efficacy of imprisonment

It may be argued that imprisonment, or the threat of imprisonment, is

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68 Where a person has gone through a ceremony of marriage which did not involve the exercise of free will on his or her part, marriage may be declared invalid: *N (otherwise N) v K*, [1985] IR (Sup. Ct.).

69 In *RK v MK*, High Ct, 24 October 1978 (1978-330Sp), Finlay J observed that "the obligations of a husband or a wife are not obviated but may be heightened by the sickness of a spouse".

effective in encouraging spouses who can pay maintenance but are not disposed to do so to make the necessary payments.

A study[70] conducted in Victoria of 300 maintenance files in the magistrates' court found that there were 101 orders for imprisonment, suspended so long as the respondent complied with an order for instalment payments. There were only 11 cases of actual imprisonment, of which seven were reportedly terminated within hours of payment of the arrears in full. Indications were that the other 90 continued to pay.

The National Maintenance Inquiry Report drew the conclusion that:

> "the high profile of imprisonment, suspended or otherwise, as an enforcement technique was out of all proportion to its actual rate of use, that is , the proportion of cases in which imprisonment for more than a few hours resulted ... Dorothy Kovacs' work appears to bear out the contention of enforcement officers who have worked both under the Family Law Act [1975] and the former system that the rate of actual imprisonment pre-1976 may have been overstated by opponents of the technique".[71]

The Law Reform Commission of Australia commented:

> "In other words, the real benefit of imprisonment is the threat of its use, and the real chances of injustice flowing from its use are likely to be small."[72]

A recently published empirical study in Ireland gives *some* support for the argument that the threat of imprisonment for wilful maintenance default contributes to the efficacy of the enforcement of maintenance orders. The study, conducted by Mr Peter Ward on the financial consequences of marital breakdown,[73] found that the arrest and committal procedure under the *Enforcement of Court Orders Act 1940,* did increase the rate of compliance with

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70 Dorothy Kovacs, *Matrimonial Proceedings Before Magistrates: The Family Law Jurisdiction of Magistrates under the Maintenance Act (Vic)*, unpublished thesis, cited and discussed by the Law Reform Commission of Australia in their *Report on Contempt of Court*, para 733 (1987) and their Discussion Paper No. 24, *Contempt and Family Law*, para 112.

71 National Maintenance Inquiry Report, para 15.44, quoted by the Law Reform Commission of Australia, DP No 24, para. 122, Report, para. 733.

72 Report, para. 733. The Commission went on to state (*id*) that their own research:

> "confirms that, under the Family Law Act, imprisonment for failure to pay maintenance has been very infrequent. Of the 136 cases involving prison sentences and recognisance for contempt in which the nature of the proceedings was recorded, only seven related to failure to pay maintenance. There was a sentence of six months, one recognisance of 2,000 dollars ad five sentences of between two and six months, which were suspended pending payment of the arrears. In each of these cases, it appears that payments were finally made."

73 P Ward *The Financial Consequences of Marital Breakdown* (Combat Poverty Agency, 1990).

a maintenance order, though a large majority of those who initiated this process still went unpaid. The study found that:

> "In only 18% of the 55 cases in which a committal order was made were the arrears paid. So what happened to those husbands against whom a committal order was made but yet persisted in their default? In only 3 of the 55 cases is it known for certain that the sentence was actually served, representing 5% of all cases in which a committal order was made and 1% of all husbands against whom a maintenance order existed. In other cases, the husband may never have been arrested and brought before the court or his whereabouts may have been unknown. In a majority of cases in which a committal order was made the arrears were never paid nor the sentence served."[74]

As regards effectiveness of enforcement on arrears, Mr Ward reported that:

> "12% of orders for which no enforcement proceedings were taken were fully paid. This compares with 11% of orders for which one request was made to the Clerk which were fully paid up, 17% of those for which two requests were made and 19% of those for which three or more requests were made. Overall, 14% of orders on which some enforcement steps were taken were fully paid up. Just over half of all orders fully paid up had some steps taken for enforcement under the 1940 Act.
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> It would appear that the more tenacious the maintenance creditor was in pursuit of the defaulter, the greater the chance of successful enforcement. We have already found a low success rate for enforcement proceedings when we examined them in isolation. When we look at the number of attempts at enforcement per live order we find that the chances of compliance increase with each additional attempt at enforcement .... The chances of compliance increase rapidly with the number of summonses issued for court attendance by the husband.
>
> However, the number of summonses involved was small and perhaps a truer reflection of the success rate of the enforcement procedure is given in Table 13, which shows a slower and steadier increase in the proportion of orders paid up in relation to the number of warrants issued for the arrest of the husband. When only one arrest warrant was issued the rate of compliance with such orders (9%) was less than that for orders on which no attempt at enforcement had been made. However, if four or more arrests warrants were issued, the rate of compliance more than doubled with one-fifth of all such orders being honoured. Overall, the possibility of an award having been paid at least once in the six months prior to the date of the survey was doubled if

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74 *Id*, p.40.

either an arrest warrant or a summons for attendance was issued ...

[O]ne committal order increased the rate of compliance by one-third compared with cases where no enforcement procedures were instituted. There was no change, however, when two or more committal orders were issued, although the number of orders in this category was small ...

Overall, while the use of enforcement procedures under the 1940 Act had some impact on the default rate, proceedings had to be instituted repeatedly in order to make a significant impact. Thus, women who sought enforcement of their orders had to be prepared to undergo the expense and inconvenience of regular trips to court to receive amounts which, in most cases, were lower than social welfare rates. While the procedure was effective for some, for the majority of those who made even repeated attempts at enforcement the end result was the same: default was widespread and in only a small minority of cases was maintenance paid when due."[75]

(4) The Social interest

Society has an interest in those who have family commitments discharging them. Of course a sense of realism must prevail, and a distinction drawn between cases where spouses are unable to pay and cases where they are perfectly able but unwilling to pay.

Provided the threat of imprisonment is restricted to cases of truly wilful default, it may be argued that there is an important social interest in retaining this sanction. Otherwise the burden of discharging the responsibilities of wilful defaulters falls unjustly on the shoulders of other members of the community. As the Law Reform Commission of Australia states,

> "[i]ntentional evasion of maintenance obligations may indeed be regarded as equivalent to tax avoidance, and just as the [State] has an interest in dissuading this conduct by whatever means it can, including criminal sentence, so too it should take similar action against maintenance defaulters."[76]

The case against imprisonment[77]

Several arguments may be made against the sanction of imprisonment for maintenance default. It is only sensible, at the threshold of our consideration of these arguments, to recall that the issue is not whether or not maintenance defaulters should be imprisoned, but the far narrower one of whether or not

75 *Id*, pp40-43 (Tables omitted).

76 Law Reform Commission of Australia's *Report on Contempt of Court*, para. 733 (1987).

77 See *id*, para 734, and DP No.24, para 113, *O'Connor*, 145-148.

the sanction of imprisonment should be retained as part of the Court's range of responses to *wilful* maintenance default. Quite clearly the idea of imprisoning all or the generality of maintenance defaulters, regardless of the question of the wilfulness of their default, would be misconceived. In assessing the merits of the arguments presented below, therefore, it is necessary to bear in mind the limited and quite specific focus of debate.

(1) Cost to the State

Imprisoning a wilful maintenance defaulter is very costly to the State. The amount which the State has to pay out in one year may be more than the amount the defaulter could have paid in maintenance in over a decade.

(2) Counter-productive solution

Imprisoning a wilful defaulter will often be counter-productive. During the period of imprisonment he or she will normally not be in a position to support the family. Having served the sentence, the defaulter may find that his or her employment prospects have been seriously damaged. The long-term result will be to reduce the financial resources available for the family.

In England the Finer Committee observed in their 1974 Report:

> "Everyone agrees that sending maintenance defaulters to prison is an essay in economic and social futility as far as the taxpayer is concerned. The defaulter has to be kept in prison where his future earning power is reduced, the wife and family upon whose maintenance he has defaulted fall upon the Supplementary Benefits Commission as do his second wife or mistress and her children if, as he may well have done, he has acquired another family. This might be a justifiable social cost if the result were to inculcate or to strengthen among the population at large a disposition to maintain their dependants. Not only is this proposition manifestly unsustainable in the light of a vast body of sociological knowledge about the family, but what little empirical knowledge we possess suggests that imprisonment hardly serves to deter even those who are imprisoned."

(3) Availability of other more effective remedies

There are many ways, other than imprisonment, of seeking to enforce an order for maintenance against a wilful defaulter. Attachment of earnings is, of course, the most obvious of these; but, if the defaulter has real or personal property, other remedies, such as a judgment mortgage or sending in the sheriff may be contemplated. If the *threat* of imprisonment is ineffective, then *actual* imprisonment, however satisfying it may be for the maintenance creditor, will not be likely to yield the outstanding money.

(4) Casting the net too widely

Some empirical studies of imprisoning debtors in general and maintenance defaulters in particular have found that it is not only the wilful defaulter who finishes up behind bars. In England, the Payne Committee, which reported in 1966, stated:

> "The evidence which has been put before us leads inevitably to the conclusion that the vast majority of debtors who are actually received in prison under orders of the County Courts are inadequate, unfortunate, reckless or irresponsible persons; they are, for the most part, not dishonest and do not therefore require punishment; many of them do not really qualify for imprisonment under the Debtors Act 1869 and we do not think that they would have been committed to prison by the courts if the system had been properly adapted to enable the persistent or dishonest debtors to be distinguished from the inadequate persons and if adequate evidence of the character, mentality, background and general circumstances of the latter at time of their arrest had been put before the court in addition to the sometimes meagre evidence of their means and assets."[78]

A study conducted by Professor David Chambers in Michigan found that the men in jail for maintenance default typically had "unsteady work histories as unskilled workers".[79] A high proportion had alcohol problems.[80]

(5) The psychological dimension

It may be argued that imprisonment is *always* inappropriate for maintenance default. This is because the obligation to pay a maintenance debt is surrounded by psychological factors which occlude the debtor's judgment in a way which has no counterpart in civil debts. In England the Finer Committee put this point well:

> "Unlike the ordinary civil debt, which can usually be cleared once and for all, within a foreseeable period, the maintenance obligation is a continuing one, lasting sometimes over very many years. It has often been contracted in the form of a court order under circumstances of emotional stress. It is connected with an intimate personal relationship. Its payment by a man who may be in any case hard put to it to make ends meet may give rise to further stress in the form of divided loyalties and sense of responsibility. The man's mind may be affected by anger and unreason. These are precisely the circumstances in which it seems

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78 Para. 982 of the Committee's Report.

79 Chambers, *Men Who Know They Are Watched: Some Benefits and Costs of Jailing for Nonpayment of Support*, 75 Mich L Rev 900, at 930 (1977).

80 *Id.* See further *id.*, fn.49. See also the Ontario Law Reform Commission's *Report on the Enforcement of Judgment Debts and Related Matters*, Part V, p.143 (1983).

to us the law should avoid punitive remedies, but - in combination with the normal civil processes for extracting money where it is available to be extracted - should be providing as a service of the court access to the advice, guidance and persuasion of [one] who can help such a man to resolve his problem."[81]

(6) Incentive to flee the jurisdiction

There is some empirical evidence supporting the common sense judgment that a taste of prison might encourage the defaulter not to reform but to flee the jurisdiction. Chambers, in his pioneering study of the practice in Michigan, so found: in a sample of 191 men sentenced to gaol, over one-third fled town within a year after their release.[82] Chambers explains:

> "We use the verb 'flee' here because the payment rate in the year after the release of those jailed persons who leave town in so low (.09) in comparison to those jailed persons who stay (.48) that, for most, avoidance of jail seems to have been a primary motive for their leaving town."[83]

We appreciate the force of these arguments, but consider that they are less clearcut than might at first appear. As regards the cost to the State of imprisoning wilful defaulters, the true assessment of relative benefits and costs has to range far more widely than addressing the cost of incarcerating those for whom the threat of imprisonment proved ineffective. As the Law Reform Commission of Australia noted, "the real benefit of imprisonment is the threat of its use."[84] Thus, the equation has to take into account all those cases where, in the absence of this threat, the spouse contemplating default would in fact have defaulted, leaving his or her family unjustly unsupported, with other members of society picking up some part of the bill. Ward's study found that only 1% of husbands against whom a maintenance order existed were known to have actually gone to prison for wilful default.[85] It may be surmised that the benefit to the State and to families in retaining the sanction of imprisonment outweighs the cost of imprisoning this 1%.

The refutation of this argument against imprisonment reveals, however, a more subtle argument against imprisonment, based on principles of equality. Chambers puts the point graphically:

> "Examining the men who end up in jail provides a second source of misgivings about using it widely. Most of us have probably growled over news accounts of a physician or insurance agent earning $60,000

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81 Finer Report, vol.1, p.132 (Cmnd 5629, 1974).
82 *Op. cit.*, at 932.
83 *Id*, at 932, fn.54.
84 Law Reform Commission of Australia's *Report on Contempt of Court*, para 733.
85 P. Ward, *The Financial Consequences of Marital Breakdown*, 40 (1990).

> but failing to make his support payments. Well, few doctors or insurance agents languish in Michigan jails for failing to pay child support ...
>
> The agencies do not wink at nonpayment by the doctor; rather, the doctors who fail to pay are more likely, if jail is imminent, to have access to sufficient cash to appease the agency. Several aspects of the skewed population in the jails should give us pause. To the extent that we punish the unskilled worker in order to produce higher payments from thousands of higher-income fathers, we are repeating a familiar and dubious pattern in our society that finds its analogues in the use of jailing for street-corner gambling as well as in medical experimentation on prison inmates. To the extent that we punish the blue-collar workers because we are angry at them themselves, our anger is sometimes misplaced. While most of the men jailed could, in the literal sense, have paid more than they did, they may see themselves, with some justification, as barely making do, scraping the sides of the bowl of thin gruel provided the least-skilled workers in our society. We blame such men and their supposedly footloose ways for the rise in the welfare rolls, just as some persons in the eighteenth century viewed those who did not pay their bills as a cause of the decay of civilized society. Jailing for nonsupport is a twentieth-century form of jailing for debt."[86]

It has to be admitted that the imprisonment of maintenance defaulters does raise an issue of social equality. Two responses may be made - neither perhaps amounting to a full refutation. First, and generally, socially unequal societies inevitably manifest the element of inequality throughout the social phenomena - housing, education, health, transport, employment and imprisonment. To the extent that this inequality is perceived as unjust it should be tackled: a community which condemns inequality and fails to remove it is guilty of inconsistency. Arguments invoking social inequality to warrant the removal of a sanction which is otherwise necessitated in the interests of justice need to be closely scrutinised. The wife and children of a wilfully defaulting man in a job which does not pay very well are as entitled to justice as the family of a well-off maintenance defaulter. To remove the sanction from the first defaulter is to create an unwarranted injustice for his family.

The second response is that it is essential for the imprisonment sanction to be used justly and humanely. If the default is not wilful - if, for example, the defaulter is truly an alcoholic -then he or she should not be sent to gaol. The empirical studies in some other countries suggest that the decision whether to imprison for wilful default is often made without sufficient information and consideration. This is a matter which is clearly capable of being dealt with in such a way that those who should not be imprisoned are kept out of gaol.

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86 *Op. cit.*, at 930-931.

The Irish figures in Mr Ward's study, whatever other lessons they may have, certainly do not indicate undue zeal, in practice, to imprison defaulters.

The second argument against imprisonment which we noted was that it is counter-productive, since the defaulter cannot generally support his or her family when in jail and will become less employable as a result of being imprisoned. There is, of course, truth in this argument; but it is not the whole truth. It fails to take account of the wide range of cases where the threat of imprisonment is an effective encouragement to pay, and deals only with the cases where the sanction is less than fully effective.

The third argument, based on the greater efficacy of other remedies such as attachment of earnings, involves a *non sequitur.* In deciding what path to take in the face of maintenance default, the maintenance creditor, properly advised, would choose the more efficacious remedies. If the maintenance creditor did not, it would be open to the Court to favour such an approach or at least to encourage the maintenance creditor down those avenues. The fact that other remedies are often more effective than imprisonment is not an argument against invoking the sanction of imprisonment where it is the most effective remedy. The other remedies, in fact, are far from panaceas and in some cases will have no potential application.

Our Tentative Conclusions

Our tentative recommendation is that the sanction of imprisonment for wilful refusal or culpable neglect to obey a court order to support one's family should be retained. Sensitively and prudently applied, it is an appropriate response to such default.

"Trading-Off" Rights Against Contempt

We must now consider whether the legislation should provide that a spouse in contempt of a court order should forfeit reciprocal entitlements. For example, a mother who has custody of her two children may frustrate her husband's rights of access; he may be under a court-ordered obligation to maintain her and the children, and may strenuously object to having to keep what he says as his side of the bargain when his wife seeks to get away with repudiating hers. If he fails to keep up the payments, it might seem fair for the court in contempt proceedings brought by the wife to relieve the husband of liability during the continuation of her contempt. A converse case could arise where a man neglects to maintain his family in breach of a court order, yet wishes to exercise his right of access: should he be denied the right to take contempt proceedings against his wife for her frustration of his right of access until he faces up to his financial responsibilities?

In favour of a "trade-off" principle, three arguments may be made. *First,* that it is *unjust* that one spouse should be placed under a continuing obligation towards the other spouse, and, perhaps, the children, when the other spouse

is in contempt of an order to act in a manner that benefits the first spouse and again, perhaps the children. One way of removing that injustice is no doubt to apply the full rigours of imprisonment but there should be no objection in principle to restoring the balance between the spouses by relieving the first spouse of an obligation, at least to the extent that the discharge of that obligation benefits the defaulting spouse.

The *second* argument is that the apparently separate matters of custody, access and maintenance, for example, are in fact closely intertwined. They represent particular species of the common genus of family responsibilities. Necessarily they have an element of reciprocity: the meaningful exercise of the right to custody usually depends on adequate economic support which frequently has to be supplied, in part or in whole, by the absent parent. Even to categorise these functions as involving "rights" and "duties" may not represent how parents experience them. Certainly having custody without adequate financial support may seem to the parent like a massive obligation rather than a right. Equally, a father who seeks to enforce his access rights may be inspired exclusively by the altruistic concern that in doing so he is acting in the interests of his children. In the light of the cohesive and reciprocal nature of these separate functions, it may be argued that a parent who is in contempt with regard to one of them has, as it were, unravelled the cohesion of the distribution of spousal and parental roles and cannot therefore insist on holding the other spouse to his or her part of the bargain.

The *third* argument in favour of a "trade off" is based on the pragmatic consideration that the resentment caused by allowing a spouse in contempt to insist on holding the other spouse to his or her obligations is likely to damage the welfare of the family as a whole, and lead to an enhancement of tension for the children.

Against these three arguments, a number of points may be made by way of reply. *First*, in relation to the matter of justice, the "trade off" principle is one which should be used with some caution. It is particularly controversial where the rights of innocent third parties may be imperilled by its application. It would be quite wrong, for example, that a father should be relieved of his obligation to support his children by reason of his wife's frustration of his rights of access. His obligation to maintain his children is not conditional on his ability to derive benefits in relation to them.

Secondly, the fact that the spouses share a range of functions in relation to each other and their children does not warrant the conclusion that if one frustrates the exercise by the other of a beneficial function, the other should be entitled to act in the same way towards the spouse in default. Again the problem of innocent third parties comes into consideration.

Thirdly, it is difficult to make any confident predictions as to where the balance of resentment lies. Children who love their father and enjoy their times of access with him may greatly resent his being deprived of his right of

access. They may perceive this as depriving *them* of their right to see their father, and may blame their mother for taking this step. Their father almost certainly will be resentful. Whatever about the merits of the issue, he is not likely to consider that he has been treated fairly. He may argue that he has a just reason for not paying maintenance to his wife: for example she may have committed adultery. The fact that the court properly exercised its statutory discretion[87] in favour of the wife will not always abate his sense of injustice.

Fourthly, it is a well-accepted principle of the law relating to custody of children that an award of custody "is not a prize for good matrimonial behaviour",[88] nor, conversely, is the denial of custody a punishment for misconduct. Thus the fact that a spouse has misbehaved in one way - failing to pay maintenance to the other spouse, for example - should not have any necessary effect on his or her entitlement to custody or access. Having said this, however, it is only fair to point out that, while there is, and should be, no automatic consequence for custody or access rights flowing from misconduct in relation to maintenance, there *is* a definite connection between spousal conduct and custody or access rights, in that such conduct may well impinge on the child's *welfare,* which is the first and paramount criterion to which the Court is to have regard. Thus, it would be possible, by reference to the welfare test, for the Court to conclude that it would not be in the interests of a child whose parent had financially neglected it that the parent should continue to exercise custody or access rights previously ordered by the Court. There is, no doubt, a risk of the Court in such cases being tempted to engage in a tacit *a priori* resolution; but that is a possibility which is endemic in relation to the welfare test.[89]

In Australia, the Cabinet Sub-committee on Maintenance was inclined to reject any access-maintenance link:

> "Suspending child support would financially punish the child for the

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87 Cf. the *Judicial Separation and Family Law Reform Act 1989*, section 38(2)(c) and 38(3).

88 *JJW v BMW,* 110 ILTR 45, at 47 (*per* Kenny J, reversed by Sup Ct, 1971).

89 The same risk inheres in such issues as the relevance of adultery on the child's welfare: see generally O'Reilly, *Custody Disputes in the Irish Republic: The Uncertain Search for the Child's Welfare,* 12 Ir Jur (ns) 37 (1977), and O'Connor, *The Impact of Adulterous Relationships on the Outcome of Custody Disputes,* 2 Ir L. Times (ns) 23 (1984). So also the question of sex roles can lead to *a priori* resolution of the welfare question. In *MacD v MacD,* Sup. Ct., 5 April 1979 (70-1979), Kenny J said:

> "Young children have a much greater emotional need of their mother than they have of their father who, when they are young, seems to them to be a remote figure. A mother has an instinctive understanding of children's minds and needs. She provides warmth, visible signs of affection, love, a feeling of security, a last refuge in times of trouble and patience in listening to their petty complaints".

See generally Binchy, *The Sex of a Parent as a Factor in Custody Disputes,* 77 Incorp. L. Soc. of Ireland Gazette 269 (1983).

conduct of its parents. It is also very difficult in such situations to tell which parent is at fault. Each may believe the other is, but usually the difficulties have arisen out of a situation to which both have contributed. Any linkage between access and child support might also be exploited by non-custodial parents who did not want to cut off the relationship between the child and the non-custodial parent".[90]

The Law Reform Commission of Australia were also of the view that the legislation should not prescribe an access-maintenance "trade-off". They did not object to letting access default operate as an informal extenuating factor in relation to maintenance responsibilities, or even to "the possibility of formally recognising this as a uniform way amongst different procedures for maintenance enforcement (including non-compliance) ..."[91]

In the United States of America, some courts accept the "trade-off" principle, either in full or to the extent of withholding contempt sanctions on the basis of the applicant's lack of "clean hands", while presenting no barrier to enforcement of the maintenance obligation by other means if they are available.[92] This is a rare enough phenomenon.[93]

Our Tentative Conclusion

Our tentative conclusion is that the legislation should not include any "trade-off" principle. Instead, a spouse's contemptuous defiance of a court order should continue to be a factor to be given such weight as the court considers appropriate in any subsequent proceedings brought by a spouse seeking to vary or discharge an order respecting that other spouses's obligations relating to the family.

The Civil Law/Criminal Law Overlap

There is always a possibility that conduct which constitutes civil contempt may also amount to a criminal offence. For example, an injunction restraining picketing may be breached in a manner that constitutes an offence; or a person ordered to hand over a document may burn it or otherwise maliciously damage it. But in family proceedings this prospect is a real one. Indeed, certain breaches of civil orders automatically constitute criminal offences, in addition to amounting to contempt. Thus, for example, a spouse who contravenes a barring order or a protection order or, while a barring order is in force, refuses to permit the other spouse or any child to enter and remain in the place to which the order relates or does any act for the

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90 Cabinet Sub-Committee on Maintenance, para. 2.7, quoted by the Law Reform Commission of Australia in their *Report on Contempt of Court*, para. 737 (1987).

91 Law Reform Commission of Australia's *Report on Contempt of Court*, para. 739.

92 Cf *id*, para 737. See also Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 Fam L.Q.1, at 24 (1990).

93 Express statutory authorization for abating future child support obligations on account of unwarranted access denial is conferred in Missouri: Mo Rev Stat, s 452.340.6 (Vernon Supp. 1989), cited by Krause, *supra*, at 24.

purposes of preventing the other spouse or child from doing so is guilty of an offence,[94] without prejudice to the law as to contempt of court (or any other liability, civil or criminal).

Apart from troublesome doubts as to whether a legislative strategy such as this offends against the *bis vexari* principle,[95] the cumulation of liabilities raises some difficult issues of policy. Is it right that there should be two bases of liability? Should both be available in conjunction, or should the victim of the contempt merely be free to choose between them? Should the resolution of these questions depend on the category of the contemnor's offence or on its particular seriousness in the specific case?

Our present view is that it would be undesirable to propose changing "cumulative" statutory provisions of the type we have identified. We have not heard of any complaint in regard to them. One particular problem does, however, call for a specific statutory clarification. Where the contempt alleged against the person who has broken one of these statutory provisions is criminal in nature (whether or not it also constitutes civil contempt), then the person could well be in double jeopardy. *We do not see how this can be justified; accordingly we recommend that the legislation should make it clear that in respect of offences of this type, no person who has been charged with the statutory offence should later be exposed to proceedings for criminal contempt. Moreover, where proceedings for criminal contempt have been brought with regard to conduct which constitutes a breach of the statutory provision, no prosecution for that offence should subsequently be permissible.*

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94 *Family Law (Protection of Spouses and Children) Act 1981*, section 6.

95 Certain breaches of the statutory provisions to which we here refer may, it seems, constitute criminal contempt (in addition to civil contempt in some cases).

CHAPTER 15: PROPOSALS IN RELATION TO JURISDICTION

Our enquiry will concentrate initially on the position in respect of the Circuit Court and District Court, as this raises distinctive problems.

Three options may be considered: (1) to give to these courts the full panoply of the contempt jurisdiction; (2) to leave the superintendence of these courts to the High Court, following the former tradition of the King's Bench Division; (3) to restrict criminal contempt proceedings to indictments with a jury in either the Central Criminal Court or the Circuit Court, with contempts which constitute minor offences being dealt with as summary offences triable in the District Court as in any other summary offence.

(1) Conferring a full contempt jurisdiction on the Circuit Court and District Court

Under the present law, so far as criminal contempt is concerned, it is clear that the Circuit Court and District Court have jurisdiction with regard to *in facie* contempt; beyond that the position is less clear, but it is particularly doubtful whether the District Court's jurisdiction extends to such matters as the *sub judice* rule, for example. Of the nature of things, in view of the fact that it is very difficult for the rule to apply where the case is to be decided by a professional judge rather than a jury[1], the problem is not likely to arise too often, but that does not mean that the issues of principle can be ignored. At present, it seems that the High Court can exercise jurisdiction over contempts of inferior courts; thus, one way or another, all contemptuous conduct of the Circuit Court and District Court can be reached. Moreover, it seems possible for the Director of Public Prosecutions to prosecute contempts of these types by means of indictment.

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1 Cf. *Cullen v Toibin*, [1984] ILRM 577.

Would it be appropriate for the Circuit Court and District Court to exercise a full contempt jurisdiction? We see no objection deriving from any notion of any lack of "superior" status on their part. The historical objection to "inferior" courts exercising full jurisdiction was no doubt in part referrable to the fact that Justices of the Peace had no legal qualifications - a concern which has no relevance to the professional judges who sit in the Circuit Court and District Court.[2]

(2) Letting the High Court exercise a superintendence over the Circuit Court and District Court

One option would be to leave matters unchanged. The fact that the present scope of the jurisdiction of the Circuit Court and District Court in regard to criminal contempt is a matter of unresolved uncertainty suggests that the present position is causing no practical difficulty. The High Court can always be relied on to deal with such cases, so why change matters to answer some theoretical insult to the competence of the judiciary in these two courts, when they themselves apparently perceive no such insult?

The answer must surely be that this superintending jurisdiction of the High Court is an echo of a former social and legal reality which has no contemporary relevance. Moreover, as we shall mention in a moment, the summary procedure in the High Court raises important questions as to justice for defendants accused of criminal contempt.

(3) Restricting criminal contempt proceedings to indictments with a jury, save for minor offences

The third option would restrict criminal contempt proceedings to indictments with a jury, save in cases where a minor offence is involved. The primary attraction of this option is that it answers the call of justice for the defendant. Moreover, it has the advantage of ending the obsolete notion of jurisdiction in the High Court deriving from that formerly exercised by the King's Bench Division.

The major issue of uncertainty is whether this strategy is consistent with the principles laid down by the judgments of O'Higgins CJ and Henchy J in the Supreme Court decision of *The State (DPP) v Walsh*.[3] As we have already made clear, these judgments leave the law in a state of some uncertainty as to the rights of an alleged contemnor to a trial by jury. The question thus arises as to how the views of the law expressed (admittedly *obiter*) in *Walsh* would harmonise with the proposition that all criminal contempt proceedings (save for minor offences) should be indictable offences with a jury.

Such a provision would undoubtedly be reconcilable with the approach

2 Cf *Clune v District Justice Clifford*, [1981] ILRM 17 (High Ct, Gannon, J).

3 [1981] IR 412.

adopted by Henchy J, which requires the participation of a jury in all non-minor offences of criminal contempt to the extent that any issues of fact may require determination. It is perhaps more doubtful whether they would accord with the view of O'Higgins CJ which, as we have seen, considers it a matter for the discretion of the courts as to whether any issue should be determined by the jury. We have already remarked that it may well be that his view, which is, of course, at odds in this context with the view of Henchy J, may be preferred in later cases. If that should turn out to be the case, a proposal that an alleged contemnor should be entitled to a trial by jury in respect of a non-minor offence of contempt of the Circuit Court or District Court might not be consistent with the Constitution. Equally, of course, legislation which gave statutory effect to the view of O'Higgins CJ, ie. that there was no constitutional right to a trial by jury in such cases even where issues of fact were in controversy, would run the risk of being found constitutionally invalid, if the view of Henchy J were to be preferred.

Our Tentative Conclusions

In our next chapter, we provisionally recommend that it should be left to the Supreme Court in an appropriate case to resolve the uncertainties created by *Walsh's case* since any other course would involve the enactment of constitutionally suspect legislation. *It would follow logically from this, and we so tentatively recommend, that the first option is the most satisfactory, ie. conferring the same jurisdiction in relation to contempt of court on the Circuit Court and District Court as is presently enjoyed by the High Court. Clearly, any person charged with contempt of those courts would enjoy the same rights, if any, to trial by jury as the person charged with contempt of the Superior Courts.*

Civil Contempt

As regards civil contempt, we are tentatively of the view, and recommend, that the District Court and Circuit Court should, in general, have the same powers as the High Court. Thus, for example, the powers to imprison to coerce a person in breach of an order of the Court would be identical. The only matter which gives us difficulty is the sanction of fines. In order to be fully effective the fine may in some cases have to be large, whether on a once-off or accruing basis; yet it might not be considered proper to give to the District Court and Circuit Court an unlimited jurisdiction in this respect.

In England, section 63(3) of the *Magistrates' Courts Act 1980* enables the magistrates court to order the payment of up to £50 for every day during which a person is in default of an order to do anything other than the payment of money. The maximum amount that the person may be obliged to pay is £2,000 - which may be ordered on a once off basis, or, alternatively, can be reached after forty days. The County Court, although given a seemingly broad jurisdiction by section 38 of the *County Courts Act 1984* and

under the *County Court Rules*,[4] was held[5] nonetheless to be an "inferior court" for the purposes of section 14 of the *Contempt of Court Act 1981* and thus capable of committing a person in contempt only for a fixed term not exceeding one month.[6] This caused concern among family law practitioners,[7] and resulted in a statutory amendment, the *County Courts (Penalties for Contempt) Act 1983*, section 1 of which deems the county court a "superior court" for the purposes of section 14. The effect is to remove any limit to the fine which the County Court may impose, as well as raising the maximum period of imprisonment which it may order to two years.

After some consideration, we have concluded that it would be desirable to introduce some limits to the fines which the District Court and Circuit Court may impose for civil contempt. *We tentatively recommend that the District Court should have power to order a person in contempt to pay a sum not exceeding £200 for every day during which he or she is in default, or a once-off fine of up to £5,000. The maximum amount a person ordered to pay a per diem sum should have to pay should also be £5,000. As regards the Circuit Court, we tentatively recommend that the appropriate maxima be £600 and £15,000.* We would particularly welcome views on this question.

Appeals

As regards appeals from prosecutions for criminal contempt, we recommend that the machinery be the same as applies to all other indictable and summary offences. As regards appeals in cases of civil contempt, we recommend that these should be treated in the same way as appeals in other civil matters.

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4 Order 29, rule 1.

5 In *Peart v Stewart*, [1983] 1 All ER 859.

6 Cf section 14(1) of the 1981 Act. See further *Miller*, 456.

7 Cf 113 New L J 412 (1983).

CHAPTER 16: REFORM PROPOSALS IN RELATION TO THE RESPECTIVE ROLES OF JUDGE AND JURY

In this chapter we consider a general issue which goes to the heart of law reform proposals in relation to contempt of court. This concerns the respective roles of judge and jury. As we have seen, there has been a volume of judicial analysis of the constitutional dimensions of the subject; the results have been less than fully satisfactory.

It is of course vital, in seeking to interpret these decisions, to attempt to determine two questions: how final are the conclusions which the courts have reached so far and what room for manoeuvre does the Constitution permit so far as law reform is concerned. The two questions are in large part intertwined and admit of no certain answer.

For the reasons given in chapter 8 above, the law cannot be regarded as having been finally stated in *The State (DPP) v Walsh*. We have already indicated our preference for the rationale in the judgment of O'Higgins CJ speaking for the minority, which derives powerful support from the judgments of the divisional courts of the High Court in *O'Kelly* and *Connolly*.

As far as the underlying policy considerations are concerned, our provisional view is that the objections voiced by both O'Higgins CJ and Henchy J to the assignment of the question as to whether contempt has been committed to a jury are well founded. We think it is clear that acquittal by a jury in such a case would have more far reaching and damaging implications than a perverse acquittal in a "mainstream" criminal offence. The reported cases demonstrate that the more serious cases of alleged contempt tend to arise in a highly emotional political or social context and involve, not so much imputations of corruption to an individual judge, but to a court which may be composed of different members from time to time, such as the Special Criminal Court. It would be naive to suppose that juries do not from time to time record perverse verdicts because *inter alia* of their views on the desirability of

particular laws. That this results in perverse acquittals in the mainstream of criminal law is the necessary price one pays for the existence of the jury system. It is quite another matter to extend that system to the area of contempt of court, so as to enable juries to record perverse and unreviewable verdicts of condemnation on judicial decisions arrived at by judges appointed under the Constitution. We are not persuaded at this stage that the right to a trial by jury is so uniquely indispensable a constitutional right as to override, in this extremely confined field, other considerations affecting the administration of justice and, in particular, the independence of the judiciary. As Henchy J pointed out:

> "The ultimate responsibility for the setting, and the application, of the standards necessary for the due administration of justice must rest with the judges. They cannot abdicate that responsibility, which is what they will be doing if they allow juries of laymen to say whether the conduct approved or admitted amounted to criminal contempt. It may be said that it is short of the ideal that a judge may sit in judgment on a matter in which he, or a colleague, may be personally involved. Nevertheless, in such matters, judges have to be trusted, for it is they and they alone who are constitutionally qualified to maintain necessary constitutional standards".

In this context, it may be recalled that, since the decision in *Walsh*, it has been held by the Supreme Court in *The People v O'Shea* that an appeal lies to the Supreme Court from a verdict of acquittal in the Central Criminal Court. It might be thought that this should dispose of the concern voiced by Henchy J in *Walsh*, which we respectfully share, as to the possibility of juries returning perverse verdicts in cases of criminal contempt. We are satisfied that this is not the case.

The decision of the majority in *O'Shea* has, beyond argument, resulted in a serious anomaly in the law which must at some stage be remedied by the Oireachtas. One can fully accept the correctness in law of the majority decision (which it should be said in passing, has been severely criticised) and yet find wholly unacceptable a state of affairs in which an appeal is possible from a jury acquittal in the Central Criminal Court, but not from similar verdicts in the Circuit Criminal Court or Special Criminal Court. It is not within the scope of our present enquiry to consider how this anomaly might best be rectified. It is sufficient to say that amending legislation could:

(a) provide that no appeal was to lie in any case from a verdict of acquittal; or

(b) provide that an appeal would lie only in cases where the acquittal was by direction of the trial judge on a point of law; or

(c) provide for an appeal in every case of an acquittal.

It may well be that the Oireachtas would opt for (b). There is a strong view that, if the power of appeal against an acquittal is be retained in any court, it should be confined to directions by the trial judge withdrawing the case from the jury. But it would be utterly pointless for us to make our recommendations on the basis that the present wholly indefensible law will be retained or that, if amendments are introduced, they will be confined to option (c).

A distinct and troublesome question is whether legislation providing for jury trial in cases of alleged *civil* contempt would be constitutionally permissible. *Walsh* does not seek to answer this question directly. As we have seen, in *The State (Commins v McCrann)*, Finlay P held that the Constitution did not *require* jury trial in cases of alleged civil contempt, and in *The State (H) v Daly*, the Supreme Court agreed with his analysis. It is fair to say that the sequence of earlier decisions which culminated in *McCrann* did not expressly hold that jury trials would be inconsistent with either the 1922 or 1937 Constitution, if prescribed by legislation. That question did not directly arise. Nevertheless, the tenor of those decisions is to pay such regard to the inherent jurisdiction of the Superior Courts as to suggest that they would have favourably considered an argument challenging the constitutionality of legislation removing from the judges, and placing in the hands of juries, the function of adjudicating on liability for civil contempt.

Our Tentative Conclusions

Our provisional conclusion on the role of the judge and jury generally is that, in the case of criminal contempt, the view of O'Higgins CJ in *Walsh* is preferable, although it would be desirable to clarify the circumstances in which the court should normally exercise its discretion to direct a trial by jury. As we have already indicated, it would seem that the judgment of O'Higgins CJ seeks to confine the area of jury trials somewhat too narrowly. However, it is obvious that proposing legislation to give effect to the view of O'Higgins CJ would run the risk of being found to be constitutionally invalid, if the view expressed by Henchy J, speaking for the majority, in *Walsh* were to prevail. *In these circumstances, our tentative conclusion is that, since the law is not giving rise to any urgent practical difficulties in this area, it should be left to the Supreme Court in an appropriate case to clarify the problems left unsolved by Walsh. Similarly, in the case of civil contempt, it would seem that the law is presenting no problems in practice, and, we have indicated, even if it were thought to be desirable, a proposal that the alleged contemnor should have the right to trial by jury might also be at risk of being held to be constitutionally invalid. We accordingly also provisionally recommend that there should be no change in this area.*

CHAPTER 17: REFORM PROPOSALS IN RESPECT OF CONTEMPT IN RELATION TO TRIBUNALS

In this chapter, we consider whether the present law relating to contempt and tribunals should be changed. It will be recalled that legislation[1] in 1979, passed in the wake of *Haughey*[2] (which case was in turn rendered in large part redundant by *Walsh*[3]) reformed the *Tribunals of Inquiry (Evidence) Act 1921* so as to make a wide range of misconduct in respect of tribunals of inquiry a specific offence. In the light of this change it may be thought unnecessary to address broad issues of principle on this matter. On the contrary, we consider it essential to do so in view of our remit, and of the fact that not only the 1979 Act but also other legislation includes very broad criminal provisions, on occasion going so far as "deemed contempt" offences, as, for example, section 1(2)(f) of the newly substituted provision in the 1979 Act and (even more radically) section 38(7)(c) of the *Dentists Act 1985*, which makes it an offence for a person in attendance before The Fitness to Practice Committee to do "anything which , if that Committee were a court of law having power to commit for contempt would be contempt of court".[4]

Of course, the central issue is whether tribunals are sufficiently similar to courts in structure and functions to warrant the law imposing sanctions identical or similar to the several species of contempt of court. In general terms the solution may be one of the following: (i) complete identity of contempt provisions between courts and all tribunals in respect of all species of contempt; (ii) the removal of any contempt (or quasi - contempt) provisions from all tribunals; (iii) the inclusion of contempt provisions for all tribunals in respect of some, but not all species of contempt, and (iv) the

1 *Tribunals of Inquiry (Evidence) (Amendment) Act 1979.*
2 *Re Haughey*, [1971] IR 217 (Sup Ct, rev'g High Ct).
3 *State (DPP) v Walsh*, [1981] IR 412 (Sup Ct).
4 See also the *Ombudsman Act 1980*, section 7(3), the *Employment Equality Act 1977*, section 42(1)(d) and the *Nurses Act 1985*, section 38(7)(c).

inclusion of contempt provisions for only certain tribunals in respect of some or all species of contempt.

As a threshold to our analysis, it is worth bearing in mind some of the similarities and differences between courts and tribunals. First, the structure and functions of courts are firmly rooted in specific and general provisions of the Constitution; tribunals have no similar roots, though of course their operation must be in accordance with constitutional requirements. Secondly, the courts dispense justice and affect people's rights; tribunals do not necessarily perform these functions, though in practice they may affect people's rights, albeit at a remove, more radically than some court decisions could ever do. As the *Salmon Committee on the Law of Contempt as it Affects Tribunals of Inquiry* observed:

> "The whole future of a number of persons depends upon the report of the Tribunal. Their political, commercial and social reputations may be (and sometimes have been) undermined and their careers brought to an abrupt end by the report. The findings of Tribunals of Inquiry are usually of much greater consequence to those concerned than any litigation in which they may ever have been engaged."[5]

A third difference between courts and tribunals is that courts are bound by rules of evidence whereas tribunals are not necessarily so restricted. A fourth, and related, difference is that courts in the main adhere to an adversarial procedure, whilst tribunals tend towards an inquisitorial mode of operation.[6] A fifth, and important, difference is that tribunals need not necessarily be composed, exclusively or at all, of judges. The Law Reform Commission of Australia are surely right to observe that,

> "[q]uite apart from the question of lack of experience of skills in directing a public hearing and in establishing fair procedures, it must be considered how appropriate it would be to vest coercive and punitive powers in persons other than judicial officers".[7]

After this general consideration, let us address some specific issues.

1. Should "Deemed Contempt" Provisions Be Retained?

First we must consider whether the "deemed contempt" provisions, which appear in several statutes, should be retained.

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5 Para.16 of the Committee's *Report* (1969).

6 See the Law Reform Commission of Australia's *Report on Contempt of Court*, para.750 (1987).

7 *Id*, para.751.

As we have seen, it has become popular for legislation in relation to tribunals to provide for an offence, sometimes in conjunction with specific offences,[8] to do or omit to do any thing "if such doing or omission would, if the tribunal had been the High Court, have been contempt of that Court".[9] Such a provision has the benefit, if not the virtue, of covering the widest range of conduct without having to make any attempt to define its actual content. It seems to us, however, to have fundamental weaknesses.

The first is that it is quite *unjust* that such conduct should be penalised as contempt by virtue of the fact that, if the tribunal had been the High Court, it *would have been* contempt of court. The truth of the matter is that tribunals frequently serve functions which are in a number of respects somewhat different from those served by the High Court. What possible basis can there be in justice for criminalising conduct the characterisation of which as contempt, when occurring in respect of the High Court, is defensible only, or primarily, in the light of protecting the Courts underlying functions? The assumption that there is a close or automatic similarity of functions, which could justify the exportation of contempt provisions, unthinkingly, to the different environment of tribunal proceedings seems to us mistaken. Now it is of course true that tribunal proceedings bear some close parallels with judicial proceedings, in the gathering of evidence and the maintenance of order but it is equally true that in the many important respects which we have already identified the two proceedings serve quite different goals.[10] The generic criminalisation of conduct in relation to tribunals by reference to contempt of the High Court must surely be unconstitutional in view of the arbitrary imposition of criminal responsibility which it necessarily involves. In order to preserve its constitutional validity a court might seek to read into it an implied qualification that conduct should be criminal only to the extent that the tribunal shares with the High Court common goals as to the administration of justice. Apart from the fact that we doubt whether such an identity of goals can always be discerned, we consider that such an implied qualification would not save the constitutional validity since the offence would still seem to be too uncertain to pass muster.

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8 Cf, e.g, the *Tribunals of Inquiry (Evidence) Act 1921* section 1(2), as amended by section 3 of the "Tribunals of Inquiry (Evidence Amendment) Act 1979. See also the provisions cited in fn. 4, *supra.*

9 Cf. *id*, section 1(2)(f) (as thus amended).

10 Cf. the Law Reform Commission of Australia's *Report on Contempt of Court*, para.755:

> "The primary argument against a residual contempt provision is its breadth. Conduct may be punished even though it does not fall within specifically prohibited activity. A further problem, relating chiefly but not solely to contempt by publication ..., is that it is difficult to 'transplant' the technical notion of contempt from its judicial context to the administrative context of tribunals .... Difficulties of interpretation arise. There is also uncertainty as to whether an act punishable under one of the specific penal provisions will also be punishable under a deemed contempt provision, notwithstanding that they may involve different procedures and different penalties".

Accordingly, we recommend the abolition of "deemed contempt" provisions in legislation dealing with tribunals.

2. ***Scandalising***

We now must consider the extent - if any - to which scandalising a tribunal should be treated as contempt (or its equivalent). The argument *against* making such conduct contempt is fourfold.[11]

First, it may be contended that the essence of the offences of scandalising is the interference with the administration of justice. Since tribunals of inquiry are concerned with investigation and recommendation rather than the administration of justice, the "very touchstone whereby the question of contempt or no contempt is to be judged has been withdrawn."[12] The strength of this argument in relation to certain tribunals is of course much weaker, since their functions may tend to be very similar to those of courts.

The second argument is one we have already noted in another context. Tribunals often deal with matters of considerable public importance.[13] The public interest may be regarded as better served by free and frank discussion of these matters than by attributing to tribunals the need for protection through censoring the more robust elements of that discussion. The reply to this is, of course, that there is a public interest in upholding respect and confidence in the judiciary who frequently chair such tribunals.[14] Moreover, to undermine the work of such tribunals "could make it impossible for [them] to achieve the object for which they are usually appointed, namely to resolve a nationwide crisis of confidence in the purity and integrity of our public life."[15]

The third argument is based on the political context in which tribunals may be established. Surely there must be free and frank public discussion as to the motives of the government of the day in deciding to establish a tribunal and as to the choice of who is to chair the tribunal?

The difficulty with this argument is that the mere fact that a particular process may in some instances have a political dimension should not render it fair game for any scandalous criticism. Not all tribunals are concerned with matters of a political hue (save insofar as all matters of public interest can

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11 See Odgers, *op cit*, ch 5.

12 *R v Arrowsmith*, [1950] VLR 78, at 85-86.

13 Cf The *Tribunal of Inquiry (Evidence) Act 1921*, section 1(1) (tribunal established for inquiry into a definite matter described in the Resolution as "of urgent public importance").

14 Cf. the *Salmon Committee Report*, para.36.

15 *Id.*

be considered to be in the broad sense political).[16] Moreover, the scandalous criticism need not relate to the political dimension and, if it does, it need not impugn the motives of the Government in establishing the tribunal. It would also be naive to fail to understand that much judicial decisionmaking is a matter of "practical politics"[17]; yet one suspects that a defendant who scandalised a court in respect of such decisionmaking would be ill-advised in expecting to be exempt from retribution on the basis of the political dimension underlying the decision.[18]

The fourth argument against providing for the offence of contempt by scandalising a tribunal is that defamation affords an adequate alternative remedy. This may be a particularly strong point where a member of a tribunal is not a judge and thus is not subject to the normal restraint about suing which affects judges who have been scandalised.[19] Where judges are members of tribunals they are in fact likely to be in a somewhat stronger position than when on the Bench, since the derogatory comment is more usually one affecting their performance personally or as part of a small team rather than one in respect of tribunal members as a group: thus the danger of an action failing on the basis that the defamation was of a class is usually very small.[20] It is interesting to recall that Mr Justice Lynch, who was the sole member of the "Kerry Babies" tribunal, was willing to write a detailed rebuttal of a critique of the tribunal's analysis and conclusions, the critique (by Gene Kerrigan) and the rebuttal both appearing in *Magill.*

Our provisional conclusion is that scandalising tribunals should not constitute contempt. The arguments against making it contempt, while not capable of acceptance without qualification, seem to us to have some weight, which is not displaced by concern that public confidence in a tribunal should not be impaired by unjust criticism.

3. In facie Contempt

We now must consider whether there should be a distinct offence of contempt in the face of a tribunal, equivalent to contempt *in facie curiae.* As we have seen, an offence of this type is almost universal in legislation dealing with tribunal proceedings. In favour of such a regime it may be argued that tribunals need to be protected in the performance of their functions as much as the courts. To this, however, it may be replied that contempt *in facie curiae* serves other goals as well, the primary one being the protection of the

16 Perhaps the thrust of the argument, so far as it has validity, is that every tribunal should be examined separately in order to determine whether its political dimension is such as to make it appropriate to render the scandalising it constitute contempt.

17 *Palsgraf v Long Island Railroad Co,* 248 NY 339, 162 NE 99 (*per* Andrews J, dissenting 1928).

18 The decision of the Government whether to initiate (or actively defend) litigation may in some cases be as politically inspired as to the decision to establish a tribunal.

19 Cf. Odgers, *op cit,* p.27.

20 *Id.*

dignity of the court so as to ensure the smooth and effective dispensation of justice. A goal such as this is not necessarily central to proceedings before a tribunal. A related factor is that conduct which constributes scandalising, if it takes place *in facie curiae* may be dealt with as an *in facie* contempt or as a case of scandalising. If, as we have recommended, scandalising a tribunal should not constitute contempt, then it would seem to follow that such conduct, if it occurs before the tribunal, should not constitute contempt in the face of the tribunal, unless the disruption were such as to impede the functioning of the tribunal.

Three related questions arise. First, how would the location of "the face of" the tribunal be determined in a case where the proceedings are conducted otherwise than in a fixed location?[21] Second, would every tribunal have power to order a witness to answer a question (subject to self-incrimination or privilege) or produce a document or other thing[22] under pain of contempt? Third, would every tribunal have the power to order that a person in attendance should leave the room, and would failure to obey such an order constitute contempt?

Our provisional view is that there would be no gain in the law including the notion of contempt in the face of a tribunal, akin to contempt in facie curiae. This is not for a moment to suggest that tribunals should have no powers to regulate their proceedings. On the contrary it is essential that their powers in this respect should be wideranging and fully effective. *But that necessary goal seems to us capable of being achieved by a provision which would make it an offence to disrupt*[23] *a tribunal in the holding of its proceedings.* The disruption here envisaged is of a direct kind[24]; it is not intended to capture actions such as publishing material which are equivalent to *sub judice* contempt of court.

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21 Cf Odgers, *op cit*, p32.

22 Cf section 1(2)(6) of the *Tribunals of Inquiry (Evidence) Act 1921*, as amended by section 3 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*.

23 For reasons similar to those which led to our tentative conclusion that insulting, non-disruptive, conduct in relation to a court should not be an offence, we consider that insulting, non-disruptive conduct in relation to a *tribunal* should not be an offence. We are of the view that these reasons apply *a fortiori* in relation to tribunals.

24 By direct interference we do not wish to limit the offence to disturbances within the room where the tribunal hearing is taking place. It should extend to disruptions from outside, such as disruptive picketing or disruptive protests. We agree with the Law Reform Commission of Australia's distinction, drawn in paragraph 763 of their *Report on Contempt of Court*:

> "Not every demonstration outside the premises would disrupt the hearing - for example, peaceful picketing ... On the other hand, behaviour outside the premises which did disrupt the hearing (for example, making a loud noise) would attract liability under the offence".

It will be recalled that, during the "Kerry Babies" tribunal, Mr Justice Lynch made it clear to persons protesting outside the premises that if the protest continued as it had done those engaging in it would find themselves charged.

In this context we must mention our concern about paragraphs (d) and (e) of section 1(2) of the *Tribunals of Inquiry (Evidence) Act 1921*, as amended by section 3 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, which make it an offence where a person;

> "(d) by any act or omission, obstructs or hinders the tribunal in the performance of its functions,
>
> or
>
> (e) fails, neglects or refuses to comply with the provisions of an order made by the tribunal."

An immediate difficulty with these provisions is that they do not clarify the *mens rea* requirements. Perhaps the general desiderata of intention and recklessness may be inferred. *We consider that, if these provisions are to remain, it would be desirable expressly to provide that criminal responsibility here embraces mens rea. Thus ground (d) should be read as being subject to the words "intentionally or recklessly", inserted between "omission", and "obstructs", and ground (e) should be prefaced by the words "intentionally" or recklessly". In view of our second, and more fundamental, difficulty with these provisions, we recommend that they be replaced by the disruption offence we have proposed.* This difficulty is that the two provisions, especially paragraph (d), extend too widely and would be capable of rendering criminal conduct which should be permitted. Tribunals are not courts and should not be treated as such by the criminal law. For reasons we mention presently, we consider it wrong (and perhaps unconstitutional) that tribunals of inquiry should be protected by an equivalent of the *sub judice* rule. These two paragraphs are capable of criminalising activity of this nature, which we consider is unacceptable in principle.

As an adjunct to the criminal sanction in this context, we tentatively recommend that members of tribunals should have specific statutory powers to expel persons who are engaging in disruptive conduct.[25] This solution might in some cases be better for all concerned (including the disruptive person). *This power should be capable of being effected through the use of reasonable force.* It is not dissimilar to the power of an occupier to expel a person who comes or remains on property without the occupier's consent.[26] Resistance would be likely to render the resisting person eligible to be charged with the offence of disruption in respect of the resistence (as well as the earlier disruption).

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25 The Law Reform Commission of Australia, in their *Report on Contempt of Court*, para.768, recommended a more wide-ranging power of expulsion, where commissioners or tribunal members believe on reasonable grounds that the person to be expected "would otherwise genuinely disrupt the proceedings".

26 See *McMahon & Binchy*, 426-427, *Ross v Curtis*, High Ct, Barr J, 3 February 1989, *Green v Goddard*, 2 Salk 641, 91 ER 540 (1798).

4. *A Sub Judice Parallel?*

We now must consider whether there should be an offence for publishing material impinging on the work of tribunals, parallel to the *sub judice* rule. We have already provided for such an offence in respect of court proceedings, which would consist of publishing material that involves a risk, other than a remote one, that a court would be seriously prejudiced in the discharge of its functions. On principle it would seem difficult to argue against an equivalent criminal sanction in respect of tribunals. Two considerations, however, weigh against it.

First, and more narrowly, it may be contended that there is and can be no problem which calls for such a stringent legal control. The Salmon Committee in England considered that the "sort of people likely to be appointed members of a Tribunal of Inquiry should have little difficulty in putting irrelevant and pre-judicial matters out of their minds; nor, in our view, is there any real risk of their decision or report being influenced by a Press campaign or popular clamour".[27] This approach echoes the confidence of the Supreme Court in *Cullen v Toibin.*[28]

The difficulty with this argument is that, while it may perhaps be true in relation to judges, it is less clearly the case in relation to others who may contribute to decision-making or tribunals.[29]

The second, and more substantial, argument is that a *sub judice* offence in relation to tribunals would be an unwarranted, and perhaps unconstitutional, interference in freedom of expression, especially on matters of public interest. The *sub judice* controls which we have proposed in relation to *judicial* proceedings, whether civil or criminal, are essential in the interests of justice to persons involved in the proceedings. Concern for the interests of justice has led us to recommend that there should be no defence that a publication was made as part of a discussion in good faith of matters of general public interest and that the risk of prejudice was merely incidental to the publication.[30] Lacking the dimension of concern to ensure that justice is done to litigants, the case in favour of a *sub judice* rule in relation to tribunals seems far weaker.

A number of compromise strategies might be considered. One would be for the legislation to prescribe a *sub judice* equivalent for tribunals, with a defence of good faith discussion of matters of public interest. Another would be to retain a *sub judice* rule, but with a narrow *mens rea* element, requiring an intent to interfere with the operation or effectiveness of the tribunal (or,

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27 *Salmon Committee Report*, para.11. See also *R v Arrowsmith*, [1950] VLR 78, at 86 (Dean J), quoted by the Law Reform Commission of Australia in their *Report on Contempt of Court*, para.756.

28 [1984] ILRM 577.

29 Cf. the Law Reform Commission of Australia's *Report on Contempt of Court*, para.776.

30 Cf. Britain's *Contempt of Court Act 1981*, section 5.

perhaps, recklessness in this regard).

A *via media* worth sympathetic consideration was developed by the Salmon Committee from the specific context of media interviews with potential witnesses before royal commissions. The Committee thought that these could contaminate what the witnesses had to say in evidence afterwards:

> "The real danger of such interviews is that witnesses whose evidence is vital to the matters under investigation are questioned without any of the safeguards which obtain in our courts of law or before Tribunals of Inquiry .... A witness could be bullied or unfairly led into giving an account which was contrary to or put a slant upon the truth. He could commit himself, particularly under the strain and tension of the television interview, to a badly expressed or inaccurately recollected version of events. Witnesses might also be tempted to give a version of facts which they thought most newsworthy, particularly if a fee were being paid for the interview. When such witnesses come to give evidence before the Tribunal they would either have to stick to what they had already said, however inaccurate it might be, or reveal the true facts. In the latter event, the weight of their evidence might be considerably shaken by the discrepancy between what they were telling the Tribunal and what they had said previously. This might greatly hinder the Tribunal, and, in an extreme case, prevent it from arriving at the truth."[31]

There are two principal difficulties with this analysis. The first is that of identifying who may be witnesses in a subsequent trial: "[t]hose who appear at one time or another as witnesses in a wide-ranging royal commission inquiry are by no means so easily identifiable as are potential witnesses at a trial."[32] While no doubt this is true in some cases, in others it will be very easy to identify those whose evidence is likely to be crucial in a forthcoming trial. The second difficulty is more formidable:

> "Matters of general public importance, which tend to be the subject of royal commissions, are, by definition, of considerable public interest. It may not be practicable or desirable to prohibit interviews with people who can describe at first hand events of public importance."[33]

The Salmon Committee mentioned a further argument in favour of controls on media interviews of witnesses: such a practice might deter potential witnesses from coming forward.[34] Whether there is substance in this

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31 *Salmon Committee Report*, para. 31 *Miller*, 213 is in accord.

32 Odgers, *Contempt in Relation to Commissions and Tribunals*, p21 (ALRC Research paper No. 1, 1986).

33 *Id.*

34 *Salmon Committee Report*, para 27. Cf Odgers's riposte (*op cit*, p21): "But it may have precisely the opposite effect."

apprehension would of course depend on the degree of indulgence afforded the media and the degree of responsibility with which elements of the media would exercise their freedom. International experience suggests that certain elements of the media will not flinch from exercising their powers to the maximum, with no discernible regard for justice to parties to legal proceedings, witnesses or for the administration of justice. If it were to come about that the media had relatively uncontrolled powers to interview witnesses in such circumstances, it seems less than fanciful to apprehend that some potential witnesses would be deterred from coming forward.

The Salmon Committee sharpened its focus to propose that it should be a contempt to "say or do anything in relation to evidence which is intended or obviously likely to alter, distort, destroy or withhold such evidence from the Tribunal".[35] Odgers is not greatly impressed with this proposal. He suggests that:

> "one can anticipate considerable argument over the 'obviously likely' formulation. Presumably it implies an objective 'reasonable man' test but how it is to be applied and the factors to be considered are not clear. One might ask what exactly it is that is to be altered, distorted, etc. Perhaps it is 'truthful' evidence but how does one determine what is true in this context? If it is the evidence that would otherwise have been given, what is the requisite level of probability that it would so have been given?"[36]

Odgers proposes instead that the publication of material which has a substantial risk of "contaminating"[37] evidence should be prohibited. He envisages that this prohibition should be narrowly interpreted and should require clear evidence of probable contamination. He concedes that it is not significantly different from the formulation proposed by the Salmon Committee; he explains that the replacement of the requirement of obvious likelihood by one of substantial risk seeks to avoid argument as to whether the test is subjective or objective. His preferred notion of contamination seeks "to emphasise that the central concern is to protect a commission or tribunal from conduct which is likely to impair its ability to determine accurately the relevant facts".[38] We must admit to considerable doubt as to whether the notion of contamination has sufficient precision to provide the central criterion of liability. It immediately raises the difficulty as to *how much* contamination is required. If there is no minimum limit - and none is suggested by Odgers - it seems to us to lack the necessary specificity.[39]

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35 Salmon Committee Report, para 32.

36 Odgers, *op cit*, p21.

37 *Id*, p22.

38 *Id*.

39 The only reference to quantum in the proposed formula is in regard to the *degree of risk of contamination* rather than to the *extent of contamination*.

After much consideration and with some hesitation we have been won over to the substance of the Salmon Committee's proposal. It can scarcely be criticised as being oppressive on the media, since its requirement of proof of intent or obvious likelihood is narrow in the extreme. *Accordingly, we tentatively recommend that it should be an offence to publish, say or do anything in relation to evidence which is intended or obviously likely to alter, distort, destroy or withhold such evidence from a tribunal.*

*5. **Interferences (other than by publication) with the administration or effectiveness of a tribunal.***

We now must consider whether any parallels can be drawn between contempt of court consisting of interferences (other than by publication) with the administration of justice and eqivalent conduct in regard to a tribunal. What we have in mind here are such matters as "nobbling" witnesses, chairpersons or assessors or victimising them for having given evidence, adjudicated or given advice, as the case may be. Of course aspects of conduct of this nature are already the subject of specific statutory controls.[40] What we are here concerned with is whether there should be a more wide-ranging equivalence.

At first sight there may seem no reason for establishing liability on these lines. Tribunals are not in the business of administering justice, so why should their proceedings be protected by such a strong process as contempt? The reply is that society surely has a significant interest in ensuring that the proceedings of tribunals are not interfered with. To fail to provide them adequate protection would weaken the institutions of the State. We have already tentatively recommended, under the fourth heading, that it should be an offence to publish, say or do anything in relation to evidence which is intended or obviously likely to alter, distort or withhold such evidence from a tribunal. This offence will clearly be capable of capturing a wide range of "nobbling" of jurors and witnesses and other intimidatory or corrupt conduct. Nevertheless, in view of its narrow breadth we see merit in the legislation's inclusion of some specific offences. *Accordingly we tentatively recommend that the legislation should provide that certain specific types of conduct are an offence. These would consist of:*

1. *improperly influencing or attempting to influence a tribunal in the determination of any issue which it may have to decide;*

2. *bribing or attempting to bribe a person who is or may be a witness in proceedings before a tribunal;*

3. *intimidating or attempting to intimidate such a witness with respect to such evidence;*

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40 Cf., e.g the *Tribunals of Inquiry (Evidence) Act 1921*, section 1(2)(d), as amended by section 3 of the *Tribunals of Inquiry (Evidence)(Amendment) Act 1979.*

4. *taking or attempting to take reprisals against a witness who has given evidence in such proceedings;*

5. *similar offences in respect of chairpersons and other persons involved in the work of the tribunal.*

CHAPTER 18: SUMMARY OF RECOMMENDATIONS

Contempt in the Face of the Court

1. The law of contempt in the face of the court should be retained: p234.

2. If, contrary to our provisional view, contempt in the face of the court is to be abolished, there should be an offence of disrupting judicial proceedings. The *mens rea* element should comprise intention or recklessness. The offence should not require that the disruption have a likely or intended effect on the administration of justice. The offence should not make it an offence to insult a judge where this does not disrupt the proceedings: pp235, 236.

3. The proposed offence of disrupting proceedings should be of a generic nature; specific types of disruption should constitute particularised modes of committing this offence without risk of a prosecution failing for duplicity. These would include (1) the offences specified in the *Juries Act 1976* in respect of juror misconduct; (2) the failure by a witness to answer a question in circumstances which at present render the witness guilty of contempt of court; (3) the culpable failure to attend court by a witness or a legal representative; and (4) failure to comply with the court's requirements as to the use of sound recorders in court: p236.

4. On the assumption that, in our final Report, we will recommend the retention of *in facie* contempt, we recommend that

   (a) *in facie* contempt should not be restricted so as to deal only with conduct which cannot be dealt with by other criminal proceedings (p237);

   (b) *in facie* contempt should continue as a summary procedure to

be tried by the judge before whom the alleged disruption occurred (p242);

(c) as regards the physical scope of *in facie* contempt, the legislation should not (i) attempt a precise definition of the geographical limits within which it may be committed, nor (ii) require that the judge or judges have actually witnessed the conduct in question (pp243-244);

(d) The non-attendance at court by a witness or legal adviser without reasonable excuse should not constitute *in facie* contempt but should instead be subject to a specific statutory provision, rendering it an offence to fail to attend court, with a *mens rea* requirement of intent or recklessness as regards the interference with the administration of justice. Reasonable excuse should afford a defence: p244.

5. The law relating to journalists' obligation to give evidence and, when doing so, to answer questions, should not be changed: p247.

6. As regards the use of sound recorders in court, the legislation should prescribe that the judge should determine the matter in the exercise of his or her discretion or the light of the circumstances of the case. The judge should be entitled to give or refuse leave to use the recorder in court, on such conditions as he or she considers proper. Those to whom such leave may be given such be limited to: (1) the parties, their legal representatives or any other person acting in the proceedings on their behalf; (2) representatives of the media; (3) researchers; and (4) authors of books or articles. It should be an offence to publish a recording of legal proceedings made by means of the recorder, by playing it in the hearing of the public or any section of the public, or to dispose of any recording with a view to such publication: p254.

Scandalising

7. The law of criminal contempt should not be completely abolished; significant alterations, substantive and procedural, should be made to the present law: p274.

8. Imputing corrupt conduct to a judge or court should fall within the scope of scandalising: p278.

9. Publishing to the public a false or misleading account of legal proceedings should be capable of constituting contempt by scandalising. Criminal liability should be based on the test of intention or negligence, whereby the publisher would be responsible only if he or she intended to publish a false or misleading account or ought to have been aware that the account was false or misleading: pp278-279.

10. It should be an offence to provide a false or misleading account of legal proceedings to another in circumstances where the provision of that account is intended or likely to result in the publication to the public or a section of the public of a false or misleading account of such legal proceedings: p279.

11. Abuse of the judiciary, even if scurrilous, should not constitute the offence of contempt by scandalising: p280.

12. In prosecutions for scandalising, the test should be that of a risk, other than a remote one, that the administration of justice, the judiciary or any particular judge or judges, will be brought into serious disrepute. As regards *mens rea*, liability should depend on whether it was reasonably foreseeable to the person communicating the imputation or account that such publication creates such a risk. As to the necessary mode of publication, it should embrace communications published to the public or a section of the public: pp280-281.

13. The truth of a communication should render it lawful. The onus of proof of the truth of an imputation of corrupt judicial conduct should rest on the defence; the onus of proving the falsity of an account of legal proceedings published (or provided for publication) to the public or a section of the public should rest on the prosecution: p286.

14. As regards the liability of editors, media proprietors and others for scandalous publications, the same principles should apply as apply in respect of *sub judice* contempt: p286.

The Sub Judice Rule

15. For the purposes of the *sub judice* rule, "publication" should include any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public or to a judge or juror who is involved in the legal proceedings to which the publication relates: p305.

16. The *sub judice* rule should apply (with regard to proceedings which are active), to any publication which creates a risk, other than a remote one, that the course of justice in the proceedings in question will be seriously impeded or prejudiced: p310.

17. The "prejudgment" test of liability should not be part of the law: p313.

18. Liability should attach to publications which are likely to cause serious injury to the administration of justice in general. The defence of justification should be available: pp313.

19. Liability should be imposed in respect of publications before proceedings are active where the publisher is actually aware of facts which, to the publisher's knowledge, render the publication certain, or virtually certain, to cause serious prejudice to a person whose imminent involvement in criminal or civil proceedings is certain or virtually certain: p321.

20. Proceedings should be considered active from the time an initial step has been taken until they are concluded. The initial steps of criminal proceedings would be: (a) arrest without warrant; (b) the issue of a warrant for arrest; (c) the issue of a summons to appear; (d) the service of an indictment or other document specifying the charge, and (e) oral charge. Criminal proceedings would be concluded by (a) acquittal or sentence; (b) any other verdict, finding, order or decision which puts an end to the proceedings; (c) a *nolle prosequi;* or (d) operation of law. Criminal proceedings should cease to be active if an order is made for the charge to lie on the file, but should become active again if leave is later given for the proceedings to continue. They should also cease to be active if the accused is found unfit to plead or is transferred to the Central Criminal Hospital. Criminal proceedings against a person which became active on the issue of a warrant for his or her arrest should cease to be active after a year following the date the warrant was issued, unless he or she has been arrested in that period; they should become active again if he or she is subsequently arrested. Proceedings other than criminal proceedings and appellate proceedings should be deemed active from the time when arrangements for the hearing are made or (if no such arrangements are previously made) from the time the hearing begins until they are disposed of, discontinued or withdrawn. Arrangements for the hearing of proceedings should be treated as made when the case is set down for trial or a date for the trial is fixed. Appellate proceedings should be deemed active from the time they are commenced, by any originating process, until disposed of or abandoned, discontinued or withdrawn. Where, in appellate proceedings relating to criminal proceedings, the court remits the case to the court below or orders a new trial, any further or new proceedings which result should be treated as active from the conclusion of the appellate proceedings: p321.

21. In regard to *sub judice* contempt with respect to proceedings which are active, the law should impose the onus of proof on the publisher that he or she was not negligent. Negligence, so far as a publisher is concerned, would relate, not merely to the question whether the relevant proceedings are active, but also to whether what is published creates a risk (other than a remote one) of serious prejudice to specific legal proceedings. It would be necessary for the prosecution to show first that the defendant published material which in fact created such a risk and secondly that he or she did so when the relevant proceedings were active. The onus would then shift on to the defendant to prove,

on the balance of probabilities, that he or she was not negligent in either of these two respects: p329.

22. There should be a defence of reasonable necessity to publish (so that, for example, a warning to the public that a multiple killer was at loose would not render the publisher liable for an offence): p330.

23. It should not be a defence to *sub judice* contempt that the offending material was published incidentally to a discussion of public affairs: p335.

24. The reporting of proceedings in the Oireachtas should not render the publisher liable for *sub judice* contempt. Publication in defiance of a prohibition by the Ceann Comhairle of the Dail or Chairman of the Seanad to publish any specific portion of the proceedings on the basis that it may offend against the *sub judice* rule should constitute an offence: p336.

25. The author of material which offends against the *sub judice* rule should be liable where the material is published (i) by him or her or (ii) by some other person. In exceptional cases the author should be excused, as, for example, where he or she had no reason to expect that the material would be published without further communication between the publisher and himself or herself: p338.

26. In cases where the offending material which is published derives from information supplied by a person (whether a journalist or otherwise), such a person should be capable of being held responsible for *sub judice* contempt if he or she, in all the circumstances, ought reasonably to have anticipated the publication of the information without correction: p339.

27. A person may be found guilty of *sub judice* contempt even though what was published represents an amalgamation or cumulation of contemptuous material contributed by himself or herself and another person if, in isolation, the contemptuous material for which he or she is responsible would constitute *sub judice* contempt: p339.

28. Those in control of newspapers and other media should be capable of being criminally responsible for *sub judice* contempt to the extent that, by the exercise of that control, they ought to have prevented the publication of the offending material: p339.

29. The proprietors of newspapers should be vicariously liable for *sub judice* contempts published in their newspapers. Only fines, and not imprisonment, should be permitted as penalties: p340.

30. It should be an offence to make or offer payment to any person who

is, or is likely to be, a party or a witness in legal proceedings where, in the particular circumstances, the making or offer of such payment creates a substantial risk of injury to the administration of justice or to the constitutional or other rights of any person. Making reasonable payments for expenses sustained by the witness or party in the giving of the interview or otherwise consulting with the media should not fall within the scope of the offence; but the fact that the payment is one which would be made to other persons for a similar contribution should not, of itself, afford a defence: pp342-343.

31. The present restrictions on publication, contained in the *Criminal Justice Act 1967*, should be retained: p347.

32. The court, in legal proceedings held in public, should have power, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings or in other proceedings, current, pending or imminent, to order that the publication of any report of all or part of the proceedings be postponed for such period as it thinks necessary. Breaches of this order should be an offence with a maximum penalty of imprisonment for two years or a fine of £20,000 or both; liability should depend on knowledge or recklessness as to the existence of the order: p350.

Other Acts Interfering with the Administration of Justice

33. Criminal contempt proceedings, so far as they relate to conduct other than scandalising, or *in facie* contempt or conduct in breach of the *sub judice* rule should be abolished; conduct which falls within this category of contempt should continue to be dealt with by the criminal law so far as it constitutes separate offences (such as assault, demanding with menaces, forgery, perjury, embracery, false imprisonment and interference with the course of justice): p356.

34. If, however, we take the view in our Report that there should remain a contempt jurisdiction of this category, the following rules should apply:

    (a) the impugned conduct would have to create a risk, other than a remote one, of interference with the administration of justice: p357;

    (b) contempt proceedings should extend to cases where legal proceedings have been completed: p357;

    (c) there should be no objection in principle to a person being liable for contempt in respect of pre-litigation conduct: p359;

    (d) the *mens rea* test should require proof of intention or

recklessness; the intention or recklessness should relate both to the physical act in question (locking up a witness, for example) and the consequential intended interference or risk, other than a remote one, of interference with the administration of justice: p360.

35. There should be a new offence of taking or threatening reprisals against a party, intending thereby to punish him, without reasonable excuse, for having instituted, defended or persisted in civil proceedings: p361.

36. In a case where contemptuous conduct of the present category injures a person, as well as creating a risk, other than a remote one, of interfering with the administration of justice, the court should be given a discretion as to whether to make an award of damages and, if so, its amount, having regard to all the circumstances of the case, including the conduct of the wrongdoer and the victim. This entitlement would be without prejudice to any claim the victim may have against the wrongdoer for interference with his or her constitutional rights, or for tort or other legal wrong, but, in determining any such claim that may exist, the court should have regard to the possibility, or fact, of an award, or its refusal, under the new entitlement here proposed. Moreover, in any such claim for a legal wrong, any amount awarded by the court in the exercise of its proposed new entitlement should be deducted from the damages awarded in that claim: p363.

37. The entitlement to award damages proposed above should be introduced whether the law of contempt continues to operate in this area or is abolished. In the latter event, the conduct generating an entitlement to award damages should be such as constitutes an offence: p363.

38. There should be no absolute rule of secrecy as to jury deliberations: p370.

39. Disclosure should be permissible so far as it relates to offences committed in the jury-room: p370.

40. Disclosures relating to miscarriages of justice in the jury-room should be permissible to the extent that they do not offend against the exclusionary rule: p370.

41. There should not be a blanket prohibition on research on the jury. The approval of the President of the High Court, President of the Circuit Court or President of the District Court should be a pre-condition of the carrying out of such research, subject to such conditions as he may specify. The intentional or reckless breach of any of these conditions by any person engaged in that research should constitute contempt of court. The principle of vicarious liability should not apply: p371.

42. Contempt of court should remain the appropriate means of protecting jury secrecy: p372.

43. It should be contempt of court intentionally or recklessly to disclose the voting score in the case of an acquittal after the judge has informed the jury of their right to come to a majority verdict, or to disclose any other information, intentionally or recklessly, about what took place in the jury room where this creates a risk of detriment to the liberty, reputation or physical or financial interests of a party to litigation: p373.

44. Liability for contempt of court in this context should not be limited to cases which involve publication to the public or a section of the public: p373.

45. There should be no temporal limits on the obligation not to make improper disclosures regarding the jury: p374.

Civil Contempt

46. Imprisonment should be retained as a sanction in civil contempt proceedings: p381.

47. The exercise of the coercive function of civil contempt should not include a fixed term of imprisonment: p385.

48. The courts should have power to order fines in civil contempt proceedings, whether as punitive or coercive sanctions and whether on an accruing basis or otherwise: p388.

49. As regards the requisite mental state, a person should be held responsible for civil contempt when (i) he or she ought to have been aware that his or her conduct (or inaction) constituted or risked constituting a breach of a court order, or (ii) he or she acted, or failed to act, with the intention of breaching the order: p389.

50. There should be a general defence of reasonable excuse. This defence should not be available when the defendant's excuse relates to a matter on which he or she could reasonably have invoked the authority of the court in such circumstances as would have been likely to make it unnecessary for him or her to breach the order: p389.

51. The present entitlement of the victim of the breach of a court order to waive the right to initiate or continue to termination point contempt proceedings should not be abolished or modified: p392.

52. The sanction of imprisonment for wilful or culpable neglect to obey a court order to support one's family should be retained: p408.

53. One spouse's contemptuous defiance of a court order should not be capable of being "traded off" against the breach of another order by the other spouse; it should continue to be a factor to be given such weight as the court considers appropriate in any subsequent proceedings brought by a spouse seeking to vary or discharge an order respecting that spouse's obligations relating to the family: p411.

54. In respect of statutory provisions to the effect that the breach of a court order is an offence in addition to contempt of court, no person who has been charged with such an offence should later be exposed to proceedings for criminal contempt. Moreover, where proceedings for criminal contempt have been brought with regard to conduct which constitutes a breach of such statutory provision, no prosecution for that offence should subsequently by permissible: p412.

Jurisdiction

55. As regards civil contempt, the District Court and Circuit Court should, in general, have the same powers as the High Court: p415.

56. With regard to fines for civil contempt, the District Court should have power to order a person in contempt to pay a sum not exceeding £200 for every day during which he or she in in default, or a once-off fine of up to £5,000. The maximum amount which a person ordered to pay a *per diem* sum should have to pay should also be £5,000: p416.

57. As regards the Circuit Court's jurisdiction in respect of fines for civil contempt, the appropriate maximum should be £600 and £15,000: p416.

58. The machinery of appeals from prosecutions for criminal contempt should be the same as applies to all other indictable and summary offences: p416.

59. Appeals in cases of civil contempt should be treated in the same way as appeals in other civil matters: p416.

The Respective Roles of Judge and Jury

60. Legislation should not be introduced dealing with the respective role of the judge and jury and the uncertainties in the law resulting from the decision in *The State (DPP) v Walsh* [1981] IR 412 (Supreme Court) should be left to be resolved by a future decision of that court: p419.

Tribunals

61. "Deemed contempt" provisions in legislation dealing with tribunals should be abolished: p423.

62. Scandalising tribunals should not constitute contempt: p424.

63. There should be no offence of contempt in the face of a tribunal, akin to contempt *in facie curiae*: p425.

64. It should be an offence to disrupt a tribunal in the holding of its proceedings: p425.

65. If, contrary to our tentative recommendation in the following paragraphs, paragraphs (d) and (e) of section 1(2) of the *Tribunals of Inquiry (Evidence) Act 1921*, as amended by section 3 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979*, are to remain part of the law, the legislation should expressly provide for a *mens rea* requirement. Thus ground (d) should be read as being subject to the words "intentionally or recklessly" inserted between "omission" and "obstructs", and ground (e) should be prefaced by the words "intentionally or recklessly": p426.

66. Paragraphs (d) and (e) of section 1(2) of the 1921 Act (as amended) should be replaced by the disruption offence which we have recommended in respect of tribunals: p426.

67. As an adjunct to the criminal sanction, members of tribunals should have specific statutory powers to expel persons who are engaging in disruptive conduct. This power would be capable of being effected through the use of reasonable force: p426.

68. It should be an offence to publish, say or do anything in relation to evidence which is intended or obviously likely to alter, distort, destroy or withhold such evidence from a tribunal: p430.

69. The legislation should provide that the following specific types of conduct are an offence:

    1. improperly influencing or attempting to influence a tribunal in the determination of any issue which it may have to decide;

    2. bribing or attempting to bribe a person who is or may be a witness in proceedings before a tribunal;

    3. intimidating or attempting to intimidate such a witness with respect to such evidence;

    4. taking or attempting to take reprisals against a witness who has given evidence in such proceedings;

    5. similar offences in respect of chairmen and chairwomen and other persons involved in the work of the tribunal: pp430-431.

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