An Chúirt Uachtarach

The Supreme Court

O'Donnell J
MacMenamin J
Charleton J
O'Malley J
Baker J

Supreme Court appeal number: S:AP:IE:2019:000186
[2020] IESC 045
Court of Appeal record number 2018/26
[2019] IECA 209
Circuit Criminal Court bill number: CCC

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent

- and -

Eve Doherty
Appellant/Accused

Judgment of Mr Justice Peter Charleton delivered on Friday, July 24th 2020

1. Harassment was made an offence by s 10 of the Non-Fatal Offences Against the Person Act 1997. Before that time, those whose lives were affected by harassment, or as it is commonly called stalking, could only have resort to the equitable jurisdiction of the courts and hope to obtain injunctive relief. This appeal concerns the construction and scope of the 1997 legislative measure and whether, in particular, (1) communications to other people about the subject of the prosecution come within the scope of harassment and (2) as to the meaning of besetting a person as the term is used in the Act. As to (1), this is the majority judgment. As to (2), a view is expressed here on besetting, but this is unnecessary to the outcome of the appeal; though it may be noted that the majority take a different view on the meaning of this unnecessary use in a modern statute of a word that has completely fallen out of common usage.

Appeal

2. By leave of the Court of 26 November 2019, [2019] IESCDET 277, the accused Eve Doherty appeals further against the dismissal by the Court of Appeal of her appeal against conviction by a jury for harassment in the Dublin Circuit Criminal Court of 1 August 2017; judgment of Edwards J of 31 May 2019, [2019] IECA 209. The accused had been convicted of a single count of harassment and was sentenced to three years imprisonment. The jury had acquitted her of two other counts on the same indictment, each alleging the making of a false statement, contrary to s 12 of the Criminal Law Act, 1976. In the Court of Appeal, the applicant's sentence was reduced so as to suspend the balance of the originally imposed 20 months imprisonment that she had already served. Sentence is not under appeal here.

Circumstances

3. The accused and the victim lived in a Dublin suburb. She is so called because no matter what the legal analysis, she was the victim of a very nasty experience over 18 months. The issue here is whether she was the victim within the definition of harassment in the 1997 Act. The victim worked within the justice system in the State and a distant relative of hers was a prominent person. Her husband and she are separated and, it seems, at some stage was in a relationship with the accused. What is presented in the various communications by the accused to various people and to the neighbourhood as raising her ire is that apparently in the same general area as both of them lived, a police search took place of a family home and a report went to the prosecuting authorities but no case was ever taken to court. By whatever uprush of bitterness or leap of imagination, the accused began to imagine that the victim had somehow stymied what to her was considered an obvious case to be brought before the criminal courts. She began a campaign of communication which involved one letter directly to the victim, the distribution of a set of leaflets in the neighbourhood and the sending to the agencies in the justice system and to people in prominent positions and in journalism of emails routed secretly by pseudonyms through a Canadian site. In these the accused denigrated the integrity, application to work and personal attributes of the victim. These are characterised by spite and also use some filthy language. Only by the painstaking recovery of metadata from various virtual sources was the identity of the accused discovered. The campaign lasted from September 2011 to March 2013, but, of the various communications, only one went directly to the victim. The prosecution at the trial sought to rely on the following:

1. Letter sent to victim's home in November 2011;
2. Letter sent to Director of Public Prosecutions in March 2012 (this, for whatever reason, was ruled out of consideration by the trial judge);
3. Leaflets placed on cars and pillars in the neighbourhood during the same month;
4. Email sent to many recipients in public life from markkenny@hushmail.com on 31 March 2012;
5. Letter sent to office of Director of Public Prosecutions of 21 April 2012;
6. Email similarly sent to many prominent recipients of 1 June 2012;
7. Email similarly distributed of 4 August 2012;

> 8. Two emails sent to many recipients of 16th March 2013, one of whom was the victim's family medical practitioner.

4. These communications were nasty. One email to multiple recipients purported to come from a dangerous and prominent criminal with multiple serious convictions and another from a high public official. The victim's name was distorted so that, using an example divorced from the facts, Smith became distorted into the word for excrement; she was called or described as a hag, pompous, arrogant, responsible for the breakup of her marriage, a bad mother to her offspring, two-faced, a queen bee, corrupt, evil, a dwarf, a friend of drug dealers, a person sponging off the justice system while drawing a substantial salary for little work due to protection by a supposedly influential relation, an individual living in ill-deserved luxury and a promoter of cronyism. This diatribe was liberally garnished with filthy language. Like much that characterises harassment or stalking, in terms of typical fact and not legal analysis, what was communicated and the persistence in communicating various unhinged views was obsessive.

5. The victim's evidence at trial was that she had received the letter at 1, come to know of the letters at 2, which is not in issue as part of the case, and 5, seen the leaflets at 3 and generally became aware of the rest through being told by one or more of the email recipients at 4, 6, 7 and 8 or by having emails forwarded to her at her request on being told of their existence or because the recipients, understandably, felt it right to pass on the message. Asked at the trial as to the effect that this on her, the victim said:

> Well, it really upset me and really worried me. Some of the correspondence referred to my [offspring], that just really worried me. I was in work all day and [a child] was at home. I did have a childminder, but I just worried ... It also -- I was just worried, I didn't know where it was coming from. There was a lot of personal information, so it made me feel that it was somebody who knew something about me. Some of the letters purported to be from my work colleagues, others from neighbours or I wondered if somebody had a grudge against me or whatever, so I just simply didn't know where it was coming from and that -- very distressed and very uneasy… I mean, it's very upsetting. It alleged that you're corrupt, you're politically appointed, you're lazy, you don't have the experience for the job, I mean, that's all extremely upsetting. It paints a picture of me as sort of this woman who just swans around, which is far from the truth. …. I have a very ordinary life, I work incredibly hard and … my priority [is my offspring], and that just gives a completely malicious and false impression of me... They made me very anxious. I stopped sleeping, I became nervous because I didn't know who was doing it but whoever did [this] they seemed to know quite a lot about me. I know I became nervous at night, I wondered was somebody going to come to the house, I became anxious about my [child], I was forever checking up that [the child] was okay, on the road, outplaying or whatever, checking up with [the childminder] where [the child] was, what … doing, et cetera. I also lost my confidence which -- I don't know why. I think maybe when you've had such awful things said about you and published to so many people, just that was one of the effects it had on me, just undermined my confidence.

Legislation and direction by trial judge

6. Sections 9, 10 and 11 of the 1997 Act respectively deal with coercion, harassment and debt collection using menaces. Before quoting s 10, it is appropriate to consider the

wording used in the offences around it since kindred forms of social wrongs are addressed thereby. Section 9 makes it an offence for anyone "with a view to compel another to abstain from doing or to do any act which that other has a lawful right to do or to abstain from doing, wrongfully and without lawful authority" either "uses violence to or intimidates that other person or a member of the family" of the victim, including civil partners, or "injures or damages the property of that other", or "persistently follows that other about from place to place", or "watches or besets the premises or other place where that other resides, works or carries on business, or happens to be, or the approach to such premises or place", or "follows that other with one or more other persons in a disorderly manner in or through any public place". Section 11 criminalises making "any demand for payment of a debt" whereby the debtor is caused "alarm, distress or humiliation" by demands the frequency of which "are calculated to subject the debtor or a member of the family" of that person to such result, including civil partners and cohabitants; a similar wording as in s 9. It is also an offence to seek to collect debt where the accused "falsely represents that criminal proceedings lie for non-payment of the debt, or … the person falsely represents that he or she is authorised in some official capacity to enforce payment, or … the person utters a document falsely represented to have an official character."

7. Section 10 uses some of the words that define the mischief outlawed in these cognate sections and creates the offence of harassment, carrying up to seven years imprisonment on indictment and also providing for quasi-injunctive relief. It is the wording that is in issue on this appeal and s 10 provides:

> (1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.
> (2) For the purposes of this section a person harasses another where—
> > (*a*) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and
> > (*b*) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

8. Watching occurs also in s 9 as does besetting, as watching or besetting but not "watching and besetting" as counsel for the accused submitted on this appeal. These words watching or besetting are familiar to labour lawyers since they also occurred in s 7 of the Conspiracy and Protection of Property Act 1875 as one of the activities prohibited generally, but especially aimed at industrial action. The 1997 Act repealed the 1875 Act but part of the argument of the accused is that besetting should be given the same technical meaning as the court decisions arising from the earlier legislation generated. Section 7 of the 1875 Act provided that it was not a criminal offence to attend "at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." Thus, communication of information was permitted but not abuse since it stretches the definition of information to include invective or threats and also since the section required all exempted communications to be peaceful. In so far as it has been submitted that besetting was a form of watching, the wording of the 1875 Act

made it clear that these were two separate activities. Section 7 was only an offence if the activities of watching or besetting or violence or intimidation or persistent following or hiding tools or following in a disorderly manner by two or more persons was done for the purpose of, or as the Act says with a view to, compelling "any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing" and in addition there had to be an absence of "lawful authority".

9. Both at the court of trial and here on appeal, on behalf of the accused the argument has been made that since the prosecution had opted to describe the form of harassment in terms of besetting or of communication, that besetting required a physical watching or some kind of watchfully menacing presence at the home or workplace of the victim and that this had to be persistent. Since no such thing as might be thought akin to unlawful, or lawful, picketing had occurred, the case must fail. A similar argument to the effect that the other concept of communication had not occurred and was not persistent since there was only one letter, an anonymous one, to the victim and that all the other communications were to other individuals. In short, the argument went, and goes on this appeal, that communication could not consist of emails to people other than the victim and that leafleting a neighbourhood was not a communication with a specific person. These arguments were not accepted after argument in the absence of the jury. The trial judge ruled that there was a sufficient case to go to the jury:

> In respect of count No. 1, an argument has been made that the communications, with the exception of [the letter directly to her], do not amount to harassment because they do not fall within the defined categories of conduct specified in section 10(1), namely, watching, besetting, pestering and communicating with the person affected. It is accepted that to satisfy the requirement of persistence more than a single instance of communicating with a target is required. In the alternative, a single instance of communicating with a target might be combined with instances of pestering or besetting, if the evidence establishes that there are one or more instances of pestering or besetting. It has been submitted that, in order to communicate with another person, it is necessary that the communication be addressed to or direct to that person, even in circumstances where one of the letters was sent to [the complainant's] place of work and was circulated for general consumption, as was connoted by the salutation "To whom it may concern". It is submitted that the fact that the letter to the office of the DPP is about [the complainant] and not addressed to her implies that it was not intended for her eyes and, consequently, does not constitute a communication with her. Similarly, it is submitted that the leaflets which were posted all over her neighbourhood for all to see, including the complainant] herself, were not communications with her. In my view, these two items were capable of constituting communications with [the complainant] because they were manifestly intended for her eyes, which is why they were sent to a place or left at a place where she would, absolutely without a doubt, receive and read them. It is the prosecution case that the communications were maliciously intended to interfere with her peace of mind. This end could not have been achieved if she had no knowledge of their existence. It is open to the jury to infer that these communications were circulated in these two venues specifically so [the complainant] would get to know of them and read them, and this is what in fact occurred and the content caused her some considerable distress. Communicating with someone involves imparting information to that person or the expression of one's views, beliefs or opinions on any subject, including the target of the

> communication. This objective was achieved by the author of the items sent to the DPP's office and the leaflets. Even if I am wrong in that, the prosecution maintained that all of the documentation sent by email or otherwise, and including the aforementioned documents, fall within the category of pestering or besetting [the complainant].

10. The trial judge told the jury that indirect communication, if meant to come to the attention of the victim, could be communication and that for the offence to be committed, more than one instance of communication was required. She continued:

> The last element is that the acts complained of, "intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other." Now, that requirement speaks for itself. In order for you to convict, you must be satisfied beyond reasonable doubt that [the complainant's] peace and privacy were seriously interfered with or that she was caused either alarm, distress or harm and that this was the intention of the sender or that the sender was reckless as to the effect the communications would have on [the complainant]. So in assessing the evidence in relation to the harassment count, you must consider whether all of the elements of the offence have been established, the first being was Eve Doherty the author of some or all of the communications and if she was, is persistence established by reference to that number?

Court of Appeal

11. This direction was upheld by the Court of Appeal. On the question of communicating being harassment despite not directly being addressed to the victim, but as the facts indicate to the victim on one occasion only and to multiple other recipients on several other occasions, the ruling was against the accused. The Court of Appeal relied on English authority that communication to others with a view to harassing the victim could suffice:

> 148. More significantly, although we were not referred to it by counsel, the actual Law Reform Commission Report that followed on from research conducted by the Commission subsequent to responses having been received to the said Issues Paper, namely, it's Report on Aspects of Domestic Violence (LRC 111-2013), confined itself to suggesting that the current definition of harassing behaviour was insufficient to capture certain types of indirect harassing behaviour such as where the behaviour of the defendant is directed towards a person other than the complainant but concerning the complainant, for example where the defendant spread shameful information, whether true or false, about the complainant to the complainant's friends and family. The Law Reform Commission specifically drew attention to the English case of *R. v Debnath* [2005] EWCA Crim 3472, and commented "[t]he Commission is not aware of a case with similar facts having been prosecuted in Ireland but it would appear that this type of conduct would not breach section 10 because it would not amount to any of the terms 'following, watching, pestering, besetting or communicating with' the complainant."

> 149. In *R. v Debnath* the defendant pleaded guilty to harassment pursuant to section 2 of the (English) Protection from Harassment Act 1997. The defendant and the complainant had a one night stand after which the defendant mistakenly believed she had contracted a sexually transmitted disease. This sparked a year-long campaign by her of harassing the complainant, mainly through online means. This included sending the complainant's fiancée emails claiming to be from one of the complainant's friends detailing alleged sexual indiscretions and sending the complainant's former employers an email, also claiming to be from him, which falsely alleged that the complainant had harassed the defendant. The defendant also registered the complainant on a database for individuals with sexually transmitted diseases seeking sexual liaisons, and on a gay American prisoner exchange, and set up a website claiming that the complainant was gay.
> 150. In its Report on Aspects of Domestic Violence 2013 the Commission stated, at para 2.16, that they were "not aware of a case with similar facts having been prosecuted in Ireland but it would appear that this type of conduct would not breach section 10because it would not amount to any of the terms 'following, watching, pestering, besetting or communicating with' the complainant."
> 151. The Commission returned to this subject, and re-iterated the views just recounted, in its Report on Harmful Communications and Digital Safety 2016 (LRC 116-2016) at para 2.35. However, there was no specific discussion in either the 2013 or 2016 reports of whether the word "beset" is to be treated as a term of art and afforded the narrow meaning attributable to it under the Conspiracy and Protection of Property Act 1875, or those of its wider natural and ordinary meanings which could potentially constitute unlawful conduct. Moreover, the 2016 report, at para 2.37, having noted newspaper accounts of two first instance prosecutions under s. 10 of the Act of 1997, observes: "[t]hese cases suggest that there is a view that section 10 may extend to some situations where a person is exposed indirectly to publicly available content. So, just as persistently displaying abusive placards about a person in public places might amount to traditional harassment, in the online context posting abusive content on publicly accessible websites or social media profiles might amount to online harassment. However, both of these cases involved guilty pleas and so the law in this area has not been properly tested."
> 152. In the present case counsel for the respondent made, and has reiterated before us, the case that what the appellant is contending for, in effect, is that the word "directly" should be implied into s. 10(1) immediately before the five potential forms of harassment that are listed. However, he submits, there is simply no legal basis for doing so. We agree with him.

12. A fall-back position of the prosecution was that if communication had to be directly to the victim for harassment to occur, then the offence was committed in this case because the victim had been "beset on all sides" by the various communications. The Court of Appeal rejected the proposition advanced on behalf of the accused that besetting was a technical term meaning something akin to picketing, a meaning inferred from a loose analysis of the Conspiracy and Protection of Property Act 1875 and the resulting reported trade disputes cases. Instead, in analysing the word besetting, the Court of Appeal concluded that the term was wide enough to encompass actions which undermined a person's peace of mind through communicating with others or generally spreading unpleasant depictions about him or her. Central to the analysis was the resort to dictionary definitions:

140. Whatever about the Oxford online dictionary, and as pointed out the prosecution's recourse to it was not objected to, there is no doubt but that the print edition of the full Oxford English Dictionary (Clarendon Press: Oxford), now in 20 volumes, is a work of such renown and authority that a court could have no hesitation in taking judicial notice of it, and we do so. The second edition of this work, a copy of which we have access to in the Judge's library, suggests that there are three principal categories of meanings of the word "beset". These major categories are designated with the Roman numerals I., II., and III., and within each major category there are sub-categories of meaning designated by ordinary numerals, 1, 2, 3 etc.
141. The first major category is entitled: "I. To set about, surround". The second is entitled "II, To set (in fig sense), to bestow. "The third is entitled "III To become, suit". The only major category of meaning of potential relevance in the present case is "I. To set about, surround".
142. Within that first major category, there are four subcategories, namely 1, 2, 3 and 4 respectively. Certain of these subcategories are in turn subdivided for the purposes of providing examples of the meanings contended for, with illustrations taken from usage of the word in literature, and each division is designated a, b, c, etc.
143. Subcategory 1 is entitled "1. To set (a thing) about with accessories or appendages of any kind; to surround with things set in their places". Amongst several illustrations of usage at "a" within this subcategory is a reference to "a diadem or tiara beset with pearls". More vaguely used it connotes "To surround, encircle, cover round with". Examples of this vaguer usage, provided at "within the subcategory, include references to "faces beset with sunbeams" and "angels beset with sunbeams". The second subcategory of meaning within this main category is "2. To set or station themselves round, to surround with hostile intent". Examples of how it has been used in this context include "a. To set upon or assail on all sides (a person)"; "b. To invest, to surround(a place) to besiege"; "c. To occupy (a road, gate or passage), esp. so as to prevent anyone from passing", "d. To circumvent, entrap, catch".
144. The third sub category of meaning within this major category is "3. fig. To encompass, surround, assail, possess detrimentally". The first example of such usage is "a. said of temptations, dangers, difficulties, obstacles, evil influences". A second is provided by "b. of the difficulties, perils, obstacles which beset an action, work or course". A third is provided by "c. of actual enemies forming schemes against one's life or property" and a fourth by "d. To be possessed (with devils)". The fourth, and final, subcategory of meaning within this major category is "4. gen. To close round; to surround, hem in. (Often with some allusion to senses 2 and 3, as in 'to be beset by ice.')."
145. The default rule of statutory interpretation is to afford words their natural and ordinary meaning, unless it is clear from the statute that they are to be afforded some special meaning and treated as a legal term of art. In this case we have considered s.10 of the Act of 1997 in detail. We have considered it first of all in isolation and in its own terms; then taking into account the part of the Act of 1997 in which it appears, we have further considered it in conjunction with the other provisions in that part and have had regard to its place in the scheme of the Act as a whole. Having done so, we are not satisfied that the word "beset" as used in s.10 is to be afforded any special meaning or that it is to be considered as a legal term of art.

Interpretation of s 10

13. Section 10 of the 1997 Act is obvious in the abuse which it seeks to criminalise and to provide a statutory injunctive relief against, that of stalking or harassing another person either openly or anonymously, as here since the accused has at all times refused to accept her authorship of any of the various leaflets, letters or emails. But harassing as the mischief is statutorily required to occur in a number of stated ways. According to the submissions on behalf of the accused, the section is not written in a way which states a criminal wrong and then exemplifies a number of ways in which it might occur, thus leaving the central definition intact. Rather, the central definition is said to have been constrained by the methods of commission. Hence, counsel for the accused submits:

> It is not accepted by the appellant that the definition in section 10(1) of the Act of 1997 is description and not exclusive. The phrase in the section "by any means including" is **not** followed by a number of activities as is suggested in the statement of case but provides "by any means *including by use of the telephone*, harasses another by persistently following, watching [etc.]". The appellant's position is that the phrase "any means" relates to the *means* of the act, and so for example, harassment could be committed in person, by letter, on-line, or indeed by telephone. It was common case at the trial and indeed in the Court of Appeal that the list of acts described was exhaustive and that the respondent had to prove one or more of the acts described, that is "following, watching, pestering, besetting or communicating with". Section 10(2) of the Act of 1997 is relevant to the *actus reus*, as the offence is not committed unless the acts seriously interfere with the victim's peace and privacy or cause alarm, distress or harm, the acts as set out in section 10(1) must still be proved. As the list of acts does not contain the act of "communicating with others", the Act as drafted means that that communication with others is outside the scope of the Act.

14. Criminal statutes are not set out in neat divisions between the mental element which serious criminal offences carry and the definition of what is forbidden, or the external element of the crime. In all modern statutes a mental element is specified, if not as in *The People (DPP) v Murray* [1977] IR 360 it may be necessary to imply a state of culpability, be it intention or knowledge or recklessness or negligence, but often the actual wrong prescribed can be informed from the nature of what purpose is regarded as wrong. Harassment, a word which in ordinary speech carries a connotation of unpleasant annoyance or harrying of a person can be done by persistent communication to that person but under the mental element definition, a sense informs that external element that the wrong is that of undermining the confidence, peace or stability of the victim. The offence is not committed without the offender having a purpose of or of being aware to a culpable degree that what is done is to (intention), or carries a serious risk in morally culpable circumstances of (recklessness), causing "alarm, distress or harm" to the victim. Additionally, while recklessness already encompasses risking such abuse of the rights of the harassed person, it is also required that what is done is "such that a reasonable person would realise" that such actions "would seriously interfere with" the victim's "peace and privacy or cause alarm, distress or harm" to them. It is to be immediately noted that the section becomes almost rhetorical in the repetition of the mental element of intending to seriously annoy and of acting in such a way as the effect of actions would be in the mind of the actor together with a requirement that such consequence would occur to an ordinary person in setting about the harassing action.

Section 10 provides for injunctive-type relief and for a criminal penalty provided this definition is met:

> (1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.
> (2) For the purposes of this section a person harasses another where—
> > (*a*) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and
> > (*b*) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

15. Under s 10 any means of harassment are possible, only "use of the telephone" is specified as an exemplar. Once the action is harassment it is an offence, which means that the effect is of seriously disturbing another person in what might be called their right to be left in peace. But it is clear also that only by means of "persistently following, watching, pestering, besetting or communicating with him or her" can the offence occur. The natural result of, for example, leaving one's home in the morning and seeing the same sinister presence and turning around in a shop to become aware that such person has decided to apparently like the victim's consumer choices will be to drive a person towards frustration and annoyance if not despair. And that is what this crime is about. But there must be one or more of the methodologies of harassment as specified. In both the written and oral submissions on behalf of the prosecution, much has been made of the corresponding English offence, which is promulgated in The Protection from Harassment Act 1997. This is of little assistance. The drafting is very different from s 10 of the 1997 Act. Section 1 states that a "person must not pursue a course of conduct … which amounts to harassment of another and … which he knows amounts to harassment of the other." Defences such as preventing crime or acting lawfully are included in s 1(3). Section 7 specifies the need for "conduct on at least two occasions in relation to that person" for conduct to be harassment. Section 2 (7) states a descriptive though not exclusive text of harassment that it "includes alarming the person or causing the person distress … on at least two occasions" and "includes speech."

16. Out of deference to the arguments on both sides, it is to be considered what might be gained from a comparative analysis. Certainly, the mischief of stalking, as harassment is colloquially described, is central to the purpose behind both enactments, but English law depends on entirely different wording; though the case law throws up at least some examples on the nature of the wrong that both sets of legislation seek to address. In *Kellett v DPP* [2001] EWCA Admin 107 the victim's employer was written to claiming that she was receiving pay to which she was not entitled, implying fraud on her part. This was followed by telephone calls to the employer alleging improper absence from work. The victim became "extremely distressed when informed" of these. The accused claimed by way of defence that he was acting in the public interest and that as he had expressly stated that he had not wished the victim to be informed, that this conduct could not constitute harassment. On a case stated, the Appeal Court disagreed, Rose LJ stating at paragraph 16:

> The offence was only complete when the complaint was told of the telephone calls made by the appellant in that it was the knowledge of his conduct that

> caused her distress. But the fact that she had been informed of the course of conduct by a third party rather than by the appellant himself did not mean that there was no offence committed once she had been so informed, even in circumstances where the appellant had asked that she should not be so informed, so long as there was evidence on the basis of which the court could properly conclude, as it clearly did, that the appellant was pursuing a course of conduct which he knew or ought to have known amounted to harassment of the complainant.

17. In *R v Debnath* [2005] EWCA Crim 3472, the victim and the accused had a brief romantic liaison. She became jealous of the lack of any continuity in the encounter and, apparently, believing she had caught a sexually transmitted infection from the victim, set up a website devoted to his supposed homosexuality, registered him on a homosexual dating website, sent him homosexual pornography, deceitfully established a connection between the victim and a male homosexual long-term American prisoner, and then, by email to his employer and entire firm, claimed he was a criminal. While the appeal was about the breadth of the restraining order on her, there was no argument raised that communication to those other than the actual victim could not amount to harassment. The English legislation is wider, however, enabling harassment to be done "by any means" in contrast to the specific methodologies of the 1997 Act. In *R v ZN* [2016] EWCA Crim 92, followed in *Lang v Crown Prosecution Service* [2017] EWHC 339 (Admin), communications were mostly made to the victim, but some were disguised as coming from other sources, including his mother, claiming that he was not to be trusted with his own child. The Court of Appeal clarified that while some conduct may be objectionable or cause alarm, this will not amount to harassment unless the series of actions or communications is also oppressive of the victim. Quoted was a passage from Blackstone's Criminal Practice (2015) at B2.180:

> The definition provided by s.7 is clearly inclusive and not exhaustive… 'Harassment' is generally understood to involve improper oppressive and unreasonable conduct that is targeted at an individual and calculated to produce the consequences described in s.7. By s.1(3) of the Act… reasonable and/or lawful courses of conduct may be excluded. The practice of stalking is arguably the prime example of harassment…. but a wide range of other actions could, if persisted in, be so categorised. A course of conduct which is unattractive and unreasonable does not of itself necessarily constitute harassment; it must be unacceptable and oppressive conduct such that it should sustain criminal liability…… Harassment includes negative emotion by repeated molestation, annoyance or worry. The words 'alarm and distress' are to be taken disjunctively and not conjunctively, but there is a minimum level of alarm or distress which must be suffered in order to constitute harassment.

18. Certainly, continuation in an action or the repetition of an event is required to constitute the offence under s 10. In *Director of Public Prosecutions (O'Dowd) v Lynch* [2008] IEHC 183, [2010] 3 IR 434, a man came to a family home to install a fridge but while there exposed himself and fondled his genitals in front of children, going into the garden and returning to resume what were a number of incidents of this behaviour. The High Court held that to be harassment, there had to be a number of incidents or a single but continuing action. What was required was persistence. This fulfilled both categories whereby something might be persistent, repetition or extending the time taken over an activity. Further, the behaviour was beyond any norm of even poor conduct.

19. But, what occurred here is argued on behalf of the accused to be neither communication nor besetting and to exclude all but the first letter, sent to the victim herself, from the catalogue of wrongs inflicted on the victim is to render that single missive other than persistent. At 2.13 of the Report on Harmful Communications and Digital Safety (116/16) the Law Reform Commission comments:

> Lynch illustrates that persistence requires continuing behaviour and will usually involve more than one incident, but it can include a single incident provided it is prolonged, thereby meeting the test of continuity. However, the interpretation of the persistence requirement made in Lynch has yet to be considered by the Supreme Court or applied by the High Court in any subsequent cases.

20. In construing a statute the context matters in giving meaning to specific words. Here, the definition is not exclusive, as in removing certain activities from the scope of criminalisation, but is descriptive: harassment may be "by any means including" a number of activities that are examples "persistently following, watching, pestering, besetting, or communicating with him or her". While some may refer to that kind of conduct as stalking, the essence of the offence is to harass someone to the extent that it would "seriously interfere with the other's peace and privacy or causes alarm, distress or harm to the other". Further, the mental element is that "a reasonable person would realise that" effect. The conduct and the result are thus linked in the mental element whereby the broad definition is exemplified and is required to result in particularly described mental effects on the victim. This actually tightens rather than broadens the mischief addressed.

Communication with

21. Understanding the origin of a word, or even to listen carefully to the syllables within it to comprehend its make-up, may assist in grasping its meaning. An online entomology of communication shows its origin and literal construction as a concept in logic:

> early 15c., "act of communicating, act of imparting, discussing, debating, conferring," from Old French comunicacion (14c., Modern French communication) and directly from Latin communicationem (nominative communicatio) "a making common, imparting, communicating; a figure of speech," noun of action from past-participle stem of communicare "to share, divide out; communicate, impart, inform; join, unite, participate in," literally "to make common," related to communis "common, public, general" (see common (adj.)). Meaning "that which is communicated" is from late 15c.; meaning "means of communication" is from 1715. Related: Communications; communicational.

22. All of this is unexceptional. This is a plain word in English that should be given a plain meaning. As Henchy J said in *Inspector of Taxes v. Kiernan* [1981] I.R. 117 at 121:

> First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or an extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning. As Lord Esher M.R. put it in *Unwin v. Hanson* [1891] 2 Q.B. 115 at p. 119 of the report:—

> "If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

The statutory provisions we are concerned with here are plainly addressed to the public generally, rather than to a selected section thereof who might be expected to use words in a specialised sense. Accordingly, the word "cattle" should be given the meaning which an ordinary member of the public would intend it to have when using it ordinarily.

Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in *Tuck & Sons v. Priester* (1887) 19 Q.B.D. 629 (at p. 638); Lord Reid in *Director of Public Prosecutions v. Ottewell* [1970] A.C. 642 (at p. 649) and Lord Denning M.R. in *Farrell v. Alexander* [1975] 3 W.L.R. 642 (at pp. 650-1). As used in the statutory provisions in question here, the word "cattle" calls for such a strict construction.

Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed. In regard to "cattle", which is an ordinary and widely used word, one's experience is that in its modern usage the word, as it would fall from the lips of the man in the street, would be intended to mean and would be taken to mean no more than bovine animals. To the ordinary person, cattle, sheep and pigs are distinct forms of livestock.

23. Reverting to plain meaning and ordinary usage, communicating with someone means that some information is made common as between the person communicating and the person communicated with. This does not necessarily require the victim to be directly addressed. But according to the submissions on behalf of the accused, this is not enough. Communication is not just sharing information, it is required, on the accused's argument, to be direct as otherwise it is not the offence of "harassment … by … communicating with" the victim. This would be to introduce a meaning far removed from the statutory intent and the common sense meaning of the words used. Imagine a person obsessed to the point of hiring a light aircraft and advertising banner and causing the pilot to fly over a city where the victim resides trailing a few visible words to the effect that he or she is a nasty individual. Yes, on the accused's submissions, it is communication with the victim if he or she looks up on hearing the aircraft noise and watches, horrified, a defamatory

statement being trailed in the sky. As a matter of chance, it follows on the accused's submissions, that no it is not communication with that victim should he or she be asleep in a park or quietly reading indoors as the aircraft soars overhead. Where the subject's companions, on awakening, relate what has happened, that, on the case made on behalf of the accused, is not communication. Nor, it is claimed, is it communication with the victim should his or her phone become energised with the clamour of messages from friends and from colleagues in the workplace asking what has happened. It is not communication on that submission should the victim ask what the fuss was all about to be told exactly what happened. This submission is divorced from reality.

24. The example given here is not far-fetched and nor is it removed from the facts of this case. An email blitz was anonymously directed by the accused, as the jury's verdict makes clear, whereby the most nasty and derogatory things were said about the victim. This was not casual gossip with a friend whereby some unpleasant secret about someone, true or not, was shared quietly, sympathetically or not. It was a deliberate campaign. Furthermore, the single instance even of leafleting an entire neighbourhood was of itself a persistent interference with the human right of the victim to be left in peace. By that activity it could not rationally be said that even if the victim drove past the leaflets and did not see them, perhaps because of the ordinary preoccupations of the day, that where these communications were not immediately binned, some people because of absence from their homes or not using their cars or not bothering, would leave them in place. In the neighbourhood, someone and probably many, would mention the bizarre event to the victim. This would be a communication with the victim by the accused and the victim would then have the unpleasant task of tracking down the crazed missives, explaining herself and what was going on, and removing such leaflets as had persisted. All of these fit into the category of a communication where any rational person would realise that although directed at the victim, because of the campaign strategy, news, and in high probability the full text of it, would reach her.

25. No comment is made here on the trial judge removing the email to the victim's employer. But there was a veritable blizzard of other emails through anonymous routing and the point of all of this activity was communication. No offence would be committed unless the accused intended by this activity that she would act so that she, in the words of s 10 of the 1997 Act, "seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and" further these "acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other." Communication with the victim occurred here, this was intentional as there is no sense on the facts of the accused taking a serious risk of communication in morally culpable circumstances, rather the point of the emails was the same – on any common sense and shrewd interpretation, it was to undermine the life of the victim.

Besetting

26. On behalf of the accused it is argued that besetting is a particular activity of attending at premises and of there encouraging a point of view, as with placards or in the context of a trade dispute urging workers to leave work, or suppliers not to supply a factory or business, in pursuit of improvement in pay and conditions and it is further submitted that nothing about emailing generally or leafleting a neighbourhood could ever amount to besetting. The meaning of besetting on this submission, to put it shortly, is confined to physical besetting of a person and that means that the use of the words in sections 9

and 10 have a trades disputes origin and were intended by the Oireachtas to be so construed:

> It is accepted that the general rule when construing a particular word or expression is that the provisions of another statute are not normally used as an aid or a guide unless that statutory provision is *in pari materia* (see Dodd on Statutory Interpretation paragraphs 8.23 to 8.41). In this instance however, the Non-Fatal Offences Against the Person Act 1997 specifically repealed section 7 of the Conspiracy and Protection of Property Act 1875 and replaced it with section 9 (unlawful coercion) which, as noted by this court in the statement of case, also contains the word "beset". It appears therefore that the Acts of 1875 and 1997 are *in pari materia* and should be taken together as forming one system, and as interpreting and enforcing each other. It follows that the word "beset" should be interpreted as "occupying or surrounding a place".

27. Of the activities described in s 10 whereby harassment may take place, there are many overlapping sorts of criminal conduct. Thus, "by any means", which despite the telephone being exemplified in the world of 1997 takes in literally any form whereby these activities can be carried out, persistent "following" must also involve a strong element of "watching", which as and of itself will necessarily also be "pestering" and often that will involve, as well, "communicating with" the victim if something is said, which it is hard to imagine not happening, or a placard or notice is held by the accused. What should be born in mind by the word following, which is "besetting", that it became a concept in legal speech due to its promulgation as a wrong in the 1875 Act. But that is all. What is easily forgotten, however, is that that legislation must also be construed in terms of the interaction of the words used to define the wrong; or as a maxim of statutory interpretation has it *noscitur a sociis*, see *Foster v Diphwys Casson* (1887) 18 QBD 428. As has already been pointed out, the wrong in s 7 of the 1875 Act was only an offence where besetting happened in the context of and for the purpose of causing someone else to stop doing something or to do something. This is another example of mental element and external elements in an offence being intermingled. But that does not matter, because what counts is the meaning that the legislation defines an offence by. In that earlier context, only letter writing, telegraph and actual picketing were available to beset someone. If strikers in Victorian times wrote people letters or sent them telegrams, an expensive business then, it is certainly not mentioned in any of the law reports on trade disputes. The Cambridge Dictionary Online has this entry for beset: "having a lot of trouble with something, or having to deal with a lot of something that causes problems" and carries this example "With the amount of traffic nowadays, even a trip across town is beset by/with dangers."

28. The trial judge told the jury that they might convict on communicating with the victim or on besetting. The prosecution had concentrated on the latter term. No matter how the conviction is thus viewed, the direction of the trial judge and the verdict accord with law. There was most definitely communication. Many other activities are a subset of that in s 10. Besetting, however, is quite an arcane word and to return to the exhortation of Henchy J in *Kiernan*, is so lacking in the usage of ordinary English as to defy the course of statutory interpretation that gives plain meaning to everyday words. Without, however, a definition it is a concept hard to grasp and has led to differing views from O'Donnell J and O'Malley J. Certainly, to wed the word to the historical struggle for workers' rights and the response of the Victorian judiciary would be a mis-match. There, besetting would have involved turning up at a place or being deliberately near a person for no

ordinary reason. Of course, to do that, the accused would also have to at least watch out for the victim, thus being captured by another approach in an offence definition that seems determined to leave nothing out. By so doing, the section has become capable of argument that strains towards the opposite result. It is to be doubted that the meaning of besetting is limited to physically turning up, the premise of O'Malley J's analysis, since watching covers that, but it is certainly correct that being in a place because the victim is there is besetting if that happens over a stretch or by repetition. Here, the view is expressed that the victim was beset by persistent communications which beset her life with trouble. The majority view of O'Donnell, MacMenamin, O'Malley and Baker JJ take the view that besetting requires some physical presence or physical actions, albeit at a distance. Using such a word in a modern statute is not going to help in ordinary criminal trials. The definition of the offence needs to be looked at again but none of the court doubt that communication is a wider concept. But, this section is a monofilament net and like belts worn with braces captures so much of the accused's activities by so many different forms of conceptual outlawing of a range of interlocking behaviours that communication covers the accused's conduct.

Result

29. For clarity's sake, which is required only as there are different views on besetting, the conviction of the accused is upheld on the wrong of harassment of the victim through communicating with her. This judgment is the unanimous expression of the reasons on harassment through communication with which reasoning the Court agrees. O'Malley J is in the majority in her view that what happened here was not harassment through besetting.

30. The appeal should therefore be dismissed, affirming the order of the Circuit Criminal Court and upholding the order of the Court of Appeal.