INTRODUCTION

Good morning. The focus of my paper this morning is on identifying practical guidance from the case law concerning workplace stress, bullying and harassment and to assess where the law now stands as of May 2012. In order to this, it is necessary to analyse some of the most significant recent cases and the approaches to these claims taken in the courts.

At the outset, the scope of this paper should be clearly explained: it does not purport to provide an exhaustive overview of the many different (though often overlapping) legal mechanisms through which workplace stress, bullying and harassment can give rise to a cause of action. Rather, the focus of the paper is on identifying practical guidance from the new approaches in the courts in the context of claims for personal injuries sustained in this context. Accordingly, it must be emphasised that the issues discussed in the herein paper are not dispositive of the legal implications which may flow from workplace bullying, harassment and stress1: amongst the other separate and distinct consequences not treated here are possible claims for constructive dismissal arising from workplace stress; potential claims under employment equality legislation; industrial relations mechanisms, and claims arising from other distinct legislative sources. An important preliminary point to be made at this point, therefore, is that the issue of workplace

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1 For an overview of the various different jurisdictional features of the different fora in this context see for example Niall Neligan B.L., “Jurisdictions and causes of action: Commercial considerations in dealing with bullying, stress and harassment cases—Part I” (2008) 15(1) CLP 3. It should be noted, however, that draft legislation is expected very shortly which is designed to bring about fundamental change to the structures of the employment law fora for the resolution of workplace disputes: see www.workplacerelations.ie and the Press Release issued by Minister Richard Bruton TD on 8 March 2012 to this effect. Indeed, at another conference taking place elsewhere this morning, our colleague Tom Mallon B.L. is delivering a paper concerning these proposed reforms (Thomson Round Hall Employment Law Conference, 19 May 2012).
bullying, harassment and stress is one capable of generating a multiplicity of overlapping causes of action: my focus on the approaches of the courts to personal injuries actions in this area in 2012 must thus be viewed in this wider context as representing one piece of a complex and at times confusing legal jigsaw.

Workplace Stress, Bullying and Harassment: Profile Overview of Developments this Year

Statistical evidence suggests that workplace stress, bullying and harassment in general is increasing. This is certainly consistent with trends in litigation. Last year, two high-profile stress and bullying cases were the subject of detailed High Court judgments; this year, the High Court (Cross J.) has held in favour of the plaintiff in *Kelly v Bon Secours Health System Ltd*; a great many more cases have been settled; others are apparently ongoing before the Courts at the time of preparing this paper. In the English courts, there have been two significant decisions on point this year at Queen's Bench level, and there has also been the long-awaited judgment of the United Kingdom Supreme Court last December in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*, where the majority of the Supreme Court ruled that employees may not recover damages for loss suffered as a result of a breach of a term in their employment contract as to the manner of their dismissal unless the loss can be said to precede and be independent of the dismissal. In this paper, I will focus on the Irish developments in the last year but in

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5 For a recent example see “Garda’s claim of harassment settled before court hearing”, *The Irish Times*, 6 February 2012. “Principal accused of bullying settles case”, *The Irish Times*, 7 March 2012.

6 See for example “Garda sues over alleged bullying after woman died”, *The Irish Times*, 11 May 2012.


order to do this effectively it is necessary to identify the key background principles from the case law to date.

**STRESS CLAIMS IN THE COURTS: THE LEGAL FRAMEWORK**

**Preliminary Observations**

It is now well established that employers owe a duty of care to their employees to guard against the potential danger of stress-related illnesses being sustained at work. As my fellow panelist this morning Neville Cox B.L. has observed:

> “It is now abundantly clear that employers owe a duty of care to employees in this regard and that failure to fulfil such duty of care can either justify an employee resigning and then claiming constructive dismissal, or alternatively can lead to an employee bringing a personal injuries action against the employer.”

In one leading High Court judgment in the area, the late Lavan J observed:

> “It has been a fairly recent movement towards the thinking that an employer must take care not only of the physical health of their employees, for example, by providing safe equipment, but also take reasonable care to protect them against mental injury, such as is complained of by the plaintiff in this case. It follows on from this that employers now have an obligation to prevent their employees from such that would cause mental injury, *i.e.* stress, harassment and bullying in the workplace”.

Regarding the basis upon which the court should approach such a case Lavan J noted that:

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10 *Quigley v Complex Tooling and Moulding* [2005] ELR 305. The Supreme Court appeal is analysed below in this paper.
“The fundamental question is whether the defendant fell below the standard to be properly expected of a reasonable and prudent employer”.

In this paper, it is proposed to consider in some detail the seminal decisions of the Irish courts and of the courts in other common law jurisdictions in this growing area in order to assess the question of “where are we now?”.

**Ordinary Negligence Principles apply in cases of workplace stress**
The case law thus far has been consistent in recognising that ordinary principles of negligence apply in cases of occupational stress. As was stated in one of the leading judgments:

“There is an argument that stress is so prevalent in some employments, of which teaching is one, and employees so reluctant to disclose it, that all employers should have in place systems to detect it and prevent its developing into actual harm. ...[T]his raises some difficult issues of policy and practice which are unsuitable for resolution in individual cases before the courts. If knowledge advances to such an extent as to justify the imposition of obligations upon some or all employers to take particular steps to protect their employees from stress-related harm this is better done by way of regulations imposing specific statutory duties. In the meantime the ordinary law of negligence governs the matter”.

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11 *Per* Hale LJ in *Sutherland v Hatton* [2002] 2 All ER 1 at [16].
IDENTIFYING GUIDELINES FROM THE KEY CASES IN THE AREA OF STRESS

Developments in English Law

The starting point in the case law in this area is, of course, the decision of the Queen’s Bench Division of the English High Court in *Walker v Northumberland County Council*. Since this case, it has been apparent that, in certain circumstances, employers may be held liable in negligence for stress-related illnesses suffered by employees as a result of workplace conditions and events.

The plaintiff in *Walker* worked as a social worker dealing with child abuse cases. His workload increased significantly over the years, without any increase in resources. In 1987 he suffered a nervous breakdown which was found to have been caused by his workload. On his return to work he was promised support which did not materialise. Some months later he suffered another breakdown and was eventually dismissed on grounds of ill-health.

Colman J found that although the first breakdown had been caused by the plaintiff's excessive workload, it was not reasonably foreseeable at that stage that his work would give rise to a risk of a nervous breakdown. However, on his return to work the employer should have foreseen that there was a risk that he would suffer further mental illness if again exposed to the same workload as before given that the plaintiff was vulnerable to psychiatric damage. Colman J held that, at the point of the plaintiff’s return to the same workload, it was “quite likely, if not inevitable” that he would suffer another breakdown and that he had not been afforded the “measure of additional assistance” with his work that he ought to have been given so as to avoid a recurrence of the illness. Colman J described the issue involved in the case as “work-engendered psychiatric injury”.

“Practical Propositions” laid down in *Sutherland v Hatton*

This year marks the tenth anniversary of the leading English authority in this context which is the case of *Sutherland v Hatton*, decided in February 2002. In this year’s Irish High Court judgment in *Kelly v Bon Secours Health System Ltd*, in which judgment was

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13 [2002] 2 All ER 1.

delivered in January 2012, Cross J described Sutherland as having “clarified the law”\textsuperscript{15} in this area and it is thus worth considering this authority briefly now that it is ten years since the Court of Appeal judgment.

**Hatton** involved four composite appeals; in each case, a defendant employer sought to appeal against a finding of liability for an employee’s psychiatric illness caused by stress at work.

Penelope Hatton worked as a modern languages teacher between 1980 and 1995. In that time, teaching methods changed radically, with a move away from traditional exam-based assessment, to a more modular system of teaching. In January 1994, about 18 months before she suffered from a nervous breakdown, she was attacked on the street. The evidence in the case was that towards the end of the period of her employment in the school, she was frequently absent due to illnesses, many of which were stress related.

Whilst Mrs. Hatton attempted to prove that her illness was caused by overwork, there was no evidence that she had ever complained to the school about the level of her workload during her employment. There was also evidence that when she discussed her illnesses with her superiors, she attributed her ill health to difficulties in her private life. The English High Court found in favour of Mrs. Hatton, but this decision was reversed by the Court of Appeal.

It has been observed, correctly in my view, that in **Hatton** “the Court of Appeal was keen to put a good deal of responsibility on the employee to draw any problems he is experiencing to the employer’s attention, so the starting point will usually be a complaint (either informal or formal) from the employee himself.”\textsuperscript{16} As we will see this morning, this is one of the key lessons from the case law, and indeed is again demonstrated by the cases decided in 2011 and 2012. Indeed, in this year’s Irish High Court judgment in Kelly, Cross J remarked of **Hatton** that the Court of Appeal had in that case “placed considerable emphasis on the employee’s obligations to inform the employer of the

\textsuperscript{15} At para. [3.12] of the judgment of Cross J.

nature of the difficulties and the fact that the difficulties are having an adverse effect on their health”.\textsuperscript{17}

**Hatton Practical Propositions: Guidance for Employees and Employers**

In her judgment in the *Hatton* case Hale LJ (as she then was) set out a number of “practical propositions” to be considered by a court in dealing with a case of occupational stress. It is worth setting out this list of propositions in full as the list summarises – albeit in only a general way – many of the chief concerns and questions which guide the courts in this area. Moreover, the practical propositions have been approved as providing helpful guidance in the Irish courts.\textsuperscript{18} The propositions will then be analysed as a composite whole before turning to assess the manner in which they have subsequently been applied (and, in some cases, nuanced) by the courts both in this jurisdiction and in England.

\textquotedblleft(1) There are no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work the employee is required to do. The ordinary principles of employer’s liability apply.

(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable: this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors).

(3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large. An employer is usually entitled to assume that the employee can withstand the normal

\textsuperscript{17} At para. [3.12] of the judgment of Cross J.

\textsuperscript{18} See in particular the judgment of Laffoy J in *McGrath v Trintech* [2005] 4 IR 382. As noted above, Hatton was also referred to by Cross J in this year’s judgment in *Kelly*. 
pressures of the job unless he knows of some particular problem or vulnerability.

(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health.

(5) Factors likely to be relevant in answering the threshold question include: (a) The nature and extent of the work done by the employee. Is the workload much more than is normal for the particular job? Is the work particularly intellectually or emotionally demanding for this employee? Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? Or are there signs that others doing this job are suffering harmful levels of stress? Is there an abnormal level of sickness or absenteeism in the same job or the same department? (b) Signs from the employee of impending harm to health Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?

(6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not generally have to make searching inquiries of the employee or seek permission to make further inquiries of his medical advisers.

(7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it.

(8) The employer is only in breach of duty if he has failed to take the steps which are reasonable in the circumstances, bearing in
mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.

(9) The size and scope of the employer's operation, its resources and the demands it faces are relevant in deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties.

(10) An employer can only reasonably be expected to take steps which are likely to do some good: the court is likely to need expert evidence on this.

(11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty.

(12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job.

(13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care.

(14) The claimant must show that that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress has caused the harm.

(15) Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrongdoing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment.
(16) The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event”.19

The application of the *Hatton 16 Practical Propositions* in English and Irish case law

While the above guidelines represent a valuable contribution to the development of the law and comprise highly useful practical guidance, it should be emphasised, as courts have emphasised, that they must not be read “as having anything like statutory force”.20 Equally, it has been remarked that “the 16 propositions in *Sutherland* do not necessarily offer an employer a scheme for avoiding civil liability for stress-related psychiatric injury.”21 That having been said, the Irish courts have consistently demonstrated a willingness to have regard to these propositions. Thus in the course of his judgment in *Maher v Jabil Global Services Ltd,*22 one of the leading cases in this area, Clarke J stated as follows:

‘In *McGrath v Trintech Technologies Ltd*, Laffoy J reviewed the authorities in relation to an employer’s liability for psychiatric illness induced by stress and pressures at work. In the course of her judgment Laffoy J cited with approval 16 ‘practical propositions’ set out in the judgment of Hale LJ in *Hatton v Sunderland* which are designed to assist in the assessment of such cases. While not all of those practical propositions will be relevant in each case, it was accepted by both

19 *Hatton*, above, at [43] (internal references omitted).


22 *Maher v Jabil Global Services Ltd* [2008] 1 IR 25.
sides that the principles identified by Laffoy J represent the law in this jurisdiction.\textsuperscript{23}

The Court of Appeal in \textit{Hatton} placed a considerable onus on the employee to inform the employer of the nature of his or her difficulties and that those difficulties were having an adverse effect on his or her health. The apparently onerous nature of that requirement was lessened by the House of Lords in dealing with one of the four cases on appeal, \textit{Barber v Somerset County Council}.\textsuperscript{24}

\textbf{Difference of Approach between Court of Appeal and House of Lords in \textit{Barber} and Implications of this Difference for Stress Claims}

It was observed earlier in the paper that the \textit{Hatton v Sutherland} guidelines were delivered by the English Court of Appeal in the context of four conjoined appeals. One of these cases was further appealed to the House of Lords and the judgments delivered by the House of Lords in the case now represent a leading authority in this area of the law.

\textit{Barber v Somerset County Council}\textsuperscript{25} involved an appeal by a teacher who was an employee of the council, against a decision of the Court of Appeal that the council had not been in breach of the duty of care that it owed him to avoid injury to his health. The crucial issue in this case was the standard of care that applied to employers who have reason to believe that one of their employees is having difficulty coping with a heavy workload and as a result is suffering a degree of stress.

Mr. Barber was head of the mathematics department at the East Bridgewater School. In September 1995 he was informed that to maintain his current salary level after a restructuring of staff at the school, he would be required to take on additional responsibilities as “mathematical area of experience coordinator” and project manager for public and media relations. Acting on that advice, the claimant increased his working hours to between 61 and 70 hours a week, and worked on many evenings and weekends.

\textsuperscript{23} Internal citations omitted.

\textsuperscript{24} \textit{Barber v Somerset County Council}[2004] UKHL 13, [2004] 1 WLR 1089.

\textsuperscript{25} [2004] UKHL 13; [2004] 1 WLR 1089.
Five months later, the claimant complained to the deputy head teacher at the school about what he described as “work overload”, and in March and April 1996 he consulted his GP about the stress he was experiencing at work. Around the same time he made enquiries about early retirement. In May 1996 the claimant was absent from work for three weeks, and his GP wrote a medical certificate indicating that he was suffering from stress and depression. When he returned to work the claimant had discussions with senior staff, expressing his fears that he was unable to cope with the increased workload, and told them he felt this was detrimental to his health. He did not receive very sympathetic responses, and the school did nothing to assist him. The claimant consulted his GP again on several occasions, complaining of stress. Finally, in November 1996 he lost control and shook a pupil, then left the school permanently. Since then he had been unable to work as a teacher, and could only manage to undertake undemanding work on a part-time basis. Two psychiatrists, expert witnesses, were in agreement that the claimant was suffering from moderate to severe depression.

His claim was upheld at first instance but was rejected by the Court of Appeal. The Court of Appeal found that the injuries sustained by the employee were not reasonably foreseeable and that it was “expecting far too much” to expect the employer to pick up the fact that problems of which they had been made aware previously were continuing without some such indication being made by the employee.

The House of Lords allowed the employee’s appeal – though it should be noted that the House of Lords considered the case to be “fairly close to the borderline” and the decision was not unanimous. The House of Lords found that the trial judge had been entitled to conclude that an employer had breached its duty to act. The House of Lords (Lord Scott dissenting) ruled that the question of the breach of the duty of care owed by the council to the claimant was not clear-cut. There was insufficient reason for the Court of Appeal to set aside the finding of the trial judge on the factual matters concerning breach of duty.

The House of Lords took the view that the Court of Appeal had failed to give adequate weight to the fact that the claimant, an experienced and conscientious teacher, had been

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26 Per Lord Walker at [67].

27 See below, treatment of dissenting judgment of Lord Scott.
absent for three weeks with no physical ailment, and that the reason for his absence had been certified by his GP as being due to stress and depression. The duty of the council, as an employer, was to take steps towards remedying the situation had arisen in June or July 1996 when the claimant had been in discussion with the school’s management team, which should have made enquiries about his health problems. They should have discovered what might have been done to ease those difficulties. Simply because other staff faced severe problems, as every teacher was stressed and overworked, it did not mean that there was nothing that could have been done to assist the claimant. The trial judge had been entitled to conclude that the school’s senior management team was in continuing breach of the employer’s duty of care, and that this had been the cause of the claimant’s breakdown in November 1996. Accordingly, the appeal was allowed.

As to the correct legal test to be applied in cases of this kind, Lord Walker agreed\(^\text{28}\) that Hale LJ’s analysis of the issue provided “useful practical guidance”, but said that the following well-known statement of Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd*\(^\text{29}\) remained “the best statement of general principle”:

“[T]he overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probably effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly

\(^{28}\) At [65].

\(^{29}\) [1968] 1 WLR 1776 at 1783.
expected of a reasonable and prudent employer in these respects, he is negligent.\(^{30}\)

The Court found that a three week period of certified stress leave should have led to enquiries from management about what they could do to ease the plaintiff's problems. The House of Lords held that management should have, at the least, made "sympathetic inquiries" in this respect on the plaintiff's return to work; attempted to reduce his workload and monitored his condition. The employer's failure to carry out these steps had caused the employee's ill health. It should be noted that the House of Lords accepted that the factual conclusion in this case involved a delicately balanced value judgment – providing a further reason why the findings of the trial judge ought not to be upset on appeal.

**Strong Dissenting Judgment in House of Lords in Barber of particular significance in the context of Irish developments**

It should be noted that Lord Scott in a strong dissenting judgment took the view that the question on the appeal was one of law as opposed to fact: namely, what standard of care should be imposed upon the employer in these circumstances. Lord Scott considered that the appeal should be dismissed on the basis that Mr Barber had failed to bring his difficulties to the attention of his employer. This difference marks the key point of departure in Lord Scott's approach from that of the majority. It will be recalled that the Court of Appeal in *Sutherland* placed a considerable onus on the employee to inform the employer of the nature of his or her difficulties and that those difficulties were having an adverse effect on his or her health. The apparently onerous nature of that requirement was lessened by the majority of the House of Lords in the *Barber* appeal. The tone of Lord Scott's dissenting judgment on this point is perhaps best captured in the following passage:

"Schools operate under considerable difficulties. I do not suppose there are many, if any, teachers whose workload does not place them under considerable continuous pressure apt to cause stress and sometimes depression. The same, I suspect, would apply to many professional employees. Nurses and doctors working in the

\(^{30}\) The test originally propounded by Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776, 1783.
NHS are an obvious example. Employed lawyers working in busy city firms are probably another. Pressure and stress are part of the system of work under which they carry out their daily duties. But they are all adults. They choose their profession. They can and sometimes do complain about it to their employers. In under funded institutions, providing vital social services there is often very little that the employers can do about stress problems. Colleagues in the school or hospital are likely to be carrying an equally heavy workload. Is it fair to ask them to assume a greater burden in order to relieve the stress on a particular teacher? Can the school afford to ask for a supply teacher? As a last resort the school may have to do so. But the school is entitled to expect, first, to be kept fully informed by the teacher of his or her problems.  

Assessment of significance of *Barber* in the context of stress claims

A number of points can be made of the general significance of *Barber* in the context of stress claims. Interestingly, there was a difference of emphasis when it came to considering whether the onus lay on a vulnerable employee to alert his employer to his difficulties. Hale LJ had implied that it did, and Lord Scott agreed. As we have seen above, the majority held that although it was up to an employer to evaluate physical dangers his system of work might pose to his employees for himself, when it came to the risk of psychiatric illness an employer could not even begin to consider what precautions to take unless kept informed by the employee in question.

Two other points of importance were made in *Barber*. First of all, Lord Scott in dissent questioned what could be done by schools and hospitals faced with an employee’s stress problem. It was not fair to expect other hard-pressed employees to fill the gap, and yet the employer might not be able to afford to hire new staff to plug it either. Lord Rodger, meanwhile, was concerned about the relationship and interaction between the employer’s tort law obligations and the employee’s contract of employment. Lord Rodger observed that a tortious duty of care which might require an employer to provide assistance to enable an employee to return to work and draw his normal pay, while

31 *Barber*, at [14].

32 At [34].
performing less than his contractual duties, did not “sit easily” with the overarching contractual framework.\(^\text{33}\)

**Whether Hatton imposes “heightened scrutiny” threshold**

As we have seen, the four appeals considered by the Court of Appeal in *Hatton* were all appeals by employers on whom liability had been imposed at first instance: in three of the four cases their appeals succeeded. Although, the House of Lords did reverse the decision of the Court of Appeal in one case (*Barber*), as we have seen, it did so whilst expressing the view that the case was a borderline one and the majority judgment was accompanied by a strong dissent from Lord Scott. This has led some commentators to suggest that, after *Hatton*, the bar has been raised for claimants bringing these cases. Buckley, for example, suggests that “the overall effect of *Hatton v Sutherland* will have been to heighten the scrutiny to which the courts will subject claims for work-related illness based on stress”.\(^\text{34}\)

Whilst it is indeed possible to point to a number of English cases decided post-*Hatton* in which claimants have been unsuccessful,\(^\text{35}\) so too have there been recent cases in which plaintiffs have successfully invoked the principles in *Hatton* to recover damages for injuries caused by workplace stress.\(^\text{36}\)

**THE IRISH CASE LAW: WHERE ARE WE NOW?**

It is now proposed to conduct an analysis of some of the key Irish cases in this growing and difficult area. By way of introductory comment, and in light of the foregoing analysis of the English authorities, it would appear that the dissenting approach of Lord Scott in the House of Lords in *Barber* is more consistent with the approach that has been seen from the Irish Courts, with the apogee being reached in the Supreme Court decision in *Berber v Dunnes Stores Ltd*\(^\text{37}\) three years ago, to which I refer below. Having said that, it

\(^{33}\) Ibid.

\(^{34}\) Buckley, *The Law of Negligence*, (4\(^{th}\) ed, Butterworths, 2005) at [17.08].


is significant to note that there have recently been two significant plaintiff wins in this area, in the cases of *Sweeney v Ballinteer Community School*¹⁸ and this year’s decision in *Kelly v Bon Secours Health System Ltd*¹⁹. It should be emphasised, however, that these cases are notoriously fact-specific and it is difficult to point to firm trends in the legal authorities.

**Analysis in Ireland of 16 Practical Propositions in *Hatton***

In one of the leading High Court judgments in this area, in the case of *McGrath v Trintech Technologies Limited*²⁰, Laffoy J set out a detailed analysis of the relevant legal principles relying significantly on the decision of the Court of Appeal in *Sutherland v Hatton*. She concluded as follows:

“The effect of the decisions of the Court of Appeal and the House of Lords in the *Hatton/Barber* case is to assimilate the principles governing an employer’s liability at common law for physical injury and for psychiatric injury where an employee claims that the psychiatric injury has resulted from the stress and pressures of his/her working conditions and work load. In my view, there is no reason in law or in principle why a similar approach should not be adopted in this jurisdiction. I consider that the practical propositions summarised in the judgment of the Court of Appeal in the Hatton case are helpful in the application of legal principle in an area which is characterised by difficulty and complexity, subject, to the caveat of Lord Walker in the *Barber* case – but one must be mindful that every case will depend on its own facts.”²¹

The plaintiff in *McGrath* was a senior project manager in a multinational information technology company. He claimed that he had suffered from stress as a result of the manner in which he had been treated by his employer during his time on a placement in Uruguay. There was evidence of a number of crises having occurred during this time which he had responsibility for managing; there was further evidence of an acrimonious relationship between the plaintiff and his immediate boss. During his time in Uruguay the

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²⁰ [2005] 4 IR 382.
²¹ McGrath, at p. 416.
plaintiff claimed he was subjected to serious work related stress and pressure which he claimed resulted in psychological injury. On his return to Ireland the plaintiff was on certified sick leave until he was made redundant.

Laffoy J in her judgment undertook an extensive review of the Irish and English caselaw in the area. She accepted that the plaintiff had established that he suffered from what she termed “a recognisable psychiatric illness”. Nevertheless, the plaintiff’s case failed in relation to foreseeability, a point which I now analyse.

**Failure in relation to Foreseeability**

Foreseeability of harm has emerged as perhaps the most difficult of the legal thresholds for plaintiffs in stress cases to cross – a point that is well illustrated by *McGrath*.

The court in *McGrath* concluded that the defendant did not have any actual knowledge of the plaintiff’s vulnerability to psychological injury or harm, having had him medically assessed before the commencement of his employment. It should be noted that in taking this approach in relation to foreseeability Laffoy J placed particular emphasis upon the fact that the plaintiff had been an employee in a workplace environment that embodied a robust corporate culture:

“It clearly emerged from the evidence that the corporate culture in the defendant’s companies is competitive and demanding of their employees…the American model where employees work hard and play hard against the background of economic ups and downs. It was not a place where one would admit weakness...On the evidence I conclude that there was no reason why the defendant should not assume that the plaintiff could withstand the stresses and pressures of this type of work environment and of the workload which he was prepared to undertake”.

On the evidence, Laffoy J found that the defendant had adequately addressed any signs of vulnerability on the part of the plaintiff or possible harm to his health. Laffoy J referred specifically to the fact that the plaintiff had not informed the defendant of his medial problems while in Uruguay and that he was not absent on sick leave. This would suggest

an onus on an employee to inform the employer of the medical difficulties he was experiencing, and underscores the difference of approach taken by the Court of Appeal and the majority of the House of Lords in Hatton/Barber explored above in this paper.

In McGrath, the plaintiff had claimed that certain matters constituted putting the defendant on notice of the fact that he was prone to psychological injury attributable to work related stress. He had referred, for example, to a conversation with his manager. Laffoy J concluded that this conversation was a casual conversation which did not put the individual on any further enquiry as to the plaintiff’s psychological condition. She found that:

"insofar as the defendant was put on enquiry in relation to the plaintiff’s health problems, by procuring medical advice the defendant discharged its duty of care to the plaintiff."\(^{43}\)

Laffoy J concluded that the plaintiff had failed to cross the foreseeability threshold. She stated that the fundamental test was whether the defendant fell below the standard to be properly expected of a reasonable and prudent employer and concluded that this defendant did not, having done what was reasonable in the circumstances.

Objective analysis of treatment required

Laffoy J in McGrath accepted that the plaintiff undoubtedly held a “subjective perception” that he was not being properly supported. However, she concluded that, viewed objectively in the light of what the defendant knew about the plaintiff, what his role was, and what was expected of him, the manner in which the plaintiff was treated by the defendant did not give rise to a breach of the defendant’s duty of care to the plaintiff.

Accordingly, it seems that the courts in this context will require an objective analysis of the treatment complained of. As Marguerite Bolger S.C. has observed, this is “in stark contrast to the statutory law on harassment including sexual harassment at work which seems to permit a very subjective analysis.”\(^{44}\)

\(^{43}\) Ibid, at 435.

\(^{44}\) Marguerite Bolger in her article, “Claiming for occupational stress, bullying and harassment” (2006) 3(4) IELJ 108 points out that this approach has been supported by the High Court in the case of Cronin v Kostler (ex tempore judgment of Haugh J, High Court, 1 December 2005, reported in The Irish Times Law Report 27 February 2006) and in the Circuit Court in the case of Hickey v Health Insurance Authority (Unreported judgment of Judge Smyth,
The *Maher v Jabil* Test

*Maher v Jabil Global Services Ltd* is another high-profile example of a case where the plaintiff failed to establish reasonable foreseeability on the part of the employer. This judgment of the High Court is now arguably the leading Irish authority on point since the High Court (Clarke J) articulated a three-stage inquiry or test for assessing whether recovery lies in a case of workplace stress which has since been applied in subsequent cases. In this year’s *Kelly* decision, Cross J stated that he regarded the *Maher v Jabil* test formulated by Clarke J to be “the best summary of the questions to be addressed”.

The plaintiff in *Maher* had claimed damages for stress arising from one period of alleged overwork and one period of alleged underwork. The Court was satisfied he had suffered personal injury which was caused by his work environment. In relation to the period of overwork, Clarke J concluded:

“[I]t does not seem to me that, having regard to such factors as those identified in Item 5 of the practical propositions specified in *Hatton*, that the objective threshold for foreseeability is met. There is no evidence from which I could conclude that the work load was more than is normal in the particular job. While it may be that the work turned out to be more demanding for the plaintiff I am not satisfied that there was any evidence upon which it is reasonable to infer that the employer should have known this. It does not appear that there is any real evidence that the demands made of the plaintiff were unreasonable when compared with the demands made on others in the same or comparable jobs. Nor were there any signs that others doing the job had suffered harmful levels of

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45 [2008] 1 IR 25.

46 See in particular the judgment of the High Court (Laffoy J.) in *Berber v Dunnes Stores Ltd* [2007] ELR 1. This judgment was reversed by the Supreme Court three years ago: [2009] IESC 10, [2009] ELR 61.

47 At para. [3.15] of the judgment of Cross J.
stress or that there was an abnormal level of sickness or absenteeism in the same job or in the same department."

As in its earlier judgment in *McGrath*, the High Court in *Maher* again emphasised the need for an objective analysis of the treatment complained of, as opposed to the plaintiff’s own subjective views, as considered above.

In relation to the period of underwork, the Court concluded:

“I am not satisfied that there was any concerted plan on the part of the employer to seek to exclude the plaintiff from his employment. As also appears above I am satisfied that the plaintiff did make some complaint about the inadequacy of the work which he was been given but not as frequently or in the terms which he claims. In those circumstances I am not satisfied that the plaintiff has established a breach on the part of his employer of a duty of care during this period either.”

Clarke J was satisfied that “the starting point for any consideration of liability in a case such as this” was the consideration of three questions:

(a) has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress;

(b) if so is that injury attributable to the workplace; and

(c) if so was the harm suffered to the particular employee concerned reasonably foreseeable in all the circumstances.

**Post-*Maher v Jabil* Developments in this area**

It should be noted that at this point the landscape surrounding bullying, harassment and stress at work appears to have altered somewhat in the last couple of years, particularly in light of two prominent High Court cases having been successfully appealed to the Supreme Court relatively recently. As we shall see, the two most significant cases in the Irish courts in 2011 involved a plaintiff win in one (*Sweeney*) and a defendant win in the other (*O’Toole*), whilst the stand-out case thus far in 2012, the plaintiff win in *Kelly v Bon Secours Health System Ltd*, involved detailed consideration being given to the *Sweeney*
case of the previous year. Before coming to these cases, however, it is important to analyse two Supreme Court cases which form the backdrop to how these cases are now being litigated. The first of these, *Quigley v Complex Tooling and Moulding*,\(^{48}\) concerns bullying; the second, that of *Berber v Dunnes Stores Ltd*\(^{49}\) concerns stress. Each of these Supreme Court case marks a very important further development in this area of employment law: *Berber* represents the first occasion on which the Supreme Court has had to deal with the issue of whether and when an employee can recover damages from an employer for psychological injury caused by stress in the workplace, as distinct from a situation such as that in *Quigley* where the stress in question was alleged to be the result of bullying.

**The Supreme Court judgment in *Quigley v Complex Tooling and Moulding***

*Quigley*, in which the Supreme Court delivered its judgment almost four years ago, is one of the leading Irish cases on employers’ negligence concerning bullying and harassment at work. It constitutes an important addition to the evolving understanding of the difficulties facing plaintiffs in this type of negligence action against their employers. Whereas the well-known High Court ruling in *Maher v Jabil Global Services Ltd.*\(^{50}\) analysed above is of central importance for its illustration of the difficulties facing plaintiffs in terms of the third stage of the test formulated by Clarke J in that case – foreseeability – the judgment in the Supreme Court appeal in *Quigley* emphasises the problems plaintiffs can encounter in the second stage of that test: causation. The case is striking in that whilst the plaintiff’s complaints of bullying and harassment were upheld, and the employer was found to have been in breach of its duty of care to him, the plaintiff failed to establish this crucial causal link.

In *Quigley*, the plaintiff was a factory operative who had been subjected to harassment, bullying and victimisation at work which the company had taken no reasonable steps to prevent or remedy. He gave evidence of having been subjected to excessive scrutiny and unfair and humiliating treatment by management, which was not challenged by the employer. (Indeed, one of the most striking features of the High Court hearing in *Quigley* was the availability and willingness of no less than nine fellow employees to testify on


\(^{50}\) [2008] 1 IR 25.
behalf of the plaintiff: at the time of the trial of the action, the defendant had ceased trading, none of these witnesses being still employed by the defendant.) The High Court found, as a matter of fact, that the plaintiff had been a successful worker prior to the arrival of the current defendant; that he had an exemplary work record and never missed a day’s work; that the defendant, through its servants or agents, had adopted a particularly unfair approach towards the plaintiff by singling him out for unacceptable treatment and attempting to force his departure from the workforce and that his treatment resulted in his suffering illness and depression. Lavan J relied on health and safety legislation (the legislation in force at the material time having been the Safety, Health and Welfare at Work Act 1989 and the related 1993 Regulations) and the Code of Practice made thereunder in finding that the plaintiff had been subjected to “a campaign of bullying which had repercussions on the mental health of the plaintiff” for which the defendant was liable in damages.\(^{51}\)

The defendant appealed to the Supreme Court, arguing that the evidence, though uncontradicted, did not bear out the plaintiff’s complaints of bullying and that, secondly, there was not sufficient evidence of a causal link between the bullying to which the High Court found the plaintiff had been subjected and the depression his doctor found him to have suffered. Each of these grounds of appeal will now be considered separately.

On the first ground, it is important to note that before the Supreme Court, both parties accepted the definition of “workplace bullying” contained in paragraph 5 of the Industrial Relations Act 1990 (Code of Practice detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002\(^ {52}\) as an accurate definition of bullying to be referred to when considering the employer’s duty of care to its employees. This definition is as follows:

"Workplace Bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual’s right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but, as a once off incident, is not considered to be bullying."

\(^{51}\) The High Court judgment is reported at [2005] ELR 305.

\(^{52}\) S.I. No. 17 of 2002.
Having regard to the above definition, Fennelly J accepted the submission that bullying must bear the following characteristics: it must be repeated; it must be inappropriate, and it must undermine the dignity of the employee at work. Fennelly J was satisfied that the bullying complained of by the plaintiff in Quigley “amply meets the criteria of being repeated, inappropriate and undermining of the dignity of the plaintiff at work.” He so found on the basis that the “treatment of the plaintiff represented a unique amalgam of excessive and selective supervision and scrutiny of the plaintiff, unfair criticism, inconsistency, lack of response to complaint and insidious silence.” Based on this finding, the employer’s first ground of appeal was rejected.

On the second ground of appeal – causation – the employer was successful. In its judgment, the Supreme Court parsed closely the medical reports in Quigley. The first of these reports revealed that the plaintiff had told his general practitioner in January 2001 that he had been dismissed from his job in October 1999 and that he had been suffering from depression for six months before his visit to her. He said that he had won his case before the Rights Commissioner but that the company was appealing the decision and the uncertainty of waiting for a date was adding to his anxiety. The medical report stated that the plaintiff “had become increasingly anxious about his impending case” and that “his symptoms of depression had intensified.” It concluded that the plaintiff had “suffered from a moderately severe depressive episode arising directly from his industrial relations problems.” Very significantly, the report did not record that the plaintiff had been bullied or harassed at work.

The Supreme Court allowed the appeal on the basis that the medical evidence presented was consistent only with the plaintiff’s depression having been caused by his dismissal and the subsequent unfair dismissal proceedings, but that there was no medical evidence of a link with the bullying or harassment. That was, the Court held, consistent with the plaintiff’s own evidence. Consequently, the plaintiff failed to discharge the burden of proving that his depression was caused by his treatment during his employment. Fennelly J (with whom Denham and Geoghegan JJ concurred) concluded that “[t]he picture presented by the medical evidence ... is consistent only with the plaintiff’s depression having been caused by his dismissal and subsequent unfair dismissal proceedings and there is no medical evidence of a link with the harassment.” Accordingly, the Court held that the plaintiff had not discharged the burden of proving that his depression was caused by his treatment during his employment.
A number of comments may be made by way of analysing the Supreme Court judgment. First, from a practical perspective, the decision starkly highlights the importance in cases such as these of comprehensive statements in medical reports as to the link between injuries to health being complained of and the wrongful treatment at work.

Secondly, it is significant that the Supreme Court in Quigley expressly refrained from formulating legal principles in relation to this line of case law on negligence claims arising out of bullying, harassment and stress at work: in fact, Fennelly J expressly noted that "[i]n spite of the comparative novelty of the cause of action, the Court has not been asked to decide any principles of law", since the parties were ad idem both as to the nature of the wrong of bullying and harassment and the standard to be applied. This is significant in that the now well-established body of High Court jurisprudence in this area (including authorities such as McGrath v Trintech Technologies Ltd and Maher v Jabil Global Services Ltd) remains fully intact after the Supreme Court appeal in Quigley.

Thirdly, the approach taken in allowing the employer's appeal in Quigley underlines the formidable hurdles of causation facing plaintiffs under the second stage of the Maher v Jabil test, namely the hurdle of establishing that the injuries suffered are attributable to the workplace.

**The Supreme Court judgment in Berber v Dunnes Stores Ltd**

The impact of the judgment of the Supreme Court in Berber continues to be strongly felt in this area of employment litigation.

The plaintiff in Berber had been an employee of the defendants since he was 19 years of age in 1980, and had worked successfully in the company for some years. At a particular point in his employment relationship with the defendants he felt that his superiors’ view of him changed. He was, for example, given far less opportunity to travel abroad for work purposes. He also felt that there was an increased interest in the state of his health. This centred largely on the fact that he had Crohn’s disease. He felt that various events over the course of a year involved him being demoted and ignored by management within the company. Moreover, he felt that such actions represented a clear threat to his mental health, despite the fact that his solicitors had, from an early

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stage, put the company on written notice that he was suffering from stress. Eventually his employment relationship with the defendant company was terminated.

**The Approach of the High Court in Berber**

In the High Court, Laffoy J took as her starting point the “three questions” approach to the issue of workplace stress first posited by Clarke J in *Maher v Jabil Global Services Limited* set out above but repeated here for convenience:

(a) has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress?;
(b) if so is that injury attributable to the workplace; and
(c) if so was the harm suffered by the particular employee concerned reasonably foreseeable in all the circumstances?

In *Berber*, the High Court answered these questions as follows:

(a) Laffoy J accepted that the plaintiff *had* suffered a genuine injury to his health (a psychiatric condition known as adjustment disorder) as distinct from mere ordinary occupational stress. Moreover, she concluded that this disorder had exacerbated the plaintiff’s Crohn’s disease symptoms and hampered the treatment thereof.

(b) Laffoy J also accepted that these conditions were caused by workplace stress – in other words that it was not the symptoms and treatment of his Crohn’s disease that were the stressors affecting his mental health. Equally, however, the Court was not prepared to find that a particular flare-up in his Crohn’s disease in March 2000 or a deterioration in his symptoms in 2005 could be attributed to the manner with which he was dealt by the defendants.

(c) Finally, Laffoy J held that the possibility of the plaintiff suffering from psychological injury as a result of the manner in which he was treated after 23 November 2000 was reasonably foreseeable, especially in light of the fact that the defendants had been informed on 7 December 2000 about the fact that the plaintiff was suffering from stress.

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It was still necessary, therefore, for Laffoy J to address the vexed question of what the nature and scope of an employer’s duty of care should be, once it was found that one existed. In this respect Laffoy J accepted that the obligation on the employer was not to act as an insurer of the employee’s safety but merely to do “what a reasonable and prudent employer would have done in the circumstances.” Equally in this case, because she had already concluded that the defendants had actually breached the implied term of trust and confidence, Laffoy J had no difficulty in concluding that their conduct fell short of what a reasonable and prudent employer would have done in the circumstances. Accordingly damages (both for the psychological symptoms suffered by the plaintiff and for the exacerbation of his physical symptoms) were assessed at €40,000.

The Supreme Court Judgment in Berber

The main discussion point about the Supreme Court decision in Berber[^58] is arguably the fact that although it appeared to endorse the approach taken by the High Court to the law on workplace stress, it nonetheless overturned many of the conclusions of fact reached by the High Court on the question of the respective roles of employee and employer in the breakdown of the employment relationship.

As far as the plaintiff’s constructive dismissal claim was concerned – the bulk of the judgment involves analysis of the contractual aspects of the claim other than those relating to stress – Finnegan J concluded that the actions of the defendant did not constitute a repudiation of the plaintiff’s contract of employment. Indeed, the Supreme Court found that it was the plaintiff who had acted unreasonably: on this basis his purported acceptance of repudiation of the contract of employment by the respondent was “neither justified nor effective”. More generally, the court found that the employer was simply not responsible for any breakdown in the relationship of mutual trust and confidence between the parties – a conclusion of obvious importance as far as the stress claim was concerned in that Laffoy J in the High Court had essentially held that what negligence there was on the part of the employer was manifest in it being responsible for the breakdown in the contractual relationship between the parties.

In dealing with the stress claim itself, Finnegan J for the Supreme Court accepted that the correct legal position in Irish law was that stated in the decisions of the High Court in

Maher v Jabil Global Services Ltd.\textsuperscript{59} and of the UK Court of Appeal in Sutherland v Hatton\textsuperscript{60}, although significantly it was the “three questions” posed by Clarke J in Maher that Finnegan J used as the template for his approach to the matter.

Notwithstanding this explicit recourse to the Maher three-step test, Finnegan J in Berber cited the 16 practical propositions laid down in Sutherland v Hatton, and the inference would appear to be that these principles are of considerable authority in Irish law and possibly that they are now the Irish law in this area. Such a conclusion seems fortified by a consideration of what was said in Maher itself in relation to the approach of the High Court in McGrath, as for example, in the following passage of the judgment of Clarke J:

\begin{quote}
In McGrath v Trintech Technologies Ltd, Laffoy J reviewed the authorities in relation to an employer’s liability for psychiatric illness induced by stress and pressures at work. In the course of her judgment Laffoy J cited with approval 16 ‘practical propositions’ set out in the judgment of Hale LJ in Hatton v Sunderland which are designed to assist in the assessment of such cases. While not all of those practical propositions will be relevant in each case, it was accepted by both sides that the principles identified by Laffoy J represent the law in this jurisdiction.\textsuperscript{61}
\end{quote}

I now turn to the approach of the Supreme Court in Berber to the stress aspect of the claim. As far as the question of the duty of care was concerned, Finnegan J accepted that because the plaintiff had put the employer on written notice of his vulnerability to mental injury, therefore it was reasonably foreseeable on the part of the employer that “if it should fail to take reasonable care, it would cause stress”. In addition, unlike the position adopted by the Supreme Court in Quigley, Finnegan J in Berber did not regard causation as an issue in the case. Moreover, it was clear that the plaintiff had suffered psychological harm. Hence three of the four elements of the tort of negligence (those captured in Clarke J’s three questions in Maher set out above) were made out and the

\textsuperscript{59} [2008] 1 IR 25.

\textsuperscript{60} [2002] 2 All ER 1.

\textsuperscript{61} Maher v Jabil Global Services Ltd [2008] 1 IR 25, per Clarke J at 38 (internal citations omitted).
key remaining issue was whether the employer had breached the standard of care by acting unreasonably in the circumstances. On the facts, Finnegan J found that the defendant employer had acted reasonably in dealing with the plaintiff's known vulnerabilities and consequently that the claim must fail.

*Berber* comprises the only occasion to date (May 2012) on which the Supreme Court has afforded consideration to a stress at work claim. It can now be added to the earlier decision of the Court in *Quigley v Complex Tooling and Moulding*[^2]. In relation to these two decisions, a number of points emerge. First, whilst each such case is clearly highly fact-specific, it is significant that in both instances, the findings of fact in the High Court were overturned on appeal. It is, perhaps, unusual for the Supreme Court to reverse a decision of the High Court exclusively on a factual and not a legal basis. Whilst the result in both cases amounted to the reversal of successful plaintiff wins in the High Court, it must be emphasised that because the Supreme Court found no fault in the statements of law propounded by Lavan J and Laffoy J in the High Court judgments in *Quigley* and *Berber* respectively, the legal principles set out in those judgments remain authoritative propositions of law in this area.

**2011 High Court judgment in Sweeney v Ballinteer Community School**

Against this background of plaintiff wins being reversed on appeal in the last couple of years, last year’s High Court judgment in *Sweeney v Ballinteer Community School*[^3] is noteworthy in that it constitutes a recent example of liability being imposed in the context of bullying, albeit on very extreme facts (including the use of a Private Investigator). Two aspects of the case are particularly significant, in my view: first, the fact that aggravated damages were awarded; secondly, the fact that Herbert J was willing to impose vicarious liability for bullying. That having been said, however, the very unusual facts of the case suggest that the decision is of limited value in terms of any lasting contribution to the jurisprudence in this area; and the judgment of Herbert J does not appear to change the principles of law applicable from the above-discussed cases in any respect. Notwithstanding this, the case is important in signalling the possibilities of this cause of action in 2012 and beyond.

The extraordinary factual background to the case was well summarised by Herbert J in his description of a number of decisions taken by the school Principal concerning the

plaintiff which resulted in “escalating mutual distrust between them as disagreement followed disagreement”. Herbert J found that “the plaintiff came to believe that every action or omission on the part of [the Principal] whether actually or, as she perceived it, affecting her, was part of a conscious and deliberate campaign by him to bully and harass her.” It is notable that one of the witnesses in this case is reported in the judgment as having described the factual scenario at the root of the litigation as “catastrophic, totally strange, unusual and unreal”. Some extracts from the judgment of Herbert J will give a flavour of the aptness of this description! These include:

- “I do not accept the bona fides of the explanation offered for the admitted entry by one of the college caretakers, acting on the instructions of Dr. C., into the plaintiff’s office in B.C.C. by slipping the lock with a knife and, the moving of the contents of that office to the Home-School Liaison room. Absent any emergency, ie. fire or flood or, faced with an inability after reasonable and proper attempts to contact the plaintiff and a pressing need in the interests of the college to have the rooms interchanged, what was done on this occasion on the instructions of Dr. C. was high handed and inexcusable. The fact, which I accept, that the college caretaker moved everything very carefully and put everything in exactly the same position in the other room and did not open anything does not mitigate the enormity of this conduct in the least. Neither does the fact that the other teacher made no complaint or that the plaintiff was in any event returning to the Home-School Liaison room at the start of the new term.” ([11])

- “Between the 31st August, 2006 and the 27th March, 2007, the plaintiff was absent from work and furnished each week a medical certificate from her General Medical Practitioner, Dr. Philip McMahon, that she was suffering from work related stress. The quite extraordinary manner in which these certificates were furnished, - they were found by the clerical officers each Monday morning pushed under the door of the general office and not given or sent to the Deputy-Principal the person entitled to require and to receive them, - demonstrates in my judgment the continuing concern on the part of the plaintiff to avoid any risk of having to communicate personally with Dr. C., even to the extent of refusing to furnish these very important documents from her own perspective directly to management. The clerical officers further informed the court that each Monday morning a man or a woman would telephone the general office and state that the plaintiff would be absent from work that week. These callers never identified themselves to the clerical officers”. ([14])
“After this exchange the plaintiff told the court that she noticed that the door of
the business studies room, about ten feet away, was open. She entered this
room where a male colleague, (and one of the Teachers Union of Ireland College
Committee), was teaching a class. She told the court that her purpose was to ask
this teacher to watch while she went down the corridor as she felt stressed and
afraid. I am unable to accept that this as the reason why the plaintiff went into
her colleague’s room. I am satisfied that she went there, not as Dr. C. perceived
it to convey negative information about him in front of a class, but pursuant to
her plan to involve a third party immediately in all confrontations which she
might have with Dr. C.. I am satisfied on the evidence that this colleague was
discomfited by the plaintiff’s sudden intrusion into his class and was most anxious
that she should not linger in the room. I accept this teacher’s evidence that the
plaintiff was quivering and appeared to be fighting back tears and had said to
him, “He is at me again, its happening again”. I also accept this teacher’s
evidence that as they were speaking a knock came to the door and Dr. C. put his
head into the room, beckoned this teacher over to the door and said to him “You
cannot have people invading your room, you’d want to look after yourself”.
I am satisfied that this teacher, who had been a member of the Teachers Union
of Ireland Committee that had spoken to Dr. C. in 2006, on behalf of the plaintiff,
reasonably and rationally interpreted this statement by Dr. C. as a threat, that he
would suffer some detriment for speaking to the plaintiff and not insisting that
she leave his room immediately. I find that Dr. C. had full authority to circulate a
notice to all the teachers that they should not enter a colleague’s classroom while
a class was in progress. I am satisfied that on this occasion Dr. C. was referring
solely to the plaintiff whom he disparagingly described as having “invaded” this
other teacher’s classroom. I find that this intervention at this time and in these
terms by Dr. C. was a destructive and malicious targeting of the plaintiff and
amounted to bullying of the plaintiff within the definition of the March 2003 Code
of Practice to which both Dr. C. and the plaintiff had subscribed and had invoked.
But apart altogether from that definition in my judgment these words were
hostile, offensive, unnecessary and disparaging to the plaintiff who was a very
senior teacher in the college and would amount to “bullying” within the meaning
of the 2002 (now 2007) Code of Practice for Employers and Employees on the
Prevention and Resolution of Bullying At Work, or even within the ordinary
dictionary definition of that word. In my judgment a particularly vicious form of
bullying involves isolating the victim in the work place by influencing others by actual or suggested threats to their own interests and by undermining the victim’s standing in the organisation and amongst colleagues by disparaging references. In my judgment this was the first indication of a firm determination on the part of Dr. C. to brook no positive interference, as he saw it, by the plaintiff in his management of the college.” ([19]-[20]).

• “I find on the evidence, with particular reference to a contemporaneous note made by Dr. C. on the 26th November, 2007, that as soon as he and the Deputy-Principal entered the room, the plaintiff, who had been standing beside a parent at a computer console, turned towards them saying loudly, “Here’s the Principal and the Deputy-Principal coming to bully me”. I am satisfied that the Deputy-Principal then told the parents that there had been a misunderstanding over booking and asked them to turn off the computers and to leave the room as another class was waiting. The parents hesitated, - a wholly natural reaction in the circumstances, - and I accept that Dr. C. and the Deputy-Principal then moved around the room saying “Come on, come on, out you go, out you go”. The plaintiff then protested that they were properly in the room as she had booked it and she pointed to a time-table fixed to the back of the door. The Deputy-Principal told the court that he had examined this A-4 size document and that he had never seen or approved of it. The plaintiff then told the parents not to leave the room and to continue with their work. Dr. C. pointed out that he was the Principal of the College and insisted that they leave. One of the parents told the plaintiff to telephone the Department of Education and the plaintiff had replied that she did not know the number. The evidence clearly establishes that Dr. C. then said to this particular parent, “Turn off that computer or I will call the gardaí”. To this the parent responded, “Well get them then”. The plaintiff then used her mobile telephone to summon the two teachers who were then serving as Teachers Representatives on the Board of Management of B.C.C.. Dr. C. said to the plaintiff “Don’t get another teacher out of her class”. One of these ladies then arrived followed very shortly by the other. One of them suggested to Dr. C. that perhaps both groups could use the computer room simultaneously. Dr. C. would not agree to this proposal and I am satisfied that his reasons for not agreeing were rational and reasonable. The parents then left the computer room and went with the plaintiff to the Home-School Liaison room. One at least of the parents wrote to the Board of Management of B.C.C. about this incident.
In my judgment, the behaviour of Dr. C. towards the plaintiff on this occasion was oppressive and bullying. However extremely provocative the plaintiff’s own behaviour may have been and however much her actions may have been interfering with the smooth running of the college on the 26th November, 2007, she should not have been publicly disparaged and humiliated by Dr. C. in front of the parents present. Her countermanding his direction to the parents to leave the computer room may properly be regarded as a amounting to scandalous insubordination. However, in my view it did not cause the bullying but was a consequence of it. I find that there was no necessity at all for Dr. C. to have been in the room on this occasion. The Deputy-Principal could have dealt with the matter as a simple double booking of the computer room, something which the evidence showed had happened in the past. But having chosen to enter, Dr. C. should have disregarded, for the moment at least, the locked door and the plaintiff’s first remarks, explained the position to her with regard to the other class and asked her to inform the parents present of the difficulty and invite their cooperation in the matter. In the event, he treated her and the parents as trespassers and trouble makers. It is significant that Dr. C. told the court that he had felt slandered and undermined and that the plaintiff was embarking on a course of confrontation with the management. Dr. C. later telephoned the Rev. Chairman of the Board of Management who promised to raise the matter at the meeting of the Board scheduled to take place on the 12th December, 2007. If it was raised no action was taken. By letters dated the 28th November, 2007, and the 14th December, 2007, Dr. C. invited the plaintiff to meet him and the Deputy-Principal to discuss the incidents of the 20th November, 2007 and the 26th November, 2007. However, the plaintiff was unable to see her way to attending such a meeting insisting that the matter was something which required to be dealt at Board of Management level and involving her solicitors”. ([27] – [28])

**Specific Legal Bases on which Liability was imposed in Sweeney**

Much later on in his judgment, Herbert J set out clearly the legal bases on which he was prepared to impose liability on these facts:

"Apart from being vicariously liable for the actions of Dr. C. the Board of Management of B.C.C. owed the plaintiff a direct duty of care, as her employer, both at common law band by virtue of the provisions of the Safety Health and Welfare at Work Act 2005, to take reasonable care to prevent her suffering
mental injury in the workplace as a result of being harassed or bullied by other employees if they knew or ought to have known that such was occurring. (Quigley v. Complex Tooling and Moulding Limited [2009] I.R. 349). I am satisfied that in the post 28th March, 2007, period the Board of Management of B.C.C. ought to have known, from correspondence from the plaintiff's solicitors, correspondence from the parents of pupils in the college and, from the personal knowledge of several members of the Board involved in the day to day business of the college that the plaintiff was continuing to claim that she was being victimised, bullied and harassed by Dr. C.. For the same reasons to which I have adverted in the case of Dr. C., the Board of Management ought reasonably to have foreseen that there was a materially serious risk that the plaintiff would suffer some form of mental illness if the situation between her and Dr. C. was permitted to continue.”

It is thus significant that Herbert J in the above passage makes reference to a wide range of discrete sources of the imposition of liability upon the defendant, viz.:

- Primary liability in negligence;
- Vicarious liability;
- Liability under the 2005 Act;
- Invocation of the Quigley precedent analysed above in this paper.

**Aggravated Damages Awarded**

As mentioned above, another noteworthy feature of this case is the fact that Herbert J was prepared to make an award of aggravated damages, commenting:

“In my judgment the behaviour of [the Principal] towards the plaintiff in the present case was oppressive and arrogant and, I find caused her additional hurt and insult. I therefore consider that this is an appropriate for the court to mark its abhorrence of such conduct by awarding aggravated damages to the plaintiff.”

**The Approach of the High Court in O’Toole v County Offaly VEC**

In contrast with last year’s Sweeney case analysed above, the case of O’Toole v County Offaly VEC⁶⁴ involved the plaintiff teacher losing her case of alleged bullying, harassment and stress. Although the judgment of the High Court (O’Neill J) does not analyse legal authorities in any detail, the case is an important reminder of the firm legal rule that An

employee must bring to the attention of the Board of Management complaints regarding bullying, stress and harassment and pursue the procedures open to teachers at the local employment level. Despite the fact that the Judge rejected the plaintiff teacher’s complaints of bullying and sexual harassment, the Court emphasised that the appropriate engagement with and application of procedures is an extremely important element of these cases. O’Neill J said:

“Notwithstanding the fact that I have rejected the plaintiff’s evidence in relation to her complaints and found that she was not sexually harassed or bullied by Mr. Mooney, she was, nonetheless, entitled, as indeed would any employee of the defendants, to make such complaints and to have them properly dealt with under the appropriate current procedures, by the defendants, as employers. If it could be said that the evidence identified damage or injury to the plaintiff caused by any actionable failure by the defendants in this respect, notwithstanding the lack of merit in the plaintiff’s complaints, damages could arise. It is, of course, fair to say that there is a theoretical element to this conclusion, given that it would be highly unlikely and that a plaintiff could establish or that a court could identify separate injury or damage resulting from a procedural deficiency, in circumstances where the underlying complaint was without foundation.”

In O’Toole, the High Court did not accept that the plaintiff had correctly engaged with or pursued the procedures open to her and on this additional basis it rejected the entirety of the plaintiff teacher’s claim. Thus, as with the McGrath v Trintech case analysed earlier in today’s paper, last year’s O’Toole case further emphasises the cardinal importance in this type of litigation of properly bringing to the employer’s attention the grievances complained of in good time. This principle is thus a key lesson from the case law.

Sweeney applied in this year’s decision in Kelly v Bon Secours Health System Ltd

The Sweeney case was referred to in detail by the High Court again this year in the latest published decision in this area: the January 2012 decision of Cross J in Kelly v Bon Secours Health System Ltd. There, Cross J referred to the analysis in Sweeney as “most helpful”. Thus, albeit that the facts of Sweeney were most unusual, it is significant that it has received detailed treatment by the High Court in the most recent authority on point, suggesting that the case constitutes a significant contribution to the body of case law in this area.

65 Per O’Neill J at [185].

An interesting aspect of the *Kelly* case is the reference therein to “corporate bullying”, with Cross J summarising the plaintiff’s case in the following terms:

“[T]he essence of the plaintiff’s case is that the bullying and harassment came not merely from fellow employees but were in effect orchestrated or directed from the management of the defendant’s company or what is sometimes known as corporate bullying.”

Later on in the High Court judgment, in the context of assessing the defendant’s failure to adhere to correct procedures in terms of an appointment process, Cross J concluded that this amounted to “corporate bullying and harassment and discrimination against the plaintiff and resulted in stress to her”.

As with *Sweeney*, the conduct of the defendant was such as to prompt criticism from the High Court Judge in terms of the motivation of hostility revealed by the defendant towards the plaintiff, which included the latter being frogmarched off the premises, an occurrence which Cross J described as being “by any scale ... an extraordinary insult to her”.

It is, however, significant to note that Cross J held that the plaintiff’s acute depressive symptoms were not causally linked to the bullying, but that her other symptoms were related. General damages in the sum of €60,000 were awarded (a figure separate and distinct from damages awarded for a physical back injury sustained by the plaintiff).

The judgment in *Kelly* thus constitutes an important contribution to this area of the law given not only the express finding of corporate bullying made therein, but also the significant level of general damages awarded.

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67 At para [9.16].
Penalisation Claims under the Safety, Health and Welfare at Work Act 2005

Given the difficulties facing employees dealing with issues of bullying, harassment and stress through the mechanism of personal injuries actions – and the enormous risks on costs to which such plaintiffs are exposed – little wonder that new avenues of redress are being increasingly tested. A good example of this concerns penalisation claims under the Safety, Health and Welfare at Work Act 2005 (s. 27). It is in this litigation that the precise ambit and contours of what is covered by “penalisation” are increasingly being clarified.

The Labour Court determination in Akduman
An important example of such litigation is the determination of the Labour Court two years ago in St John’s National School v Jacinta Akduman. Before turning to analyse this case, it will be helpful to note the wording of s. 27 which states, in so far as is relevant:

“(1) In this section “penalisation” includes any act or omission by an employer or a person acting on behalf of an employer that affects, to his or her detriment, an employee with respect to any term or condition of his or her employment.

(2) Without prejudice to the generality of subsection (1), penalisation includes—

(a) suspension, lay-off or dismissal (including a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2001), or the threat of suspension, lay-off or dismissal,
(b) demotion or loss of opportunity for promotion,
(c) transfer of duties, change of location of place of work, reduction in wages or change in working hours,
(d) imposition of any discipline, reprimand or other penalty (including a financial penalty), and
(e) coercion or intimidation.


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(3) An employer shall not penalise or threaten penalisation against an employee for—

(a) acting in compliance with the relevant statutory provisions,
(b) performing any duty or exercising any right under the relevant statutory provisions,
(c) making a complaint or representation to his or her safety representative or employer or the Authority, as regards any matter relating to safety, health or welfare at work,
(d) giving evidence in proceedings in respect of the enforcement of the relevant statutory provisions,
(e) being a safety representative or an employee designated under section 11 or appointed under section 18 to perform functions under this Act, or
(f) subject to subsection (6), in circumstances of danger which the employee reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, leaving (or proposing to leave) or, while the danger persisted, refusing to return to his or her place of work or any dangerous part of his or her place of work, or taking (or proposing to take) appropriate steps to protect himself or herself or other persons from the danger.”

The key issue in Akduman that is of interest is the question of whether delay on the part of an employer in implementing and progressing grievance procedures can itself amount to penalisation within the meaning of s.27. For, in Akduman, the linchpin of the complaint was that the delay on the part of the school’s Board of Management in implementing certain agreed procedures itself constituted a form of penalisation within the meaning of s. 27. At first instance, the Rights Commissioner found that most of the matters complained of occurred prior to the coming into operation of the Act. The Rights Commissioner held that the only period for which he had jurisdiction to hear complaints under the Act was the period from 1 September 2005 (the date on which s.27 came into force) until 1 December 2005 (the date of the claim being brought) and concluded that the matters complained of (including the failure of the employer to act with sufficient expedition in implementing a mediation process) during that period could not be considered as penalisation within the meaning of s. 27.

On appeal to the Labour Court, detailed consideration was afforded to the meaning of penalisation within s. 27. On behalf of the employer, it was argued that the section would normally require the taking of some concrete act or pursuit of some course of action by the employer which itself could be regarded as causing a detriment to the
employee. As such, a delay in the manner in which a procedure was applied, though regrettable, could not amount to penalisation within the meaning of s. 27. This argument was accepted by the Labour Court.

Further Clarification on the Meaning of Penalisation

The Labour Court determination in *Akduman* contains a number of helpful statements of principle that further serve to elaborate upon the existing understanding of s.27 and the definition of penalisation contained therein. Thus, the Court observed in *Akduman* that penalisation “involves the imposition of some separate or independent detriment on an employee which, if undeterred, could undermine the effective operation of the general provisions of the Act.” The determination further takes pains to emphasise the stringent causation hurdle (with the Labour Court even using the language of “but for” causation) that must be met in establishing penalisation. Whilst the approach taken in *Akduman* must of course be viewed in light of the factual findings in that determination, the decision will make it difficult for employees to argue that a lack of expedition in dealing with bullying or other complaints in and of itself amounts to penalisation within s. 27. Notwithstanding this, this section of the 2005 Act remains a useful additional tool in the arsenal of employees seeking to litigate bullying and harassment cases.69

Thank you.

DES RYAN B.L.
19 MAY 2012

69 For a recent example of a successful penalisation claim arising from a complaint of bullying (albeit one where the Labour Court lowered considerably the level of compensation awarded by the Rights Commissioner) see *Moran v Leahy & Co.* (HSC/11/21, Determination No. HSD122, Labour Court, 26 March 2012).