INTRODUCTION

Bullying, harassment and stress at work continues to be is a significant legal issue. In the absence of legislative intervention in the area, claims have to made within existing causes of action, most of which were never designed to deal with this sensitive and challenging area of interpersonal relationships. Personal injury proceedings are regularly taken in the Circuit or High Court claiming negligence, breach of duty and breach of contract. Issues of bullying and stress also routinely in other cases such as where an employee’s contractual rights have been breached\(^1\) or their employment has been unlawfully terminated.

There has been a spectacular lack of legislation in this area. Some tentative intervention was made by the Health and Safety Act 2005 and by various Codes of Practice, but no attempt has been made to establish a statutory cause of action of bullying or harassment. This is in stark contrast to the statutory recognition of sexual harassment as an actionable wrong\(^2\), even without proof of loss or damage. This is entirely unsatisfactory as litigation outside of a clear statutory framework can be very unpredictable and invariably involves substantial legal costs. Nevertheless, in the absence of statutory intervention, it will continue to be up to the courts and the lawyers to develop and apply causes of action for victims of bullying, harassment and stress at work.

This paper will examine how the cause of action has developed in Irish law and what is required to succeed in establishing liability and damages for an injury sustained as a result of bullying in the workplace. Contemporary developments will also be examined in the development of corporate bullying and how the law may seek to exclude certain claims for psychological damage arising from work related treatment.

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\(^1\) An example can be seen in the High Court decision of Laffoy J. in Delaney v Central Bank of Ireland [2011] IEHC 212.

\(^2\) Pursuant to the Employment Equality Acts as amended.
1. LIABILITY FOR PSYCHOLOGICAL WORKPLACE INJURY IN IRISH LAW

The test to establish liability in Irish law was succinctly set out by Clarke J. in *Maher v. Jabil Services Limited*\(^3\) (a test endorsed more recently by the High Court in *Browne v. Minister for Justice Equality and Law Reform*\(^4\)) as follows:-

“(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.”

Significantly, the Supreme Court recognised the existence of bullying as a cause of action in *Quigley v Complex Tooling and Moulding Ltd*\(^5\). Fennelly J., having found that the Code of Practice definition of workplace bullying was “an accurate statement of the common law duty of care”, pointed out that:-

"The plaintiff cannot succeed in his claim unless he also proves that he suffered damage amounting to personal injury as a result of his employer’s breach of duty. Where the personal injury is not of a direct physical kind, it must amount to an identifiable psychiatric injury.”

Therefore a plaintiff must prove firstly that they have suffered a recognisable psychiatric condition, secondly that this was a result of the employer’s wrongful acts and thirdly that the injuries sustained were reasonably foreseeable.

2. A LIMITED STATUARY BASIS FOR LIABILITY

\(^3\)[2005] 16 ELR 233.
\(^4\)[2012] IEHC 526
\(^5\)[2009] 1 IR 349.
There are a number of provisions in the 2005 Act that could be relevant to workplace bullying and the Act clearly applies to psychological as well as physical health. In *Sweeney v Ballinteer Community College*\(^6\) Herbert J expressly relied on the provisions of the Act in locating an employer’s legal duty to provide a workplace free from bullying, which he found on the facts had been breached. He found that the plaintiff’s employer owed her:

> “a direct duty of care... both at common law and by virtue of the provisions of the Safety, Health & Welfare Act Work 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.”

Section 8 of the Act sets out the wide ranging duties owed by an employer to their employee. Amongst the most significant provisions in relation to workplace bullying is that set out in Section 8(2)(b) which extends an employer’s duties to:

> “managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk”.

Thus, the Act takes account of the management of interpersonal relationships and the impact which behaviour may have on an employee’s mental well being. An employer must take steps to prevent the consequences of unacceptable treatment of employees by other employees or persons with whom they can be expected to come into contact in the course of their employment.

A decision of the High Court in an ordinary personal injuries case, sets out some helpful observations on the scope of Section 8. In *Warcaba –v- Industrial Temps (Ireland) Limited, Dublin Airport Authority & Ryanair Limited*\(^7\) damages were awarded for personal injuries arising from an injury sustained at work as a result of an accident which the Court found should not have occurred. Charleton J. described Section 8 as expressing:-

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\(^6\) [2011] IEHC 131  
\(^7\) Unreported decision of Charleton J., 2010 No. 3091 IP, See IRN of 15 December 2011
“in a useful way, what previously would have been the common law duty of care of an employer towards workers. The duty of an employer is to take such measures as are reasonable and practicable, in the circumstances of the work performed, to ensure that no employee is injured while at the workplace. The more hazardous the work involved, the more stringent is the duty on the employer to ensure that an accident does not occur. Even apparently simple and straightforward work, however, may carry the risk of an accident occurring. This must be guarded against by reasonable measures which are practicable in the circumstances.”

The Act also imposes duties on employees at Section 13 to take reasonable care to protect their health, safety and welfare and the safety, health and welfare of any other person who may be affected by the employee’s acts or omissions at work. Section 13(1)(e) imposes a duty on employees not to:

“engage in improper conduct or other behaviour that is likely to endanger his or her own safety, health and welfare at work or that of any other person”.

This could cover the “horseplay” type scenario that has seen employers avoid liability in the past where an employee is found to have been on a frolic of their own in their unacceptable treatment of a fellow employee. If an employee is now under a duty not to engage in bullying behaviour, it is arguable that the employer is under a duty to advise the employee of their obligations. This would require an employer to inform all employees that certain behaviour is unacceptable and to advise them of the consequences of such behaviour. A good bullying policy should achieve this. The emphasis from traditional health and safety law on prevention rather than cure is obvious.

2(ii) The Codes of Practice
A number of Codes of Practice have been introduced in the general area of bullying and harassment, as recommended by the First Taskforce on the Prevention of Workplace Bullying. whilst Codes of Practice are not legally binding as they are more like indications of best practice, they can be admitted in legal proceedings and an employer's failure to have regard to them can assist in making a case.

The Code of Practice detailing procedures for addressing bullying in the workplace made under the Industrial Relations Act 1990 sets out both informal and formal procedures for dealing with workplace bullying. This Code has been expressly taken into account by the courts in dealing with personal injury claims, the most significant example of which is the case of *Quigley –v- Complex Tooling and Moulding* where Lavan J. referred to the definition of bullying as contained in the Code of Practice detailing procedures for addressing bullying in the workplace made under the Industrial Relations Act 1990 and expressly applied it to the plaintiff's evidence.

"From the evidence of the plaintiff, who states that this treatment made him feel humiliated, in conjunction with the Code of Practice definition of bullying, the only conclusion that can be reached is that the treatment does amount to bullying. These were not isolated incidents, as claimed by the defendants, but all together amounted to a campaign of bullying which had repercussions on the mental health of the plaintiff."

Whilst the decision was overturned by the Supreme Court on other grounds, the Court found the decision of the High Court in relation to the plaintiff's treatment "cannot be faulted". Fennelly J for the Court found that the plaintiff's treatment:-

"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."

Fennelly J. concluded that the treatment satisfied the definition of workplace bullying set down in the Code of Practice and it was therefore "not appropriate to refer to any other authority".

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9 SI 17 of 2002.
10 [2005] ELR 305.
11 SI No 17 of 2002.
The Health & Safety Authority’s Code of Practice on Bullying in the Workplace is frequently cited in court and contains the same definition of bullying as the Industrial Relations Act Code of Practice. This Code echoes the provision of the 2005 Act set out above in emphasising the importance of having a bullying prevention policy drafted in simple and understandable language in place.

There is also the Code of Practice on Guidance on Prevention and Procedures for dealing with Sexual Harassment and Harassment at Work under the Employment Equality Acts which outlines the meaning of harassment and sexual harassment. It also outlines best practice procedures for dealing with claims of harassment as well as guidance on preventing harassment occurring in the workplace.

3. A RECOGNISABLE PSYCHIATRIC INJURY

*McGrath v. Trintech Technologies Limited*[^12] was one of the first realistic attempts to persuade the High Court to grant damages for injuries sustained from bullying in the workplace. Laffoy J was prepared to hold that, despite inconsistencies in the opinions and diagnosis of the medical experts, that the plaintiff had established that he had suffered a "recognisable psychiatric illness", adopting the concept from the far more developed law on nervous shock. The use of ‘recognisable’ as opposed to ‘recognised’ acknowledges that the views on psychological damage can develop and change over time.

Laffoy J adopted the sixteen practical propositions devised by the UK Court of Appeal in *Sutherland v. Hatton*.[^13] The first of these propositions provides that there are no special control mechanisms applying to claims for psychiatric or physical injuries arising from the stress of doing the work the employee is required to do. Therefore the ordinary principles of employer’s liability apply. Laffoy J concluded that the plaintiff had suffered an injury to his health, as distinct from ordinary occupational stress, and that as a matter of probability it was attributable, at least in part, to stress at work. Medical evidence of “ordinary stress” as a result of workplace difficulties, confirmed by a GP medical certificate was held by Laffoy J in *Cronin v Eircom*[^14] to be insufficient to give rise to a claim of general damages. A number of more recent decisions of Cross J.

[^14]: [2007] 3 IR 104.
(discussed further below) suggest a less vigorous approach to excluding stress from what can ground a successful claim for damages.

In Quigley v. Complex Tooling\textsuperscript{15}, the Supreme Court confirmed the type of medical evidence required to ground any such claim for personal injury:

"Where the personal injury is not of a direct physical kind, it must amount to an identifiable psychiatric injury."\textsuperscript{16}

More recently in Sweeney v. The Board of Management of Ballinteer Community School\textsuperscript{17}, the plaintiff claimed that she had suffered clinical depression as a result of the failure of her employer to deal with bullying and harassment she had been subjected by the principal of the school. The High Court rejected the medical evidence of her psychiatrist that she had also suffered from post-traumatic stress. Herbert J pointed out that there were no studies put forward in favour of the contention of the plaintiff that the feeling of helplessness in the face of a perceived threat to one's career from an accumulation of events over a period of nineteen months (as versus the more traditional single threat to a person's physical health) would be a sufficient trauma to give rise to post traumatic stress disorder. Applying the criteria set out in Mullaly v. Bus Éireann\textsuperscript{18} and Kelly v. Hennessey\textsuperscript{19} he found that the plaintiff had failed to establish on the balance of probabilities that she had suffered from post-traumatic stress disorder. However he did find that she had suffered an actionable psychiatric injury in the form of clinical depression.

The decision of Clark J in Larkin v. Dublin City Council\textsuperscript{20} starkly illustrates what does not constitute an actionable psychiatric injury. Mr Larkin advanced what Clark J described as an "unusual case" in seeking damages for the humiliation and disappointment he suffered when, owing to an administrative error concerning exam results, he was wrongly advised that he had been successful in applying for promotion to the position of sub-officer within the fire service. He was so upset and distressed after learning of the withdrawal of the promotion that he was unable to complete his shift and thereafter he remained out of work certified by his doctor as unfit for six

\textsuperscript{15} [2009] 1 IR 349.
\textsuperscript{16} Ibid at p. 372.
\textsuperscript{17} [2011] IEHC 131.
\textsuperscript{18} [1992] ILRM 722
\textsuperscript{19} [1996] ILRM 321
\textsuperscript{20} [2008] 1 IR 391.
months. His GP diagnosed an acute stress reaction caused by his understandable disappointment and distress at the events which had occurred around the withdrawal of the promotion. Crucially the plaintiff was not referred by his GP to any specialist and no medication was prescribed. The only treatment undertaken as a result of the events was that he attended a number of sessions with the fire station counsellor.

Although Clark J accepted that the duty of care was owed by the employer in its treatment of its employee had been breached, she found that the plaintiff had not suffered a recognised psychiatric injury or nervous shock. She concluded that whilst the Plaintiff had suffered "upset, humiliation, sensitivity and disappointment" but as this required no treatment or medical intervention, it did not constitute a recognisable psychiatric condition. Therefore there was no actionable damage occasioned to the plaintiff. This important decision confirmed that claims for disappointment and distress (which could possibly even cover stress?) where no psychiatric illness is suffered, will not give rise to damages even though the actions may have constituted a breach of the duty of care owed to the employee.

A number of more recent decisions of Cross J on damages for bullying in the workplace seems to recognise a different and less medical basis for damages. In Kelly v Bon Secours Cross J accepted that the plaintiff’s acute depressive symptoms had been caused by matters other than her work situation but also accepted the conclusions of the plaintiff’s psychologist that the plaintiff had physiological, psychological and behavioural problems. Cross J. concluded that the acute plaintiff’s depressive symptoms were not related to the bullying but that what he referred to as "the other symptoms" were. General damages of €60,000 were awarded for "the severe distress and insult she has suffered" to date and into the future. He stated that he considered the plaintiff would not be likely to return to work which he presumably considered relevant to the assessment of damages given that he expressly mentioned it. However he made no mention of loss of earnings in his award or his decision even though by then the plaintiff had been off salary and consistently certified as unfit for work for over four years.

Ms Kelly’s symptoms as diagnosed by Dr Lynch could be viewed as ordinary occupational stress as referred to by Clarke J. in Maher v Jabi where he said that what was required was "an injury to their health as opposed to ordinary occupational stress". To that extent, the decision of Cross J.

21 [2008] 1 IR 391 at 397.
22 [2012] IEHC 21
23 [2005] 16 ELR 233
could be seen as a move away from the traditional jurisprudence of damages for actionable psychological injury i.e. that evidence of stress is not sufficient and damages will only be awarded for a recognisable psychiatric injury.

More recently in *Browne*²⁴ Cross J made a similar award of general damages of €55,000 for suffering to date and into the future where the plaintiff was found by the court to have "suffered a significant stress reaction". The plaintiff’s GP diagnosed a reactive depression of moderate to severe in nature which had been ongoing for some 12 years. His psychiatrist diagnosed an adjustment disorder of moderate severity and depression of a reactive type with ongoing psychological consequences. It does not seem from the judgment that any medication was prescribed for depression or any other medical condition. The defendant’s expert, Professor Casey, agreed that the plaintiff had suffered an adverse reaction but found it to have been mild and referred to his stress as being moderate. The court found that the plaintiff suffered a significant though moderate psychiatric injury. Whilst he had only had two weeks certified sick leave, the court found that his reactive depression, though only moderate, was an ongoing continuous matter for approximately ten years until his retirement. No award was made for loss of earnings.

The level of general damages awarded in *Browne*, when combined with the approach adopted in *Kelly*, suggests a move away from the medicalised concept of a recognisable psychiatric injury to awarding damages for conditions such as stress and adjustment disorders, even though such conditions seemed to have been rejected by the High Court in *Larkin v Dublin City Council*.

4. BULLYING AS AN ACTIONABLE LEGAL WRONG

A plaintiff must establish that the treatment which they claim has caused their injury constitutes an actionable wrong. A plaintiff may be able to establish a statutory breach of duty as set out above. In establishing a breach of the common law duty of care, the conduct complained of must come within the Code of Practice’s definition of bullying as endorsed by the Supreme Court in *Quigley* as “an accurate statement of the common law duty of care”²⁵.

²⁵ That definition was endorsed in the High Court in *Browne v Minister for Justice Equality and Law Reform [2012] IEHC 526*
"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 be 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”.

In the recent decision of Glynn v Minister for Justice Equality and Law Reform and Others26 Kearns P gave a strong critique of the nature of workplace bullying:-

“...It is important to record at the outset that bullying is one of the more obnoxious traits in human behaviour. That is so because it involves a deliberate and repeated course of action designed to humiliate and belittle the victim. It is conduct which is intended to reduce that person’s sense of self-worth. It may occasion significant pain and suffering to any person so treated. The phenomenon of teenage suicide is often linked to bullying. Bullying can occur at any stage in life and between all age groups. The young can bully the old and vice versa; those in authority can bully pupils or employees, those charged with the care of the weak and elderly can similarly behave and school or workplace colleagues can engage in bullying behaviour (in any of its multiple forms) to such a degree that life no longer seems worth living for the victim. Any rational person who has seen the effects of bullying will agree that it is an activity which carries a grave risk for the victim’s health and for his or her ability to function in a normal way.”

In the decision of Berber v Dunnes Stores27 the Supreme Court analysed the various incidents complained of to see whether, assessed objectively, the employer had taken appropriate steps to protect the employment relationship. Finnegan J. set out the following criteria of the appropriate test:-

“1. The test is objective;
5. The test requires that the conduct of both employer and employee be considered;
6. The conduct of the parties as a whole and the cumulative effect must be looked at;

26 Decision of 21st March 2014
27 [2009] 20 ELR 61
7. The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it.

Mr Berber’s first complaint was that he had been suspended with pay for having refused to report to Blanchardstown, the store to which he was being relocated. Finnegan J. found, in applying an objective test to his suspension with pay, that it could not be said that this was unreasonable and that the employer acted bona fide and within its rights in deciding to move the plaintiff from buying to in-store management and to the location at Blanchardstown. He found the plaintiff’s refusal to co-operate until such time as he should speak to Mrs. Heffernan to have been unreasonable. The next incident related to an error in the roster which described the plaintiff as a new trainee. Finnegan J. found that he would not categorise the employer’s conduct in relation to the planned rectification “viewed objectively as unreasonable”. He did not consider the employer’s course of conduct “as unreasonable or oppressive”. In relation to a further matter he found that the plaintiff in requiring written communication to be sent to his Solicitor as “damaging to the relationship and unreasonable”. He concluded on the history of interaction between the Plaintiff and the employer and looking at each event individually and at the events cumulatively, that:-

“The conduct of the appellant judged objectively was not such as to amount to a repudiation of the contract of employment. The conduct judged objectively did not evince an intention not to be bound by the contract of employment. On the other hand the conduct of the respondent was in the instances mentioned above unreasonable or in error and the employer’s conduct must be considered in the light of the same. In these circumstances the purported acceptance of repudiation of the contract of employment by the respondent was neither justified nor effective.”

The decision of Sweeney (and more recently, Browne) demonstrate how many issues between an employee and their manager or their colleagues might be viewed by the employee as bullying but may not be accepted by a court as an breach of any duty which their employer owed to them. Both plaintiffs claimed a number of the incidents constituted unlawful bullying and harassment. Some of her complaints were upheld and others were not.
The plaintiff in *Sweeney* in that case had been absent on work related stress from the 31st of August 2006 until the 27th of March 2007. Herbert J. found that the manner in which she chose to return to work on the 28th of March 2007 to have been “utterly indefensible”. She claimed that questions asked of her by the principal upon her return to work constituted bullying and harassment. This was rejected by Herbert J. who found that the principal:-

“was entitled to put these questions to the plaintiff and even though the manner in which they were put may have been lacking in diplomacy and somewhat brusque, nonetheless I do not consider that in the extraordinary circumstances it amounted to bullying or harassment of the plaintiff”.

However he did find an incident which occurred some days later to have been a “destructive and malicious targeting of the plaintiff”. The plaintiff had entered the classroom of a colleague and she claimed this was to ask the teacher to watch while she went down the corridor as she was feeling stressed and unafraid. Herbert J. was unable to find that as the reason why she went into her colleague’s room and was satisfied that she went there “pursuant to her plan to involve a third party immediately in all confrontations which she might have with Dr. C”. After she went into the room the principal put his head into the room, beckoned the other teacher over to the door and said to him “you cannot have people invading your room, you’d want to look after yourself”. Herbert J. found these words to have been “hostile, offensive, unnecessary and disparaging to the plaintiff”. He found the behaviour would amount to bullying within the meaning of the relevant Code of Practice or even within the ordinary dictionary definition of the work bullying. He stated:-

“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.”

This statement was subsequently described by Cross J. in *Kelly* as “most helpful”.

A subsequent event of the 24th of October 2007 when the Plaintiff was recorded in the college attendance book as having been absent from work when she was in fact attending an authorised
in school training course and ought to have been marked in service to have been a “simple mistake”. A further incident of the 20th of November 2007 arose from a parent of a pupil having been hard loudly abusing another teacher for disciplining her son. The principal came into the classroom to try to mediate. The plaintiff was standing at the door way of the class room. The parent ran over to the Plaintiff who stated “do you see what is happening here”. The Plaintiff then advised the parent not to go with the principal to his office as he had requested until someone else went also and that the parent should write to the Board of Management about the matter. The principal directed the Plaintiff to return to her room. Herbert J. found that the Plaintiff:

“had no reason to come to or to remain in the door of this teacher’s classroom and, had no right or duty to interfere as she did. Her advice to the parent in the circumstances was grossly irregular, offensive to Dr. C and a challenge to his authority as Principal of the College. I find that Dr. C in this occasion acted properly and proportionally and entirely within the scope of his authority as Principal of B.C.C. I find that on this occasion he neither bullied nor harassed the Plaintiff.”

A later incident of the 26th of November 2007 involved a double booking on the computer room. The class which was scheduled by the time table to use the computer room was unable to enter because the door was locked and the room was occupied by the plaintiff who was teaching computer skills to three parents of pupils as part of the home school liaison program. The principal arranged for the door to be unlocked and the plaintiff stated to the parents that the principal and deputy principal had come to bully her. The parents were then requested by the principal and deputy principal to leave. The plaintiff protested and told the parents not to leave and to continue with their work. The principal said to one parent “turn off that computer or I will call the Gardai”. Herbert J. concluded that the behaviour of the principal towards the Plaintiff on that occasion was “oppressive and bullying”. He said that no matter how provocative the plaintiff’s own behaviour may have been that 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 mounting to scandalous insubordination. However in my view it did not cause the bullying but was a consequence of it.”

Herbert J. concluded that since the Plaintiff’s return to work on the 28th of March 2007 that she had been:-
“continuously treated by Dr. C in a bullying and aggressive manner. She had been marginalised and treated by him with unrelenting hostility and contempt. This “freezing out” as she aptly described it caused the plaintiff anxiety and stress. She found particularly hurtful and damaging the fact that when addressing others in her company Dr. C totally ignored her as if she was not there. For anybody, but especially a woman and a senior teacher in the college, this was a particularly savage form of bullying, targeting her and clearly designed to break her will to disagree with any future decisions of his. In all his dealings with the plaintiff after the 28th of March 2007, I find that Dr. C behaved like an offended tyrant and not as a fellow teacher and long-time colleague of the plaintiff who had been appointed to the senior management position in the college”.

Herbert J analysed a decision of the principal of January 2008 to engage the services of a private investigator to carry out a covert surveillance on the Plaintiff during college hours as “being a most serious harassment of the plaintiff by him”, Herbert J. stated that it was unnecessary for him to consider other course the principal might have adopted in the circumstances and that it sufficed to say that he found the course which the principal did in fact choose to pursue was “wholly inappropriate”.

In Kelly Cross J ultimately found in favour of the plaintiff who he found had been subjected to bullying at work in relation to four incidents, even though many more allegations of bullying had been made by the plaintiff in her case. There is a brief but useful reference in the judgement to references made by the Plaintiff’s colleagues which Cross J. found had been made in “a jocular way” and which he found did not amount to bullying. Even though the plaintiff was very upset by the comments made, Cross J viewed the incident as “workplace banter rather than bullying”. This does strongly suggest that allegations of bullying will be analysed objectively rather than subjectively, which is consistent with the approach of the Supreme Court inBerber and mirrors the most recent approach of the High Court in Glynn where Kearns P set out the test as follows:-

“It follows that the first question that must be asked in every bullying case is whether the behaviour complained of, by reference to an objective test, imports that degree of calibrated inappropriateness and repetition which differentiates bullying from workplace stress or occupational stress.”

Kearns P went on to apply the Quigley definition as requiring:-
“This wording must be taken as requiring an objective test to determine if bullying has occurred. The test must, for reasons of common sense also, be an objective one given that any other would leave every defendant vulnerable to allegations of bullying based on purely subjective perceptions on the part of a plaintiff who might contend that straightforward situations at work or otherwise were construed by him/her as amounting to bullying.”

A detailed analysis of individual incidents claimed by the plaintiff to constitute unlawful bullying and harassment was also conducted by the High Court in *Browne v. Minister for Justice Equality and Law Reform*29. Some of the incidents were found to constitute bullying and harassment and others were not. Interestingly, the failure of the gardaí to investigate certain complaints made by the plaintiff was not found to constitute bullying and harassment, very similar to the conclusions drawn by the same court in the decision of *Nyhan v Commissioner of An Garda and Others*30.

5. **A Breach of the Mutual Duty of Trust and Confidence**

In a number of U.K. decisions the plaintiff has succeeded in establishing liability arising from a breach of the mutual duty of trust and confidence implied into their contract of employment31. For example in *Curran v Commonwealth Office*32 allegations of sexual misconduct and treatment of subordinates were made against a High Commissioner. He was summarily suspended and withdrawn from his post even though the Court found that the allegations should have been seen as lacking credibility. The Plaintiff’s views were never sought in relation to the allegations until much later in the process. Further breaches were found to have occurred from the chairing of a disciplinary hearing by a person who had made conclusions on the preliminary investigation. The Court found that the decision to remove the Plaintiff from his position was summary and knee-jerk in nature which it found constituted breaches of contract and breaches of the fair treatment to which he was entitled. Summary suspension and withdrawal from his post led to him suffering from a depressive illness and he was therefore entitled to damages for the unlawful application of the disciplinary procedure and the decision to remove him from his position. A breach of trust and

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29 ([2012] IEHC 526
30 Decision of 26 July 2012
31 A case which was made successfully before the Irish High Court in Berber v Dunnes Stores, but the decision was overturned by the Supreme Court on the facts
confidence was also found to have occurred in *Gogay v Hertfordshire County Council*\(^3\) where the Court found that the employer’s decision to suspend the Plaintiff was not justified or warranted and therefore constituted a breach of trust and confidence.

Whilst the recent decision of O’Neill J in *Ruffley v Board of Management St Annes School*\(^3\) was not expressly stated to be based on a breach of mutual trust and confidence, the decision is clear in grounding liability in the manner in which a disciplinary process was wrongly conducted, an approach reminiscent of *Curran* and *Gogay*. O’Neill J found that the employer’s failure to allow any "meaningful consideration of the merits of the plaintiff’s case" within a disciplinary procedure constituted "persistent .... unfair and inappropriate treatment" of the plaintiff and the injuries she sustained as a result entitled her to (very substantial) damages.

### 6. WORKPLACE STRESS AS AN ACTIONABLE LEGAL WRONG

In *Glynn*, Kearns P pointed out the difference between bullying, occupational stress and workplace stress which he said:-

> “are all things which, conceptually at least, are quite different from each other, though on occasion they can overlap and coincide”.

He described occupational stress and workplace stress as follows:-

> “Occupational stress is not actionable given that occupational stress is something which every employed person may experience at some stage of his or her working life and can occur for reasons quite distinct from and unrelated to bullying. Workplace stress on the other hand may be actionable if certain legal criteria are met. It can be the result of behaviour which falls far short of bullying. It can be the result of negligence where excessive demands are made of an employee or where complaints about shortcomings in the workplace go unheeded. It lacks however that degree of deliberateness which is the hallmark of bullying.”

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\(^3\) [2001] I.R.L.R. 703

\(^3\) Decision of O’Neill J. 9\(^\text{th}\) May 2014
An example of where complaints went unheeded and resulted in a finding of negligence against an employer can be seen in the decision of Quirke J in *Keenan v Power and ors* [35] where the plaintiff was awarded damages to compensate him for injuries sustained by him as a result of the State’s negligence in allowing the plaintiff to come into regular contact with a colleague who had been previously found to have bullied him.

7. THE HURDLE OF FORESEEABILITY

In *McGrath –v- Trintech Technologies Limited* the plaintiff claimed he had suffered from stress as a result of the manner in which he had been treated by his employer during a placement in Uruguay. There was evidence of a number of crises having occurred during this time which he had to manage. There was evidence of an acrimonious relationship between him and his immediate boss. However 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. She refused to impute to the defendant a knowledge of a vulnerability of which the plaintiff was aware in circumstances where the plaintiff’s psychological history and the related likelihood of psychological harm was not ascertained prior to the conduct complained of. She expressly found that there was no basis upon which the employer could not assume the plaintiff could withstand the “*corporate culture*” within its organisation. The plaintiff failed to cross the foreseeability threshold or to establish that the defendant had fallen below the standard to be properly expected of a reasonable and prudent employer.

In her later decision in *Frank Shortt –v- Royal Liver Assurance Limited* [36] where the plaintiff sought damages for personal injuries which he claimed he had suffered as a result of an unlawful application of the disciplinary process, Laffoy J. found that disciplinary action will almost inevitably be accompanied by a certain degree of stress but that they are events encountered in the normal course of management. In the absence of any reason to the contrary an employer is entitled to assume that an employee is entitled to withstand such stress (similar to her findings in *McGrath* on the “*corporate culture*”). In those circumstances she found that any injuries sustained by the Plaintiff were not reasonably foreseeable.

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35 Decision of 5th October 2011
36 [2009] 20 ELR 240
The plaintiff in *Maher v Jabil* continued the trend of failing to establish reasonable foreseeability on the part of the employer. The plaintiff had claimed damages for stress arising from one period of alleged overwork and one period of alleged underwork. Clarke J was satisfied from the medical evidence that the plaintiff had suffered actionable injuries caused by his work environment. In relation to the period of overwork, he 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 stress or that there was an abnormal level of sickness or absenteeism in the same job or in the same department."

In relation to the period of underwork, Clarke J 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."

In *Berber v Dunnes Stores*, Finnegan J. summarised the law on foreseeability in stress at work cases:

“As to foreseeability, the issue in most cases will be whether the employer should have taken positive steps to safeguard the employee from harm and the threshold to question is whether the kind of harm sustained to the particular employee was reasonably foreseeable. The test is not concerned with the person of ordinary fortitude. The answer may be found in asking the question whether the employer knew or ought to have known of a particular vulnerability. Stress is merely a mechanism whereby harm may be caused and it is..."
necessary to distinguish between signs of stress and signs of impending harm to health. Frequent or prolonged absences from work which are uncharacteristic for the person concerned may make harm to health foreseeable: there must be good reason to think that the underlying cause is stress generated by the work situation rather than other factors. Where an employee is certified as fit for work by his medical adviser the employer will usually be entitled to take that at face value unless there is a good reason for him to think to the contrary.

In Sweeney, the plaintiff had a history over the previous three years of absence from work due to work related stress which was found to have constituted “long and totally uncharacteristic absences from work”. Therefore the principal was found to have known or ought to have known that this “rendered the plaintiff very vulnerable to some form of mental illness such as nervous breakdown”. It was therefore reasonably foreseeable by the principal that if the plaintiff became aware of the private investigator, it was likely to be so traumatic as to “ precipitate her... into mental illness”.

The Plaintiff’s medical history of stress as advised to his employer by his psychiatrist combined with the history of continuous bullying by a co-worker which he had notified to his employer, was found to render his injuries reasonably foreseeable in Keenan.

Cross J. made some interesting observations in Kelly on matters he considered put the defendant on notice of what was going on such as to establish foreseeability. Cross J had regard to historic industrial relations difficulties that has existed in the department before the plaintiff joined which he expressly found “gave [the defendant] an obligation to be particularly stringent in relation to any further bullying”37. He also found as a fact that the defendant had become aware of the fact that the plaintiff had suffered alleged stress and had a number of complaints against her previous employer as a result of some of the defendants’ employees being called to give evidence in her case of unfair dismissal before the Employment Appeals Tribunal against that previous employer shortly after she commenced her employment with the hospital. Perhaps most radically of all, Cross J. stated that the Ms Kelly’s estranged husband’s paramilitary “career” as well as Ms Kelly’s own personal history with a previous employer meant that the defendant was or ought to have been aware of the fact that she “was clearly a person subject to stress...from a very early stage”.

37 At paragraph 5.5
Cross J. found that the defendant must therefore be prima facia liable for the bullying and harassment.

The same Judge in *Browne v Minister for Justice Equality and Law Reform*, in making a finding that a particular incident constituted bullying and harassment, found that:

"It would have been clearly foreseeable that this action would have undermined the plaintiff’s dignity and caused him distress and injury in his career as a garda."

The court accepted that there had been a campaign by members of An Garda Síochána against the plaintiff in order to discredit him in the eyes of his superiors. The court said it was not clear who was responsible and suggested it was probably some junior members of the force and did not accept that the campaign was necessarily orchestrated by the senior officer. However it did find that the incident was clearly aimed at undermining and demonising the plaintiff in the eyes of his superior and therefore was an example of bullying against him within the legal definitions of bullying as a cause of action. In more general term later in the judgment, the court found that the actions both of senior management and of the more junior Gardaí, were reasonably foreseeable to undermine and cause injury to the plaintiff.

A very recent decision of Kearns P upheld a claim for damages arising from the defendant’s failure to put steps in place to deal with what an internal investigation had found constituted bullying in breach of their policy. In *Breen v Iarnrod Eireann*38 an internal investigation had found that the plaintiff had been subjected to bullying by a colleague with whom he had limited interaction during shift handovers. Kearns P pointed out that the employee found to have bullied the plaintiff had not accepted the findings of the internal investigation, which in itself should have alerted the defendant to the possibility of a recurrence of the bullying. He found that the defendant failed to take the proper steps to prevent the bullying they had found had been carried out until over a year after the findings were made when the plaintiff was moved to a different station. The defendant was, therefore, liable to the plaintiff for the injuries he had sustained and which improved once he was transferred. Interesting there was no criticism of the defendant for having moved the plaintiff rather than his colleague who was found to have been guilty of bullying.

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38 Unreported ex tempore judgement of 16th October 2014; Irish Examiner 17th October 2014.
8. VICARIOUS LIABILITY

Many of the cases in this area that have come before the High Court have not really addressed the issue of vicarious liability as much of the focus tends to be on the management response to bullying behaviour of which they were made aware. However vicarious liability can be a relevant factor in determining whether an employer could be deemed liable for the psychological injuries alleged to have occurred as a direct result of the manner in which they were treated at work by another employee. Such liability will only apply where the employer is found to have been vicariously liable for the conduct of the offending employee. It tends to be only in the more extreme cases that vicarious liability will be really put at issue such as allegations of assault or sexual harassment. The Supreme Court in *O’Keefe v Hickey*[^39^] found that the Department of Education was not vicariously liable for the sexual assault perpetrated by a teacher on a pupil of a national school was unsuccessful. The case was referred to the European Court of Human Rights where the State was found not to have provided the plaintiff with sufficient protection in terms of her right not to be subjected to cruel and inhumane treatment. However to some extent that case can be viewed as resting on its own particular facts with the Supreme Court approach as a result of the unusual and almost unique tripartite nature of a teacher’s employment relationship and the approach of the ECHR as specific to the very particular and serious sexual assault perpetrated on the plaintiff which would be far more serious than most cases of workplace bullying.

Perhaps a more relevant example of the potential for an employer to defeat a claim of liability for the assaults perpetrated by a more senior employee can seen in the case of *Reilly v Devereaux & Others*[^40^] where the Supreme Court found that the Defence Forces could not be vicariously liable for sexual abuse committed by its employees. This was in spite of the supervisory and disciplinary role exercised by the first Defendant who was a Sergeant Major who did not contest the allegations made by the Plaintiff that he had sexually assaulted him in the course of his employment. Interestingly the Court did not reject the case of vicarious liability without some analysis as to the risk that might be said to exist within the relationship. Kearns J. pointed out that the perpetrator, whilst he did exercise the supervisory and disciplinary role where the Plaintiff was concerned, was not in the same position as a school teacher or boarding house warden in relation to a child.

[^39^]: [2009] 2 IR 302
[^40^]: [2009] 3 IR 660
"Nor was the nature of the employment one which would have encouraged close personal contact where some inherent risks might be said to exist as, for example, might arise if the first defendant had been a swimming instructor in close physical contact with young recruits. There was no intimacy implicit in the relationship between the Plaintiff and the first defendant nor was there any quasi-parental role or responsibility for personal nurturing which was found to exist in the cases where vicarious liability was established."

Kearns J. concluded that:-

"this case falls short by a considerable margin of establishing the prerequisite for a finding that the defendant should be held vicariously responsible for the criminal activities of the first defendant in this case."

More recently, in *Sweeney v Ballinteer Community School* 41 Herbert J. had regard to both the common law and Section 15 of the Employment Equality Act in finding that the Board of Management as the Principal’s employer was vicariously liable for his wrongful acts “*once those acts were committed by him within the scope of his employment*”. In *Keenan* vicarious liability did not, in the view of the Court, require to be addressed where liability was apportioned between the ‘bully’ and the employer on a joint and severable basis.

### 9. CORPORATE BULLYING AS A CAUSE OF ACTION

Bullying and harassment claims tend to focus on how one employee has mistreated another, frequently subordinate, employee. Whilst attempts can be made to blame the organisational as well as the individual treatment of a plaintiff, the *Kelly* decision for the first time recognised the concept of corporate bullying in Irish law. Ms. Kelly contended that she been subjected to unacceptable treatment by her line manager and that shortly after those difficulties commenced; she was systematically bullied and targeted by management as a whole. Her allegations were numerous, involved virtually all management with whom she had dealings, sometimes extreme (including, for example, that she had been kidnapped by a manager) and were made in lengthy written complaints some of which were unclear in what specific wrongdoing, if any, was being

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41 [2011] IEHC 131
claimed of the individual member of the management team. Her complaints very clearly communicated that she was deeply unhappy with how she believed she was perceived by management and her belief this had resulted directly in unacceptable and unfair treatment of her by them and by her colleagues.

Cross J. in particular relied on the decision of Hebert J. in *Sweeney v Board of Management Ballinteer Community College* which involved allegations by a teacher against her principal and to a lesser extent, against the Board of Management which fitted within the more traditional concept of bullying by an individual rather than an organisation in involving an employee being subjected to individual treatment by their manager which they believed led to a negative attitude by their employer towards them. However Herbert J’s judgement does implicitly suggest that organisational consequences for the plaintiff flowed from the individual treatment of her by her principal.

The evidence in *Kelly* confirmed that the plaintiff’s perception of her difficulties at work commenced after an accident she claimed occurred at work in August 2004 and caused her a injury to her back. Her line manager refused to sign her accident report form and did not report the accident in accordance with normal health and safety procedures. Shortly afterwards Ms Kelly applied for a permanent full time position which her SIPTU representative claimed should have been limited to internal candidates and that agreed procedures were breached by the appointment of external candidates. Cross J. found that the appointments were irregular and contrary to agreed procedures between management and unions and found there had been no justification given for this breach of procedure other than what he accepted was management’s the view of the plaintiff that she was trouble and to avoid giving her a permanent position for which on the face of it she seemed entitled. He concluded that “this amounted to corporate bullying and harassment and discrimination against the Plaintiff and resulted in stress to her”.

Some months later in January 2005 the plaintiff was suspended after she had refused to sign a statement of a complaint taken from her as she did not agree that it was accurate. Cross J. was highly critical of the suspension which he described as the plaintiff being “frog marched off the premises which was by any scale of things an extraordinary insult to her”. He said that the defendant’s attitude may have been due to exasperation which was understandable but was not justified and rejected the defendant’s argument that this constituted a single incident and was

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42 Unreported decision of Herbert J. of the 24th March 2011
43 At paragraph 5.14

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therefore not actionable bullying within the meaning of the accepted definition of bullying. He held that the suspension constituted a breach of contract, bullying and harassment and discriminatory treatment as a result of which the plaintiff had suffered an injury and an actionable wrong.

Thereafter, whilst Cross J. rejected all but one of the plaintiff’s claims that various treatment of her constituted further bullying and harassment, he did accept that the defendants “were at this stage looking at the Plaintiff as being a 'troublemaker' and acted in a number of ways unfairly towards her”. In fact, whilst referring to “a number of ways”, he only found one further incident to constitute an actionable wrong, which was an interference in July 2006 by the defendant with an independent investigation process. He found that an email sent by the defendant’s HR Manager to the investigators advising them shortly after they commenced their investigation that the hospital had received correspondence from the plaintiff’s solicitors informing them that there were issuing a High Court Personal Injuries Summons on behalf of the plaintiff:-

“while not technically a breach of any agreement was clearly intended to be prejudicial against the plaintiff and it was an example of the defendants through [the HR manager] taking a bullying attitude to the plaintiff and it contributed to the stress the plaintiff was suffering”.

Therefore what established corporate bullying was that steps taken by management were found to have been a response to their perception of the plaintiff as a troublemaker rather than a genuine and bona fide interaction with an employee.

More recently, the same court in Browne v Minister for Justice Equality and Law Reform44 reiterated the status of the concept of corporate bullying. The court found:

“The plaintiff’s case is that the bullying and harassment came not merely from fellow employees but were in fact orchestrated or directed from senior members of An Garda Síochána or what is sometimes known as corporate bullying ... If this plaintiff proves a campaign by management against him then unlike most plaintiffs in bullying cases, he does not have to establish that the activities above complained of were known by the first

44 [2012] IEHC 526
named defendant or the second named defendant as he is alleging that senior management were deliberately orchestrating and organising the bullying.”

Whilst the court ultimately found that the plaintiff had been subjected to bullying including in relation to an incident which the court found had been an attempt to punish him and undermine him in his role as a Garda, it did not make any further specific finding that the bullying to which the plaintiff had been subjected was corporate bullying. However implicit in the judgment seems to be the finding that an organisation can be responsible as a corporate entity for the actions of more junior employees. Interestingly, in relation to one incident where the court found that the conduct had been perpetrated probably by junior members of the force, the court also expressly did not accept that the campaign “was necessarily orchestrated by the senior officers”. Nevertheless, it did find that the incident was aimed at undermining and demonising the plaintiff in the eyes of his superiors and was therefore an example of bullying against him.

The development of corporate bullying is a significant and novel approach in Irish law and gives rise to the possibility of bullying cases being more broadly addressed than simply relying on individual interactions between an employee and an individual manager or colleague. It will mean much more focus on organisational structures and the extent to which management had genuine reasons for how they dealt with an employee, particularly an employee who had a reputation as being difficult. It is arguable that any employee who raises any concerns about their workplace is at risk of being viewed in that light. It also raises the possibility that the more vocal an employee is about making complaints, no matter how reasonable or genuine those complaints may be, the better their chances of establishing liability against their employee for bullying and harassment as any treatment of them by management could be challenged as having been motivated even slightly by management’s perception of the individual as a difficult employee.

CONCLUSIONS

The amount of litigation in the area of bullying, harassment and workplace stress has increased dramatically over the past ten years. Whilst the impact of *Berber* on establishing liability cannot be underestimated, it is a mistake to view that decision as rejecting the cause of action rather than rejecting the High Court’s conclusions on the facts that the plaintiff had established evidence of foreseeability of his injuries and wrongful repudiation of his contract.
The facts of *Berber* were not as strong as many facts that still arise in litigation where the cause of action that has been preserved by the Supreme Court both in *Berber* and in *Quigley* can still be found on the evidence and can give rise to liability where an employer has failed to deal with a situation of serious bullying at work. It has even been expanded in *Kelly* to recognise the manner in which an employee can be bullied by an organisation rather than an individual within it and how that bullying treatment can continue even after the employee has left the workplace on certified sick leave.

Whilst these developments present significant potential for litigation, the High Court with all of the costs, risk, publicity and stress which it inevitably involves, cannot be the right place to address the sensitive issue of workplace bullying and harassment, whether real or perceived. There must be a better way but until the legislature show some interest in this difficult area of workplace relations, it seems that lawyers will continue to have to bring an innovative approaches to how the civil courts should address the issues that arise for an employee and their employee where allegations of workplace bullying and stress are made.

**MARGUERITE BOLGER SC**