Neutral Citation Number: [2009] IEHC 178

THE HIGH COURT

2005 3481 P

BETWEEN

JOSEPH KEMMY

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT delivered by Mr. Justice McMahon on the 25th day of February, 2009

Introduction
The plaintiff was convicted of rape and sexual assault at the Central Criminal Court on the 16th December, 2000. He was remanded in custody and on the 26th April, 2001 was sentenced to 3 years imprisonment for the rape and 1 year for the sexual assault to run concurrently from the 16th December, 2000, with the balance of the sentence unserved as of the 16th December, 2001 suspended. On the 1st December, 2003, Fennelly J., in an *ex tempore* judgment in the Court of Criminal Appeal, set aside Mr. Kemmy's conviction and did not order a retrial.

The Court dealt with the second of the substantive trial process issues that were raised in the appeal in the following language:

> "The jury retired and had been in deliberation for a day and a half and they returned to Court and made a request to the trial judge to be allowed to see the transcript of the evidence of the complainant.
>
> …
>
> The trial judge decided to adopt the following course – he said that instead of reading a large number of pages of the entire transcript of the evidence which would have included both the questions and the answers, he would read his own note of the evidence of the complainant, that would be both her evidence in chief and in cross-examination and that that amounted to some seventeen pages of his notebook and that is what he proceeded to do. So what the jury had then was a complete re-reading of all the evidence of the complainant both, as already stated, in chief and in cross-examination at a time well into the deliberations of the jury and shortly thereafter the jury returned with a verdict convicting the accused.'

Fennelly J. continued at pages 3 and 4 of the judgment:

> "In the view of the Court to do what the judge did in the circumstances of this particular trial and it should be emphasised – in the circumstances of this particular trial – was unfair and did render the trial unfair. It should be pointed out that this was a particular case where the issue of consent was highly central to the entire question of the guilt or innocence of the accused and that to read only the complainant's evidence after such an interval of time entirely in isolation without reading also even in summary the evidence of the accused created an imbalance which must have created a serious risk of confusion in the minds of the jury at least of emphasising the complainant's evidence at the expense of the evidence of the accused. …and in those circumstances the court has decided to treat the application for leave to appeal as the appeal and it will set aside the conviction and will not order a retrial."

By the time the plaintiff's conviction was quashed on the grounds that the manner in which his trial was conducted was 'unfair and did render the trial unfair', the plaintiff had long ago served his term of imprisonment and had been released. Therefore, the plaintiff contends that he suffered deprivation of liberty, loss and damage as a result of the manner in which his trial was conducted and the quashing of his conviction did not remedy or diminish these losses. Since the plaintiff's conviction was not quashed on grounds that a newly discovered fact showed that there had been a miscarriage of justice, the plaintiff was not eligible to apply for compensation pursuant the s. 9 of the Criminal Procedure Act 1993.

The plaintiff's primary claim in these proceedings is for damages against the State for infringement by the State, through its judicial organ, of the plaintiff's constitutional right to a fair criminal trial. It is important to emphasise that the plaintiff's complaint is that he did not receive a "fair trial" from the trial judge and that this was a breach of his constitutional right. Had the Court of Criminal Appeal found that the trial judge had merely committed an error of law, counsel for the plaintiff conceded at the hearing that he would not have brought the action. The right to a fair trial is one of the unenumerated personal rights guaranteed in the Constitution at Article 40.3. In addition, and in the alternative, the plaintiff also claims damages against the State for the negligence and/or breach of duty of servants or agents of the State and if necessary, a declaration that any common law rule of law which purports to grant judges of the High Court of Ireland personal immunity from suit in respect of acts done in the performance of their judicial duty is subject to and in accordance with the plaintiff's rights under the Constitution and is unconstitutional insofar as it purports to deny the plaintiff his right to seek damages against the State. The plaintiff seeks such further or ancillary declaratory or other relief as the court deems appropriate.

The defendants deny that they have any liability to compensate the plaintiff for any loss or damage that he is alleged to have suffered as a result of his detention under orders made by the Central Criminal Court after the trial. The defendants also deny that the learned trial judge is personally liable to the plaintiff for the alleged or any negligence of breach of duty in the manner in which he conducted the plaintiff's trial. In the absence of any primary liability, none of the defendants are vicariously liable to the plaintiff for the action of the trial judge. In this connection it is further denied that judicial immunity from suit is subject to or secondary to any alleged rights of the plaintiff under the Constitution and the defendants deny that judicial immunity from suit in respect of acts done in the performance of judicial duty is unconstitutional.

The case was heard in Dundalk on Wednesday, 21st January, 2009 and Thursday, 22nd January, 2009. Since the facts were agreed, no witnesses were called. It was also agreed between the parties that the liability issue should be determined first, and only if the plaintiff was successful, would evidence be called in respect of the appropriate level of damages. Finally, the question of causation was also put back and was to be dealt with the damages issue if the court found in favour of the plaintiff.

Liability of the State Generally

The State is a legal person separate and distinct from its citizens, in a similar way that a company is a legal entity separate and distinct from its shareholders. It may sue and be sued as a juristic person and it has the capacity to hold property (*Commissioner of Public Works v. Kavanagh* [1962] I.R. 216).

Although the term "the State" is not expressly defined in the Constitution, it is created by the Constitution and its characteristics can be discerned therefrom. In the *Commissioner of Public Works v. Kavanagh (Supra)* O'Dalaigh J. observed that:

> "…in 1937 Saorstát Éireann was supplanted by the new State under the Constitution of Ireland…"

"The State" is an abstract concept but it exercises its powers and discharges its duties and obligations through its three constitutional organs, namely its legislative, executive and judicial organs. Article 6.2 of the Constitution provides that the State's powers are "exercisable only by or on the authority of the organs of State established by this Constitution". Referring to Article 6 of the Constitution, Finlay C.J. stated in *Crotty v. An Taoiseach* [1987] 1 I.R. 713, at p.772 that:

> "The separation of powers between the legislature, the executive and the judiciary, set out in Article 6 of the Constitution, is fundamental to all its provisions… It involves for each of the three constitutional organs concerned not only rights but duties also; not only areas of activity and function, but boundaries to them as well."

In *Byrne v. Ireland* [1972] 1 I.R. 241, the Supreme Court held that the State could be sued for damages in tort and rejected the argument that the State had inherited the Crown's common law immunity from liability. As Budd, J. at p. 297 put it "the State was not above the law of the Constitution but was subject to it". The court observed that since the Constitution expressly provided for immunity for specific organs of the State in specific circumstances, this strongly implied that the Constitution did not intend to confer other immunities. Walsh J. held at p. 264 as follows:-

> "The State must act through its organs but it remains vicariously liable for the failures of these organs in the discharge of the obligations, save where expressly excluded by the Constitution. In support of this it is to be noted that an express immunity from suit is conferred on the President by Article 13, s. 8, subs. 1, and that a limited immunity from suit for members of the Oireachtas is contained in Article 15, s. 13, and that restrictions upon suit in certain cases are necessarily inferred from the provisions of Article 28, s. 3, of the Constitution."

I have no difficulty in accepting these statements as accurate expressions of the law subject to one proviso. Because of the express recognition in the Constitution itself that the judiciary is independent in the exercise of its judicial functions and is subject only to the Constitution itself and the law, the position of the judiciary, as the judicial organ of the State is different from the other organs that is, the executive and the legislature. In relation to the liability of the judiciary, and the liability of the State for the wrongs of the judges, following from its constitutional independence, I am of the view first, that the State is not vicariously liable for the wrongs of the judges in exercising their judicial functions and second, that the judges have immunity from suit in respect of failures in the discharge of their functions. I will return to these issues later in this judgment where I will expand on my reasons for reaching these conclusions.

It is also clear, as the plaintiffs point out, that as well as the State being vicariously liable for the torts of some of its subordinates, the State itself may be primarily and directly liable in damages in other types of actions and for breach of constitutional obligations. Although the Constitution has not prescribed any particular remedies for a breach of a constitutional duty or right, the Supreme Court held in *Meskell v. Córas Iompair Éireann* [1973] I.R. 121, that the plaintiff could get damages for the defendant's interference with his constitutional rights. Giving the unanimous judgment of the court, Walsh J. held at. pp. 132 – 133:

> "It has been said on a number of occasions in this Court, and most notably in the decision in *Byrne v. Ireland* [1972] 1 I.R. 241, that a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right."

That the State can be sued directly for constitutional failures, can be seen from *Kennedy v. Ireland* [1987] I.R. 587 and *Redmond v. Minister for the Environment* (2) [2006] 3 I.R. 1. In *Kennedy*, the plaintiffs sued the State for the unlawful tapping of their telephones. Damages were awarded against the State for the executive's breach of the plaintiff's constitutional right to privacy. Hamilton P. twice referred to the "actions of the executive" in the course of his judgment

and earlier in the judgment he stated at p. 593:

> "There has been, as is admitted on behalf of the defendants, a deliberate, conscious and unjustifiable interference by the State through its executive organ with the telephonic communications of the plaintiffs and such interference constitutes an infringement of the constitutional rights to privacy of the three plaintiffs."

In *Redmond*, damages were awarded against the State for breach by the legislative organ of the State of a citizen's constitutional right. Herbert J. held:

> "[2] It was held by the Supreme Court in the case of *T.D. v. Minister for Education* [2001] 4 I.R. 259, that the doctrine of separation of powers required that none of the three institutions of government be paramount. In my judgment, it is essential in a constitutional democracy such as this State, where a rule or convention of parliamentary sovereignty has no place, that the courts should have the power and be prepared, wherever necessary, to vindicate by 'all permitted and necessary redress,' (to borrow the phrase of Henchy J. in *Murphy v. Attorney General* [1982] I.R. 241 at p. 313), including, where justice so requires, by an award of damages, the constitutional rights of anyone, even where the transgression of those rights is in an Act of the Oireachtas passed into law by the votes of the elected representatives of the people and signed by the President. This does not amount to unwarranted judicial activism trespassing on the legislative function of the Oireachtas. No evidence was advanced at the hearing of this issue and I am not prepared to assume that this particular power and, indeed duty of the courts, would in any way inhibit or interfere with the proper functioning of the legislative arm of the State within its own unique sphere of activity under the Constitution.
>
> [3] From the decisions of the Supreme Court in *The State (Quinn) v. Ryan* [1965] I.R. 70; *Byrne v. Ireland* [1972] I.R. 241 and *Murphy v. Attorney General* [1982] I.R. 241, and decisions in other cases to which I was referred during the hearing of this issue but which I consider it unnecessary to cite here, I am satisfied that this court does have full power to award damages, ordinary compensatory damages or aggravated or increased compensatory damages and even punitive or exemplary damages (see *Conway v. Irish National Teachers' Organisation* [1991] 2 I.R. 305), against the legislative arm of the State for breach of a constitutional right by an Act of the Oireachtas or by a provision of such an Act."

(In this case Herbert J. awarded nominal damages of €130.00. When the matter came before the Supreme Court it refused to deal with the issue of damages because the award of the High Court was so small).

It is important to note that in these two cases, liability was not imposed on the State on vicarious liability principles but was directly and primarily imposed on the State itself acting through its constitutional organs. Furthermore, it is clear from these cases and from other cases (see *Hanrahan v. Merck, Sharp & Dohme Limited* [1988] I.L.R.M. 629 and *W. v. Ireland* (2) [1997] 2 I.R. 141), that an action for breach of a constitutional right is not a mere tort, it is a wrong that may defy classification in the traditional categories of wrong and is to be distinguished from instances of tortious liability for which the State may be liable vicariously for the wrongs of its employees.

Finally, where it has been held in this jurisdiction that the State might be liable directly for the Acts of one of its organs, Budd J. in *An Blascaod Mor Teoranta v. Commissioners of Public Works in Ireland & Ors* (4) [2000] 3 I.R. 565, rejected the idea that liability should be strict where the right affected was a constitutional right. In that case he stated:

> "The nature of the relationship between a citizen and the State is complicated by the obligations of the State which, through its organs or agents, must engage in such activities as policing, imprisoning and legislating. In the course of making laws, the legislature frequently has to take into account conflicting individual rights and the exigencies of the common good within a process involving balancing and adjusting the scope of rights. There is therefore little justification for a regime of strict liability for infringement of a constitutional right where such rights are competing and in conflict. In such circumstances '*ubi ius, ibi remedium'* is too simple a formula and strict liability would in many cases be too low and easy a threshold to reach." (At p. 581)

Later, Budd J referred to the decision of the Supreme Court in *Pine Valley Developments v. Minister for the Environment* [1987] I.R. 23, where Finlay C.J., at p. 38 of the Supreme Court judgment quoted from the judgment delivered by O'Higgins C.J. in *Moynihan v. Greensmyth* [1977] I.R. 55, which stated as follows at p. 71:

> "It is noted that the guarantee of protection given by Article 40, s. 3, subs. 2, of the Constitution is qualified by the words 'as best it may.' This implies circumstances in which the State may have to balance its protection of the right as against other obligations arising from regard for the common good."

Finlay C.J. continued:

> "I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims for compensation where they act *bona fide* and without negligence. Such an immunity would contribute to the efficient and decisive exercise of such statutory powers and would, it seems to me, tend to avoid indecisiveness and delay, which might otherwise be involved."

In support of its argument that the State can be sued as a juristic person in its own right, the plaintiff also refers to the numerous cases where Ireland has been sued successfully for breaches of the law of the European Union. The State's liability in these cases, however, can be properly explained by the specific constitutional amendments which have been passed to enable Ireland to join the European Union and in doing so accepting the legal consequences of such accession. State liability in relation to community law matters therefore can be independently justified by this amendment. I am satisfied, however, that from the authorities already cited, the State in appropriate circumstances can be sued directly for breaches of constitutional rights unconnected with any community law. Although it would seem, therefore, that the State may be liable directly for its actions through its executive and legislative branches, such liability is restricted in the manner described.

The question for this Court therefore, would appear to be whether the State can be sued in such cases when the organ of government involved is the judiciary? And additionally, is the answer affected by the constitutional guarantee of the independence of the judiciary and the personal immunity which the judiciary enjoy from civil action?

Judicial Immunity

Before considering whether the State should be directly liable for the acts of the judiciary it is appropriate to examine the reasons and policy considerations which justify personal immunity for the judge when exercising his judicial functions. These underlying policy considerations may also be relevant when considering the possible immunity of the State in such a case.

The immunity which a judge enjoys from civil suit by a disappointed litigant is well established in the common law and has been accepted in this jurisdiction in several cases. Although frequently described as absolute, the judge may be successfully sued personally in extreme cases, where, for example, he accepts a bribe to decide a case in a particular way. I need not concern myself here with such extreme conduct for two reasons. First, the judge is not personally sued in this case, and second, the facts before the court show that the trial judge has unlimited jurisdiction and merely exercised an honest discretion with which the Court of Criminal Appeal did not agree. The case law clearly establishes that the judge cannot be personally liable in such a case.

In *Deighan v. Ireland, Attorney General and Ors*. [1995] 2 I.R. 56, Flood J. approved the statement of principle of Lord Denning M.R. in his judgment in *Sirros v. Moore* [1975] Q.B. 118 at p. 132 where he says:

> "The reason [for the immunity] is not because the judge has any privilege to make mistakes or do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden C.J. in *Garnett v. Ferrand* [1827] 6 B. & C. 611, 625:
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> > 'This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.'"

In *Desmond & Anor v. Cornelius Riordan* [2000] 1 I.R. 505, at p. 507, Morris P. stated:

> "It is, in my view, well settled that the immunity from suit enjoyed by the judiciary exists not for the benefit of the judge but for the benefit of the community as a whole. This immunity is perceived to be necessary and desirable so that a judge may perform his functions the better, freed of concern that in the course of performing his duties he may defame a third party and be required to be answerable to that party in damages."

(Endorsed by Geoghegan J., in the Supreme Court in *Beatty and Beatty v. the Rent Tribunal and Anor* [2006] 2 I.R. (S.C.), 191, at 212 where he said: "The immunity of judges is based on public policy considerations.")

In an earlier case, *Macaulay & Company Limited v. Wyse-Power* [1943] 77 I.L.T.R. 61 at 63, McGuire J. held that:

> "The people were entitled to have the opinion of a judge without fear of his words being challenged elsewhere. It was salutatory and beneficial privilege."

More recently in *Flynn v. Minister for Justice, Equality and Law Reform & Anor* (Unreported, High Court, Ó Caoimh J., 30th April, 2003), Ó Caoimh J. quoted with approval, Dodd J. in *Tughan v. Craig* [1918] 1 I.R. 245 at 255 where in an action against the judge in his charge he stated, *inter alia*:

> "The fourth question is: Does malice deprive a judge of the protection? The answer may be given to this also in the words of the books in *Barnardistion v. Soame* 6 State Trials 1063. It is laid down that:
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> > 'No action will lie against a judge for what he does judicially, though it should be laid *falso malitose et scienter*. They who are intrusted to judge ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage.'"

In a calmer context, the Law Commission of New Zealand in its 37th Report on *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick*, NZLC R 37 (19th May, 1997, Wellington, New Zealand) set out the reasons for judicial immunity in the following language:

> **"Reasons for Judicial Immunity**
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> 138. The reasons for the protection accorded by judicial immunity include:
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> • promoting the fearless pursuit of the truth;
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> • ensuring that the judicial function is fairly and efficiently exercised without proper interference;
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> • safeguarding a fair hearing in accordance with natural justice, which should reduce the prospect of error;
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> • promoting judicial independence;
>
> • achieving finality in the litigation in accordance with the essential principle of res judicata, except insofar as the law provides for appeal or permits review (collateral challenge should not be able to avoid that principle or widen the opportunities for appeal and review); and

> • there exist adequate rights of appeal against, and rehearing and review of, the decision itself (as opposed to proceedings against the person taking the decision), with related powers to delay the effect of any judgment or penalty while the processes are pending.

> 139. Different weight can be and is given to these reasons. The more general rationale for immunity is that, in exposing judges of the superior courts to liability to suit, the costs of prevention would be greater than the value of the cure…

> **The limits of Judicial Immunity**

> 140. Judicial immunity must be seen in context. There is a range of remedies available to those aggrieved, which reinforces the responsibility and accountability of judges. They include:

> • rejection of evidence (e.g., evidence obtained under an unlawful warrant) or stay of proceedings (e.g., for delay);

> • appeal against, review of, or rehearing of , decisions;

> • civil proceedings in respect of actions of judicial officers not taken in the exercise of their judicial functions;

> • criminal prosecution in respect of the corrupt exercise of judicial functions; and

> • removal processes for serious judicial misbehaviour or incapacity." (See also justification of public policy listed by Akenhead J. in *Hinds v. Liverpool County Court and Anor*. [2008] F.L.R. 63, at 73 which in addition to the above also states as justification that judges are chosen on the basis of their integrity and there are exceptionally few reported cases of judges acting with malice or in a corrupt manner).

Issues of Judicial Immunity in the Context of Citizen's Constitutional and Legal Rights
The plaintiff relies heavily on some precedents from the Privy Council to support his case. Before examining these more closely a word of caution is appropriate. First, these authorities are only persuasive in this jurisdiction and while they are entitled to the respect that they deserve, one must be cautious especially since the particular decisions in question in this case are heavily based on local legislation. Their relevance and force for this jurisdiction must be examined in the light of our own laws and constitutional principles relating to the issues before this court. The first case the plaintiff relies on is *Maharaj v. Attorney General of Trinidad and Tobago (2)* [1979] A.C. 385.

***Maharaj v. Attorney General of Trinidad and Tobago* (2) [1979] A.C. 385** This case is also reported by the Privy Council and may be cited as [1977] U.K.P.C. 21. Whilst the Privy Council's version contains some slight editorial differences, nothing of substance is significantly different. Furthermore, since it was the Appeal Court's version which was presented to this court, this is the version I have used.
The majority in this case held in favour of Mr. Maharaj, the appellant. It is significant, however, to note that in this case the appellant did not have the right to appeal from the original judicial determination and this fact features prominently in subsequent decisions considering the ratio of this case.

The facts of the *Maharaj* case are succinctly set out in the judgment of Lord Hailsham at p. 400 who dissented from the majority.

> "[The] appellant, a barrister, was committed for seven days on a charge of contempt in the face of the court by a judge of the High Court of Trinidad and Tobago, a conviction against which he appealed by special leave. In the result his appeal was allowed and his conviction set aside on two substantive grounds, the first of which is not, and the second of which is, relevant to the present appeal. The first, of great importance to the appellant, but no longer relevant, was that, as I understand it, on a correct analysis of the facts, he had not in fact committed the contempt of which he was charged. The second which is at the heart of the present appeal was, in effect, that he had been deprived of his liberty without due process of law. This was because the judge never explained to him with sufficient clarity or in sufficient detail the nature and substance of the contempt of which he stood accused."

As already stated, the majority in *Maharaj* came down in favour of the appellant. The Privy Council held that the circumstances giving rise to such an award would be rare. In this connection the court stated at p. 399:

> "The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1 (a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

Secondly, the majority pointed out that its decision would not affect the established immunity enjoyed by the judge in his/her personal capacity:

> "The claim for redress under section 6 (1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6 (1) and (2) of the Constitution." (*Ibid*.)

Thirdly, it was pointed out that not every failure by a judge to observe one of the fundamental rule's of natural justice brings the case within s. 6 of the Constitution. Liability would only arise where the failure resulted (or was likely to result) in a person being deprived of "life, liberty, security of the person or enjoyment of property". (*Ibid*.) The majority emphasised also that the decision applied only where, as in the cases before it, the appeal process was ineffective because of passage of time. Referring to the possibility of multiple collateral proceedings by the person affected (*e.g.* a type of *habeas corpus* procedure) the majority were confident that the High Court could by its inherent jurisdiction prevent an abuse of process by the individual. Finally, adverting to the fear that the State might be exposed to large awards of damages, it pointed out that the claim in this case:

> "…is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration…." (Page 400)

It had been indicated to the majority by the appellant's counsel that he was not seeking exemplary or punitive damages, the majority, therefore, refrained from expressing any view on this issue and instead remitted the case back to the High Court with a direction to assess the amount of monetary compensation to which the appellant was entitled.

Turning to Lord Hailsham's minority judgment he was of the view that the appellant had no right for damages against the State in the circumstances before the court. At p. 409 of the decision he states:

> "I must add that I find it difficult to accommodate within the concepts of the law a type of liability for damages for the wrong of another when the wrongdoer himself is under no liability at all and the wrong itself is not a tort or delict. It was strenuously argued for the appellant that the liability of the state … was not vicarious, but some sort of primary liability. But I find this equally difficult to understand. It was argued that the state consisted of three branches, judicial, executive and legislative, and that as one of these branches, the judicial, had in the instant case contravened the appellant's constitutional rights, the state became, by virtue of section 6 responsible in damages for the action of its judicial branch. This seems a strange and unnatural way of saying that the judge had committed to prison the appellant who was innocent and had done so without due process of law and that someone other than the judge must pay for it (in this case the taxpayer)…. What I do not understand is that the state is liable as a principal even though the judge attracts no liability to himself and his act is not a tort. To reach this conclusion is indeed to write a good deal into a section which begins innocently enough with the anodyne words "for the removal of doubts it is hereby declared…."

Lord Hailsham could not accept that the crown should be liable in such situations when the judge is personally immune. This reluctance on his part, I suggest, springs from a mindset which was formed by the old common law principle that "the King can do no wrong". Starting from that point of view, the corollary follows that the King's servants can do no wrong. This was the legal position that prevailed in England until the Crown Proceedings Act 1947. Until then the Crown could not be liable for its torts whether they were committed by the State itself or by its agents or servants.

It is not surprising, therefore, that when the question of judicial immunity first arose in the common law, the question that was at issue in the English courts was the personal liability of the judge himself. There was no question of the judge making the State liable because the King could do no wrong, and accordingly, a party who felt aggrieved by judicial conduct could only aspire to a verdict against the judge personally. It was in that context that the common law courts developed its case law which confers generous immunity on the judiciary for actions committed while exercising their judicial function. This approach can be misleading for other jurisdictions, such as Ireland, which do not start out from a position of absolute State immunity and is an approach that can distort proper analysis of the ambit and the extent of judicial immunity within these other legal systems.

In the constitutional order of this State, for example, the old prerogative of the crown immunity was exposed as a heresy in *Ryan v. Ireland* [1989] I.R. 77. In that case it was held that the State was not above the law and was subject to the Constitution. It followed that if it did wrong, it could be sued. The default position in considering the State's liability in Ireland therefore was not immunity, as it had been in the common law in England, but liability.

Flood J., in *Deighan (Supra)* declared that the majority decision in *Maharaj* was of no assistance to the plaintiff since it was based on Article 6, s. 1 of the Constitution of Trinidad and Tobago, and no corresponding provision existed in Ireland or in the Constitution (at p.63).

Maharaj **in New Zealand**

At the outset attention must be drawn to the fact that the New Zealand Bill of Rights Act explicitly applies not only to the acts of the legislative and executive branches of government, but also, to acts of the judicial branch (Article 24(3)(a)). This is significant when considering the jurisprudence from that jurisdiction.

Initially the ratio of *Maharaj* was broadly interpreted in New Zealand as holding the crown to be directly liable for breach of the New Zealand Bill of Rights Act as a matter of public law (see *Rishworth, Huscroft, Optican and Mahoney, New Zealand Bill of Rights* (2003), Oxford University Press, p. 812). The New Zealand Law Commission in its Report on *Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick*, NZLC R 37 (19th May, 1997, Wellington, New Zealand) at p.29, para.86, however, favoured a narrower ratio, one which imposed "direct liability on the crown on the grounds of breach by an element of the executive in terms of s. 3(a) [of the New Zealand Bill of Rights Act]". Subsequently, the Privy Council, emphasising that in *Maharaj*, the appellant did not have either a right to appeal or the right to apply for bail, retracted somewhat and began to favour a narrower ratio also. In *Independent Publishing Company Limited & Anor v. Attorney General of Trinidad and Tobago & Anor* [2004] U.K.P.C. 26, Browne L.J. held at paras. 87 – 89:

> "Lord Diplock's judgment [in *Maharaj*] has been widely understood to allow for constitutional redress, including the payment of compensation, to anyone whose conviction (a) resulted from a procedural error amounting to a failure

to observe one of the fundamental rules of natural justice, and (b) resulted in his losing his liberty before an appeal could be heard. That, however, is not their Lordships' view of the effect of the decision. Of critical importance to its true understanding is that Mr Maharaj had no right of appeal to the Court of Appeal against his committal and equally, therefore, no right to apply for bail pending such an appeal."

"In deciding whether someone's section 4(a) 'right not to be deprived [of their liberty] except by due process of law' has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental human right, as Lord Diplock said, is to 'a legal system … that is fair'. Where, as in Mr. Maharaj's case, there was no avenue of redress (save only an appeal by special leave direct to the Privy Council) from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterised as unfair. Where, however, as in the present case, Mr. Ali was able to secure his release on bail within four days of his committal – indeed, within only one day of his appeal to the Court of Appeal – their Lordships would hold the legal system as a whole to be a fair one."

"Once someone committed to prison for contempt of court could appeal in Trinidad and Tobago to the Court of Appeal, and meantime apply for release on bail, his position became essentially no different from that of a person convicted of any other offence. Convicted persons cannot in the ordinary way, even if ultimately successful on appeal, seek constitutional relief in respect of their time in prison. The authorities are clear on the point. Just two need be mentioned. In *Hinds v Attorney General of Barbados* [2002] 1 AC 854…Lord Bingham of Cornhill said, at p. 870, para. 24:

> 'It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so the Constitution must be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision…The applicant's complaint was one to be pursued by way of appeal against conviction, as it was…'"

In *Forbes v. Attorney General of Trinidad and Tobago* [2002] U.K.P.C. 21, the second authority cited by Browne J., Lord Millet, at para. 18 is quoted as follows:

"[The authorities] …establish that it is only in rare cases where there has been a fundamental subversion of the rule of law that resort to constitutional redress is likely to be appropriate. However the exceptional case is formulated it is clear that the constitutional rights to due process and the protection of the law do not guarantee that the judicial process will be free from error. This is the reason for the appellate process. In the present case the appellant was deprived of his liberty after a fair and proper trial before the magistrate, that is to say by due process of law. The appellant was able to challenge his conviction by way of appeal to the Court of Appeal and, when the Court of Appeal wrongly failed to quash his conviction, by way of further appeal to the Board. The appeals were conducted fairly and without procedural error, let alone any subversion of the judicial process. The appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. His constitutional rights have not been infringed …"

Browne L.J. continued, in his judgment in *Independent Publishing* at para. 93, noting that because any shortcomings in the first hearing could be made good on the appeal and by the grant of bail meanwhile, the system as a whole was fair:

"…their Lordships see little reason to maintain the original distinctions made in *Maharaj (No 2)*…between fundamental breaches of natural justice, mere procedural irregularities and errors of law – distinctions which in any event were never very satisfactory for the reasons given by Lord Hailsham [in his minority judgment in *Maharaj*]."

This exercise clearly shows how the majority decision in *Maharaj* has been qualified by subsequent decisions of the Privy Council itself. An argument based on this majority decision, such as the plaintiff advances here, will consequently be weakened.

The jurisprudence of the Superior Courts of New Zealand and the manner in which the concept of judicial immunity has evolved.

Before this recalibration of the majority judgment in *Maharaj* had been undertaken, the New Zealand Supreme Court had accepted the majority view in *Maharaj* (see *Simpson v. Attorney General (Baigent's case)* [1994] 3 N.Z.L.R. 667 and *Upton v. Green (2)* [1996] 3 H.R.N.Z. 179 (HC)). More recently, however, particularly in *Brown v. Attorney General* [2005] 2 N.Z.L.R. 405, a rethink is evident even in that jurisdiction. In that case, Mr. Brown was charged with attempted murder, wounding with intent to cause grievous bodily harm, and aggravated robbery, each together with a person unknown. A long-sleeved t-shirt was found at his flat with blood of the victim on it. The T-shirt had sweat stains. Mr. Brown wanted D.N.A. testing to prove it was not his sweat, but was refused funds to have the shirt tested for D.N.A. by an Australian laboratory. When it was subsequently established that the T-shirt had been worn by another resident in the flat, Mr. Brown obtained a discharge from the conviction for murder. He sued seeking compensation under the New Zealand Bill of Rights Act. He was unsuccessful in the High Court and in the Court of Appeal.

Since the court decided that the refusal to grant legal aid was not unlawful or unreasonable, the court held that Mr. Brown had not established any breach of his rights under the Bill of Rights Act. The question of compensation therefore did not fall to be decided. The majority expressed no view as to when (if ever) compensation or financial relief would be an appropriate remedy for breach of "fair trial" rights. Nevertheless, the court did acknowledge the strength of the views expressed by Young J. in a separate judgment in the same matter. Young J. at para. 119 considered that the case raised two issues:

(a) Has the State breached the rights of the appellant under the New Zealand Bill of Rights Act 1990?

(b) If the State has breached the rights of the appellant under the New Zealand Bill of Rights Act 1990, would

monetary relief be an appropriate remedy?

Noting that the high watermark for the appellant's case was the Privy Council decision in *Maharaj* (at para. 127), Young J. went on to say that, on the whole, the courts had taken the approach that constitutional guarantees as to fair trial are best given effect within the Statutory appellate process provided for and of course by trial courts (at para. 131). This preference he noted, was apparent from the recent Privy Council decisions already referred to above (i.e. *Hynes v. Attorney General of Barbados* [2002] 1 A.C. 854, *Forbes v. Attorney General of Trinidad and Tobago (supra)* and *Independent Publishing Company Limited v. Attorney General of Trinidad and Tobago (supra)).* Referring to the earlier New Zealand case which seemed to apply the majority decision in *Maharaj* (the *Simpson* case and *Upton v. Greene (supra))* he noted, of the decision in *Upton* that:

> "It does not, however sit easily with the later Privy Council cases." (At para. 133)

At para. 134, he further commented that:

> "As far as I am aware, there have been no decisions in the United Kingdom awarding compensation for those whose convictions have been set aside for unfairness at trial: this despite the Human Right's Act 1998…"

Continuing his judgment, Young J. stated, at para. 142 and following:

> "In my view, the New Zealand Courts ought not to award compensation as a remedy for unfair trial process but rather should require such complaints to be raised with either the trial judge or on appeal. I say this for the general reasons which I have already given and for the following somewhat more particular reasons:
>
> (a) The rules as to trial fairness have been developed for the purpose of determining whether appeals should be allowed and not for determining entitlements to compensation. They are therefore not likely to be well suited for application in a compensation context.
>
> (b) The purposes for which rules are used necessarily have an impact on their content. If the rules as to trial fairness are required to serve the dual function of determining whether criminal appeals ought to be allowed and entitlements to compensation, there are likely to be consequential changes in practice to the disadvantage of criminal appellants. It is likely to become harder for appellants to persuade appellate courts that there was unfairness.
>
> (c) For the courts to recognise claims to compensation in relation to unfair trial process would create a fiscal burden on the tax payer which parliament can hardly be seen to have authorised.
>
> (d) "…the "natural" remedy for breach of fair trial rights is to be found in the jurisdiction of trial and appellate courts rather than by way of damages…"
>
> (e) As pointed out by Lord Hailsham in *Maharaj*, it is difficult to see why a person who has been convicted following an unfair trial is any more deserving a claimant for compensation than another person convicted following a trial which miscarried for reasons other than state unfairness.
>
> (f) This approach is consistent with the most recent Privy Council jurisprudence.

In a still more recent case, *McKean v. Attorney General* [2008] 1 L.R.C. 694, a claim for damages was pleaded as part of a separate cause of action for compensation for breach of rights under the New Zealand Bill of Rights Act. In *McKean*, Fogarty J. considered that the strong dicta in *Brown v. Attorney General* [2005] 2 N.Z.L.R. 405 and *Attorney-General v. Udompun* [2005] 3 N.Z.L.R. 204, although clearly *obiter* in those cases, were a clear indication that the law is still unsettled as to whether compensation should ever be an appropriate remedy for a breach of fair trial rights. He interpreted the majority in *Brown* as requiring the High Court to examine case by case whether compensation as a public law remedy under New Zealand Bill of Rights Act can appropriately be synthesised with existing causes of action relevant to the issues.

Insofar as the *Trinidad and Tobago* case therefore relies on the many decisions in *Maharaj*, it is clear that subsequently the Privy Council greatly modifies what was originally put forward as the ratio of that case. Further, the more recent New Zealand case law, equally shows a tendency to resile from its earlier acceptance of the wide formulation. From this point of view the basis of the majority decision in *Maharaj* is considerably weakened.

From the above exposition it is clear that the independence of the judiciary is a fundamental value in western democracies. The immunity from suit for the judiciary is a necessary corollary of this set of values. This immunity has developed in the common law context where the starting point on the liability of the state was expressed in the absolute rule that "the king can do no wrong". To make the state liable now for the wrongs of the judiciary would in effect represent a late indirect challenge on the personal immunity of the judiciary. The jurisprudence on the matter is too well settled to permit any such oblique subversion.

Judgment

Before assessing the relevance of this jurisprudence for the determination of the case before the Court, it is important that the relevant provisions of the Constitution are borne in mind since the legal infrastructure of the Irish legal system is what must determine our decision and, in some respects, this differs from the legal systems with which the Privy Council was concerned and more particularly from the assumptions which underlie the Common Law itself. I set out hereunder the relevant Articles of the Constitution which are relevant to the issues before the court.

Article 6 of the Constitution provides:

> "1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.
>
> 2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."

Article 34.1 of the Constitution states:-

> "1. Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

Article 38 of the Constitution states:-

> "1. No person shall be tried on any criminal charge save in due course of law.
>
> 2. Minor offences may be tried by courts of summary jurisdiction….
>
> 5. Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.
>
> 6. The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article."

On the independence of the judiciary Article 35.2 states:-

> "2. All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."

Vicarious Liability

Let me first address the argument that the State is liable vicariously for the failure of the trial judge to give the plaintiff a fair trial. Apart from the question whether the plaintiff failed to get a fair trial in this case, something I will revisit later in this judgment, let me examine the concept of vicarious liability as it might apply to the relationship that exists under the Constitution between the State and the judge acting in a judicial capacity.

The traditional formulation of the relationship necessary for the principle of vicarious liability in Tort Law to apply states, that the master is liable for the wrongs committed by the servant during or in the course of his employment. (*Health Board v. BC & the Labour Court* [1994] 5 E.L.R. 27). Originally applicable only to the Master/Servant relationship, subsequent case law has extended the application of the principle to other relationships including the principal and agent and other similar relationships. In extending, however, the ambit of the liability, the case law is firm in holding that such extensions are justifiable only where there is a strong element of control retained by the parties sought to be involved for the wrongs of the subordinate. (*Moynihan v. Moynihan* [1975] I.R. 192). The earlier test used by the courts was to attach liability to the defendant when he was in a position to tell the subordinate not only what to do but how to do it. (*Lynch v. Palgrave Murphy Ltd.*[1964] I.R. 150 as approved in *Cork County Council v. Health and Safety Authority and Anor*. [2008] I.E.H.C. 304). Absent such an element of control the subordinate was not a servant, but an independent contractor, for whose wrongs the employer was not liable normally. (*Ibid)*. There are cases, it is true, where the doctrine had to be flexible to accommodate situations where the subordinates in the economic sense, exercised an independent judgment in discharging their professional duties, for example a surgeon employed by a hospital and where liability was imposed on the grounds that the tortfeasor "was part of the enterprise" and the liability of the employer could be justified on grounds of "enterprise liability". (*Cassidy v. Ministry of Health* [1951] 2 K.B. 343 (CA)). The importance of the principle of vicarious liability, of course, was that once it applied, the employer was strictly liable, without any fault on its part, for the wrongs of the subordinate. Various other tests have been used in recent years to reflect the different economic conditions that prevail nowadays and which emphasise how different and more complex the work environment has become since the doctrine was first described in master/ servant terminology. (See Andrew Grubb - General Editor, Butterworth's Common Law Series, *The Law of Tort*, 2002, p. 67 *et. seq*.) But whichever test one favours, the relationship between the state and the judiciary stubbornly refuses to be comfortably accommodated.

It is difficult to adopt this theory of strict liability to the relationship that exists between the State (as a juristic person) and a judge acting as a member of its judicial arm in a judicial capacity, especially when one considers the relevant constitutional provisions relevant to such consideration, that is the separation of powers and the independence of the judiciary in particular.

From these provisions it is clear that the administration of justice can only be exercised by the judiciary, and its administration is free from any interference by any other person, including the legislature or the executive. It is also clear that this is very different from the duty which a servant (employee) has towards his master (employer) and who must carry out his master's orders at all times. Importantly, under the Constitution, the judge does not receive his power or authority from the State but from the people, is independent in the exercise of his functions and is free from interference from the State, particularly from the other organs of government. The only limit or control on the judge is to be found in the Constitution itself or in the law. For these reasons too, it would be difficult to consider the judge to be part of the State "enterprise", since his only function is to administer justice as mandated by the people.

For the above reasons it is wholly inappropriate to attempt to describe the relationship between the State and a member of the judiciary in the Master/Servant terminology developed for the purposes of imposing vicarious liability for tortious acts or omissions. Accordingly, in my view, the State cannot be vicariously liable for the errors which a judge may commit in the administration of justice. This conclusion holds in respect of errors which may be described as errors within jurisdiction, and of *a fortiori* to errors which are outside the judge's jurisdiction, including those committed, *mala fides*, for which of course, in extreme cases, the judge may lose his personal immunity.

Direct liability of the State for judicial error

Given my decision that the plaintiff cannot sue the State on vicarious liability principles, the question remains whether the

plaintiff can successfully maintain an action for damages directly against the State in circumstances such as we have before the court?

Briefly, the plaintiff's argument is that his right to a fair trial was denied by the trial judge and that such a right is one of the unenumerated rights protected in Article 40.3.1 of the Constitution. This Article provides that:

> "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

Article 38 is also very relevant to this argument advanced by the plaintiff:

> "No person shall be tried on any criminal charge save in due course of law."

The phrase, "in due course of the law" has been held to imply "a great deal more than a simple assertion that trials are to be held in accordance with laws enacted by parliament." According to the learned authors of Kelly, *The Irish Constitution*, (4th Ed., Dublin, 2003):

> "Article 38.1 has been interpreted to embrace a range of both procedural and substantive rights, the content of which has been influenced by common law tradition, the European Convention on Human Rights and the case law of the European Court of Human Right, United States constitutional practice, international agreements, and, not least, the views of the Irish judiciary as to what constitutes minimum standards of procedural and substantive justice in criminal trials."

The importance of the right to a fair trial in our jurisprudence is not in doubt. One judicial quotation is sufficient to illustrate the significance this right has in our criminal justice system. In *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 Denham J. stated at p. 474:

> "The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right.
>
> A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute.
>
> If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused's right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted."

In the present case, the plaintiff states that denial of a fair trial by the trial judge was accepted by the Court of Criminal Appeal and it specifically used language to that effect. Bearing in mind the wording of Article 40.3.1 quoted above, and the independence of the judiciary established in the Constitution, one must pose the question how is it alleged that the State has failed the plaintiff in this case? As expressed in the words of Article 40.3.1, the State's duty to guarantee the plaintiff a right to a fair trial is not an absolute one, but is a guarantee to respect, defend and vindicate the plaintiff's right to a fair trial "as far as practicable". Apart from the constitutional provisions which guarantee the independence of the judiciary, the State has also enacted legislation establishing the Court of Criminal Appeal to which convicted persons may appeal if dissatisfied with the criminal trial. In the present case the plaintiff successfully availed of this opportunity. Moreover, the State has enacted the Criminal Procedure Act 1993, which also enables a trial to be reviewed if new evidence subsequently comes to light. It is my view that the State has acted reasonably to guarantee, respect and defend the plaintiff's right to a fair trial in these circumstances. The truth is that the State cannot "in" or "by its laws" do much more than it has done, because of the constitutional independence guaranteed to the judiciary and because of the theory of separation of powers. The plaintiff has not shown to the court what more the State could lawfully do to secure more fully his right in the circumstances of this case.

In addressing whether the State is directly or primarily liable in such a situation for the "unfair trial" caused by judicial error, to use the plaintiff's words, one must also look more closely at the term "unfair trial". When the Court of Criminal Appeal quashed the order of the trial judge it was passing judgment on the actual trial conducted before the learned trial judge. The Court of Criminal Appeal having considered the learned judge's handling of the trial, made what it considered to be the appropriate corrective orders. In effect it made "fair" that which had been "unfair". When the plaintiff brings the matter before this Court now, in a civil action, in my view he cannot limit the phrase "unfair trial" artificially to the stage of the process heard by the trial judge. As far as this Court is concerned in determining whether there has been an "unfair trial", consideration must be given to the totality of the legal process from start to finish. When one takes this holistic view of the process one has to conclude that even if there was unfairness at the earlier stage it has been corrected and the end result of the process is not now unfair.

The State cannot guarantee that no error will ever occur in the judicial process. The judges it appoints are human and inevitably will make mistakes. In these circumstances, it is incumbent on the State to provide for a corrective mechanism to address these errors. This is the appeal process. In my view, failure by the State to do so would be a breach of its obligations to guarantee "as far as practicable" the citizen's right to a fair trial. But by doing so, the State has fulfilled its obligation under the Constitution.

That the State will not compensate where the error committed by the judge does not amount to a breach of a constitutional right is clear from Lord Diplock's judgment in the majority decision in *Maharaj*. At p. 399 of the judgment, the learned judge says:-

> "In the first place, no human right or fundamental freedom…is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of rights…and no mere irregularity of procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their

> Lordships do not believe that this can be anything but a very rare event."

This is a clear example of a situation where the wrongly convicted person may have no remedy and yet the State, for higher public policy considerations, and perhaps with some reluctance, is content to live with this outcome. The question may be fairly asked, why must the State compensate the injured party when the error relates to a fundamental rule of natural justice? From the convicted man's point of view it is difficult to appreciate the distinction. As Halisham, L.J. in *Maharaj* at pp. 409-410 stated:

> "…as I understand the decision of the majority it is that a distinction must be drawn between a mere judicial error and a deprivation of due process as in the instant appeal, and that the former would not, and the latter would, attract a right of compensation under the present decision, even though in each case the consequences were as grave…. I do not doubt the validity of the distinction viewed as a logical concept, though the line might be sometimes hard to draw. But I doubt whether the distinction, important as it may be intellectually, would be of much comfort to those convicted as a result of judicial error as distinct from deprivation of due process or would be understood as reasonable by many members of the public, when it was discovered that the victim was entitled to no compensation, as distinct from the victim of a contravention of section 1 of the Constitution [of Trinidad and Tobago] who would be fully compensated."

In the present context, I am of the view that the plaintiff's "right to a fair trial" should more properly be referred to as an obligation on the State to provide a *fair legal system* within which the plaintiff's trial can take place. By providing an appeal system, the State has carried out its duty in this respect. As has already been quoted above, Brown, L.J. in *Independent Publishing* held at p.223, paras. 87-89 that the legal system as a whole must be examined before deciding whether someone's right to liberty or to a fair trial has been breached. Furthermore, Brown, L.J. pointed out that, in the context of Trinidad and Tobago, anyone committed to prison for contempt of court where there is an appeal process in place with the possibility to apply for bail in the meantime is essentially in the same position as a convicted person. Consequently, given that convicted persons (even if eventually successful on appeal) cannot apply for constitutional relief in respect of their time in prison, it is unlikely that those sentenced to imprisonment for contempt of court will be granted this right either.

Additionally, Young, J. in *Brown v. Attorney General* (supra) at para.134 asserted that despite the Human Rights Act 1998, there have been no decisions in the United Kingdom awarding compensation for those whose convictions have been set-aside for unfairness at trial. Young, J. also pointed out that he would be sorry to see the courts assert a jurisdiction to award compensation in 'exceptional' or 'egregious' cases involving breach of fair trial rights cases due to the fiscal burden such actions would create on taxpayers.

In my view, therefore, since the right to a fair trial includes an appeal process, the time to assess the fairness of the process, when the appeal is availed of, is after the appeal and not after the trial. If that is the correct time to make the assessment then it must be concluded that the whole process was a fair one in this instance, since the plaintiff's right was vindicated at the end of the day by the appeal court. From this it follows that there has been no breach of the plaintiff's right to a fair trial.

The real problem in the plaintiff's case was that there was an inevitable delay between the original trial and the hearing of the appeal in the Court of Criminal Appeal. Before the corrective mechanism took effect the plaintiff had served his sentence. But by definition the appeal can only come on after the original trial and such a delay cannot be avoided. Even if the appeal had been organised on the day after the trial, the plaintiff's complaint, if his appeal was successful, would in principle be the same, albeit his damages for detention would be for a much shorter period. But there has been no allegation of inordinate delay in the hearing of the appeal by the plaintiff in this case and absent this, the State cannot be faulted on this account.

In my view, the process which the plaintiff has been subjected to was not an unfair one, and the plaintiff's action against the State on that ground must fail.

Apart from that line of reasoning, it is my view that in any event the immunity which the law confers on the judiciary personally in such situations applies also for the benefit of the State when an attempt is made to make it directly liable for the wrong of the judge in such circumstances. I am of the view that many of the reasons which support personal judicial immunity – the promotion of judicial independence, the desirability of finality in litigation, the existence of an appeal and other remedies as well as the public interest – can also support the argument for State immunity in cases such as those before this Court. Indeed it is my view that not to extend the immunity to the State in the present circumstances would represent an indirect and collateral assault on judicial immunity itself.

To make the State liable in such a situation would indirectly inhibit the judge in the exercise of his judicial functions and this, in turn, would undermine his independence as guaranteed by the Constitution. It would introduce an unrelated and collateral consideration into the judge's thinking which could prevent him from determining the issue in a free unfettered manner. It might, for example, encourage the other organs of government to monitor the conduct of the judges in this regard, thereby resulting in "a chilling effect".

The fundamental reason for supporting this conclusion, however, is that when the judge is exercising judicial authority he is acting in an independent manner and not only is he not a servant of the State in these circumstances, he is not even acting on behalf of the State. He is not doing the State's business. He is acting at the behest of the people and his mission is to administer justice. In most cases he is merely exercising his discretion and his actions cannot amount to "torts" at all. For the most part he is immune from civil liability. From this perspective, the State is not directly involved with his activities, does not write his mission and cannot intervene with the judge's exercise of his functions. While in one sense, it may be appropriate to describe the judiciary as an organ of government in the broad constitutional representation of the State, in another sense, when exercising its jurisdiction, the judiciary is truly decoupled from the State. In a sense, there are two principals involved at a constitutional level in the administration of justice, and if the judiciary is immune from suit it seems logical that the State when facilitating the exercise of judicial power through the judiciary should also be entitled to State immunity in that regard.

In a constitutional sense, the State merely provides the scaffolding for judicial activity. The State is no longer involved once the judge begins his work. The State may be liable for failing to erect the appropriate scaffolding, but once this is up, and the judge goes about his business, the only liability that arises is that of the judge. To speak of the State's

liability for judicial acts in that context is somehow to re-introduce in disguise the concept of vicarious liability, something that I have already rejected.

Finally, it is somewhat contradictory, since these proceedings are taken against the State on the basis that the judge is part of the State apparatus, for the plaintiff to suggest that the established immunity which the judge enjoys ought not to benefit the State also in such circumstances. He is arguing that the judge should be identified with the State on the one hand, when liability is considered, and should, on the other hand, be distinguished from the State when immunity is at issue.

The plaintiff's case might be advanced to another stage by arguing that the above line of reasoning, which recognises personal immunity for judges and State immunity for the majority of wrongs committed by judges in the administration of justice, does not apply when the constitutional rights of the individual are at stake. I cannot agree. If one were to accept that line of argument one would have to acknowledge that the immunity given to judges personally would also have to yield in such situations. One would have to accept that compensating the individual for breach of their fundamental rights should trump the personally judicial immunity recognised by the courts here to fore. The plaintiff does not argue this. The judge is not targeted in these proceedings. Nowhere in the authorities opened to the court has that suggestion been made.

Can it be argued that if the State was to have immunity in such a situation this would have been explicitly recognised in the constitution and the absence of such specific immunity in the Constitution would suggest that it does not exist? In support of this argument, the plaintiff might cite the dicta of Walsh J. in *Byrne v. Ireland (Supra*, at 264, quoted above at p. 5 of this judgment). If one was dealing with this argument *de novo* one might be inclined to accept its force, but the fact is that personal judicial immunity is nowhere recognised in the Constitution, and yet its existence has been long established without challenge in many cases in this jurisdiction. It is too late to challenge that now.

In my view, the acceptance of personal immunity for the judiciary must logically extend to the State when sued directly for judicial error even when a fundamental right is asserted. That this immunity is not specially recognised in the Constitution, is no impediment, since the State immunity in these circumstances is a corollary of the personal immunity conferred on the judges and the State immunity can be inferred from the personal immunity long since recognised by our courts, though not explicitly acknowledged in the Constitution.

For the above reasons I reject the plaintiffs claim.