FLAC Annual Dave Ellis Memorial Lecture

The Pillar Room, The Rotunda Maternity Hospital, Parnell Square, Dublin 1

01 December 2011

Making access to justice a reality?

Good evening, Ladies and Gentlemen. I am deeply honoured to be invited here today to deliver the Annual Dave Ellis Memorial Lecture. For those of you who, like me did not know Dave Ellis, he was one of the great community activists who devoted his life to justice, working with community groups in many areas, particularly in Coolock Community Law Centre, now Northside CLC, where he worked for 20 years on matters as diverse as welfare rights, legal aid, legal education, especially for those involved in the not for profit sector, and legal entitlements generally. Dave was one of those great souls whose dedication to justice for ordinary people was the reason for his being and the focus of his life. It is an honour to be asked to speak to you here tonight.

My own upbringing, which was shattered by the early death of my father leaving eight children of whom I was the oldest at the age of 13, alerted me very much to the extent to which people may have rights but have no means to access them, little knowledge of them and even no language with which to articulate them. Thus these questions of justice and access to rights have always exercised me. I am under no illusion about the limitations of any civil process. As a young law student I became increasingly aware of the dichotomy between the mechanisms for the application of the law and the assertion of the rights of the individual. I learned that not all rights are justiciable – I.e capable of forming the basis of a claim or a complaint before a court. In jurisprudence in third year it was articulated

even more clearly in the context of the argument of a case before one of the great justices of the U.S. Supreme Court, Oliver Wendell Holmes Jr, by a young lawyer who kept asserting his client's desire for justice. The Judge responded tartly" This is a court of law, young man, not a court of justice." A sobering reflection for any of us who seek to practice law.

But there are arguments in relation to access to justice which can be made in the context of those rights which are justiciable, and which need to be asserted in the courts, and of the alternatives to courts, and also about the ways in which disputes and legal problems can be avoided.

The cost of justice

There are in every jurisdiction interminable issues of cost, or what Lord Mc Nally in a recent debate in the House of Lords called "un-ignorable problems of affordability" There are options for alternative mechanisms to resolve disputes and there are opportunities for creating structures, for example, in the welfare system which do not result in the level of appeals which currently exists as demonstrated by a question asked in the Dail [1] this year which showed that at October 2011 there were extant some 3238 appeals in respect of disability allowance, some 1571 appeals in respect of invalidity pension and some 1,402 appeals in respect of carers' allowances. We have been debating such issues in the House of Lords as we struggle with our Coalition Government's Welfare Reform Bill. One of the things which has emerged very clearly are the current defects in the assessment systems. So I think that one of the crucial factors in enabling access to justice is creating systems which will be robust, fair and inclusive and which will not lead to endless Tribunal appeals and court actions. We need to think creatively about how this can be done, and you who are gathered here tonight have a variety of expertises which would facilitate such

1 36657/11

creativity.

Cost was presumably not in the contemplation of the drafters of the 1937 Constitution Bunreacht na hEirann which contains a statement of basic legal principles including the right of access and the right of due process to litigants. Prior to 1937 very few people in Ireland had any real access to the law. It was thus in many other European states, including the United Kingdom. There are problems in all states still in relation to how the costs of providing access to justice can be managed. The total cost of the Saville Report into Bloody Sunday, for example, was £195m and it lasted 434 days over 12 years. It was money well spent ~~-~~ but could have been done at much less cost

However, legal costs in Ireland are very high now. The Third Interim Report on the Procurement of Legal Services by Public Bodies by the Oireachtas Public Accounts Committee, for example, reported in Jan last that public bodies alone spend "*anything up to E500m a year.*" There is a lack of clarity indicated throughout the Report on the actual public sector legal costs across Ireland. We do know that the likely cost to the State of the Moriarty, Morris and Mahon tribunals is anticipated to be in the region of E336m to E366m, a figure which could increase as a consequence of third party costs by a further E68m.

In the case of the Laffoy/Ryan Tribunal the cost, initially estimated at E2m to E2.5m, turned out to be E130m. The PACommittee had heard evidence to suggest that the cost of legal services in Ireland is amongst the highest in the world, and it has been suggested that the State itself is one of the drivers. The Committee referred to "*three senior Counsel at the Moriarty tribunal being paid E2,500 a day for an extraordinary 304 days in 2008. The Moriarty Tribunal sat in public session for an average of 20 days in each of the past three years.... There were no specific attendance records for the legal teams maintained at the Morris and Moahon Tribunals. The Moriarty Tribunal records attendance of Tribunal*

legal team members but does not take account of arrival and departure times." At the Moriarty Tribunal two Senior Counsel earned almost E10m and one earned E6.7m. At the Mahon Tribunal three Senior Counsel earned in the region of E5m each.
Evidence was given that the largest brief fee for Senior Counsel engaged by the DPP for a murder case was E8,600 with a subsequent per diem rate of E1,800 as opposed to Tribunal brief fees of E30,000 and a per diem rate of E2,250.

Ireland might ask whether she can afford to pay those costs, particularly the tribunal costs, and government is now trying to limit its exposure to further tribunal costs. There will always be exceptional circumstances in which public faith in the rule of law will necessitate a public tribunal. The question must be how does Ireland finance Tribunals and other exceptional matters, whilst providing a reasonable and proportionate means of access to justice for the many people are having to wait to get legal aid and advice across the whole country?

Making changes

The Public Accounts Committee has made many findings and recommendations for change to the problems affecting access to justice which it identified, including the introduction of compulsory competitive tendering for the procurement of all solicitors' and barristers' services with a value of over E5,000 by the State . I have long experience of the benefits of competitive tendering, not least that, having quantified the nature and cost of legal services to be provided there is an accounting imperative to be aware of the cost of seeking advice and to be sure that it is only sought when it is necessary. The PAC also recommends that "*restrictive customs and practices in the two legal professions which lead to higher legal fees should be challenged and removed and should not be tolerated any longer by the State"*

One can query what has happened to the legal profession in Ireland. I know that there are many hard working, ethical solicitors and barristers providing a professional service in Ireland. And yet the PAC has stated that "*The Committee has concluded that legal practitioners seem to be regarded as comprising a very privileged group. It seems to members of the Committee that the normal rules of accountability do not apply to the profession.*" This is a savage judgement. And I know that there are many lawyers struggling to make a living, many young barristers who do not get paid for years one way or another, many young trainees and solicitors living on salaries which are just not adequate. I know that many of them do pro bono work. I know that many of those who have recently qualified are unemployed. I know that there is a genuine wish to provide an effective and comprehensive legal service.

Given the level of legal expertise, the state of the administration and the level of under deployment of legal capacity I have to ask you Is there is scope for improvement in the provision of legal services here? Can you make it better? Better for you and better for the people with whom you deal?

The current problem

In Ireland access to justice is vitally important for business, as well as for individuals. We know that legal costs in Ireland for commercial litigation are very high. It has been established that the average cost of a E200,000 dispute was E53,000 compared with E25,000 in the rest of Europe. The average case takes 515 days to resolve. That is too long. There is a maxim of law that justice delayed is justice denied. The situation is not better in the UK, but it is till too long and too expensive. A recent report indicated that by 2010 average claimant costs represented 142% of the sum received by injured victims.[2] It may be a case of apples and pears but there are clearly problems in all jurisdictions in this

2 Reforming Civil Litigation Funding and Costs in England and Wales 2011

context.

Six years ago in O'Donoghue v The Legal Aid Board & Ors, the Court stated, inter alia, that a reasonable waiting period during which a person should have been able to consult a solicitor fell within 2-4 months. After that judgement the Legal Aid Board took steps to ensure that a new commitment to a maximum waiting time of 4 months was met. The Private Practitioners Scheme was introduced, and waiting times across the country did reduce.

Demand for legal aid has increased though, as you will know. The stark economic situation has resulted in unprecedented levels of loss of employment and an overall reduction in income. The consequence of this in terms of people trying to get legal aid and advice from the Law Centres has been dramatic. Although there are areas in which the situation has improved, I have seen figures which indicate that in October 2010 in Tipperary 95 people were waiting 5 months. In October 2011 the number of people waiting has risen to 205 and they are waiting up to 11 months. The situation is similar in Clondalkin where 79 people were waiting 4 months in October 2010 and by October 2011 229 people were waiting up to 9 months. This is just a cameo of the situation which prevails.

Most people will go through their lives at a distance from the legal system. They will not feel any need to engage in a dispute or to seek redress in a court or tribunal. However each year thousands of people will be forced, through circumstances, to contemplate legal action. Those who have disposable incomes and capital above the current limits of E18,000 of disposable income or disposable capital in excess of £320,000 will have no access to legal aid, and will have to fund any proceedings themselves. This will always be a daunting prospect even for those with assets. For those with assets below the disposable income thresholds of E18,000 and the capital threshold legal aid will be

available but at very limited rates. It is only those with a disposable income of less than E18,000 who are entitled to Legal Aid. The consequence of this is that there is a huge middle band of people for whom access to justice is rarely possible, and there is a further band for whom there is legal aid but only when they reach the top of the queue, and when the case satisfies the merits test. With limitation periods applicable to many if not all applications to the court there is an imperative on the individual in such circumstances to find a way to access the system in time for the lodging of any papers.

Let us think for a moment of the reality for a parent who has given birth to a child who has suffered significant injuries as a consequence of medical negligence, of the family of a person catastrophically injured in an accident consequential upon negligence and suffering permanent disability. Such people face an almost insuperable problem. They must come to terms with the consequences of the alleged negligence in terms of a baby's ability to function, of an adult's need to adjust to a new world. They must enter a world which they may hitherto not have known of clinical process and in some cases almost constant emergency situations. As carers they must learn to do that which nurses and doctors do, to preserve what life and function those for whom they care have. They will often be constantly exhausted and frightened. They may have other responsibilities: families to care for, jobs etc. whilst coming to term over the years with the consequences of medical and other negligence. And in the midst of all this, with the consequential visits to doctors and occupational therapists and physiotherapists, to those who provide wheelchairs and other aids and adaptations for those with disability, they must contemplate the need to commence legal proceedings to seek compensation which will enable them to deal with the future.

They will need to know how long they have got to initiate legal proceedings. They will need to know how to do so. They will have to contemplate funding the costs of expert medical

and other technical evidence to support and even to explain their situation to them, They will have to have the capacity to keep their claims going through years of litigation. Where the defendant is the state in one manifestation or another it will be funded as necessary, but the claimant may have no equal right to funding to enable the necessary legal challenges.

And what of the other challenges to getting access to justice, some of them way outside matters relating to courts and tribunals? What of the lot of the most vulnerable and marginalised members of our society in those circumstances in which they find themselves facing homelessness through eviction, dealing with the consequences of loss of a job, of the pressures attendant upon increasing age, and the need to negotiate the jungle of welfare and benefits law? I think of all those who are very poor, who have to cope with disability in all its forms, with physical and mental illness, of the 20% or so of our population who cannot read and/or write (and prisoners are disproportionately represented amongst those with mental health and literacy)? What of those facing immigration problems? Very often they come from places where access to justice was completely unknown and where there was a very real fear of a corrupt and abusive police force. They may come to this country believing that they will be able to stay. Ireland provides E8m for legal support for asylum seekers, but only 2% of applications succeed. Is there a problem in the way in which services and processes are structured which could be addressed to facilitate earlier resolution of these issues?

If we start from the premise that access to justice is not necessarily about access to courts what are the alternatives and how do we develop them?

FLAC have published in their most recent FLAC News details on the issues which dominate the agenda for their clients now. Not surprisingly FLAC have seen a huge rise in

the incidence of employment queries compared with last year – some 30% extra. 15% of all queries related to employment, some 980 cases. Of those 27% related to contract terms, 21% to redundancy, 8% to discrimination, 8% to payment of wages , 7% to bullying. Such cases often give rise to corresponding problems for the employer. They too will need legal advice.

There has also been a 66% rise in the number of queries in relation to social welfare on the FLAC telephone line. This clearly reflects the current situation. Data collected from 59 centres this year shows that the current three principal issues bringing people into legal information centres are family law which accounts for roughly one third of visits, some 2046 visits, of which 47% related to divorce/separation, 32% to custody maintenance/ guardianship, 15% to the family home and 8% to domestic violence, Debt related queries rose by 44% . There were 520 such queries, 41% related to mortgage arrears, 30% to debt collection procedures, 24% to personal loans, 4% to HP and 3% to utility bills.

The human face of these statistics is known to you all. Those of you who meet these people day by day, know the cost to them in terms of fear, distress and pain as they attempt to resolve problems which lie at the very heart of their capacity to function as people and as families. It is not fanciful to say that such problems as these contribute to the increasing level of deaths by suicide. Many of you are faced with the problem of inadequate resources, growing demand and an incapacity to meet that demand as quickly as you would wish, and as the courts have said you should be able to meet them: in a timely and appropriate manner.

In the House of Lords we are currently addressing these issues as the Legal Aid, Sentencing and Punishment of Offenders Bill goes through Westminster. The government has stated that their proposals seek to focus legal aid on circumstances where a person's

life or liberty is at stake, where they are at risk of serious physical harm or where they face immediate loss of their home. If the Bill succeeds there will be no government funding for legal representation in private family law cases. Instead the money will be spent on mediation. In the UK the average length of divorce hearings where the plaintiff is unrepresented is 34.1 weeks, where the plaintiff is represented cases average 55.7 weeks. Such lengthy litigation rarely satisfies either of the parties, involves huge legal costs, and often serves to further disrupt relationships within the fractured family.

Welfare benefits, education, advice and representation apart from Special Educational Needs and discrimination will be removed from legal aid, debt advice will also be removed, as will employment advice and representation, except discrimination issues, and housing advice except where the client's home is at risk. Routine immigration issues are removed. Some domestic violence cases will be excluded. Speaking of these matters Baroness Patricia Scotland, former Attorney General for England and Wales and Attorney General for Northern Ireland, said that "*when hard choices have to be made they must be the right choices – made with proper understanding of what is fair and proper*". She quoted Lord Bingham who stated "*one of the ingredients of the Rule of Law itself was that means must be provided for resolving without prohibitive costs or inordinate delay bona fide disputes which the parties themselves are unable to resolve... Denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law.*"

Recognising that the removal of so many areas of activity has the capacity to cause real failures in terms of the right of access to justice in exceptional cases, the British Coalition Government propose that there will be an exceptional funding scheme to provide for excluded cases where failure to do so would amount to a breach of a person's right to legal aid under the Human Right Act or EU Law. There is a distinct lack of clarity about how this would work.

Conditional fee arrangements

Lord Woolf, former Lord Chief Justice described the disadvantages of the current English arrangements for recovery of damages where legal aid is not available, through what were initially conditional fee agreements, introduced by Lord McKay, *"which initially helped to obtain access to justice for those who were not able to use the court because they were neither poor enough to qualify for legal aid, nor wealthy enough to dine at the Ritz."* They worked well initially but there were concerns that they gave lawyers enough assistance to take on the really difficult cases because of the need for payment of an uplift fee to get the case going. The solution to this was the introduction of after-the event- insurance. After a case the uplift fee had to be paid by an unsuccessful defendant, s did the ATE fee in addition to the other damages and costs. As Lord Woolf put it " *A defendant who was unsuccessful could end up paying four sets of of costs – first the costs he incurred himself, secondly the costs of the claimant who won, thirdly the uplift which could be up to 100% and fourthly the insurance premium ...there were defendants who regarded the total burden as wholly inappropriate, to the extent that they had no option other than not to contest the cases that they otherwise would*" The new Bill will end the recoverability from losing parties for success fees and ATE premiums but will be balanced by a 10% increase in general damages for the defendant. It will give effect to the findings of the 2010 Jackson Report on Civil Litigation costs. Michael Todd QC, Chairman of the Chancery Bar Association has said that,

"*Lord Justice Jackson's report is a landmark document, and should be accorded the status of Lord Woolf's report of the mid-1990s. The Woolf reforms did not achieve everything that was hoped for them. Costs in civil cases have risen inexorably, and disproportionately, over the past 15 years and therefore need to be contained.* ***An accessible civil justice system is essential to underpin economic activity, and to promote social justice and equity.*** *Lord Justice Jackson's proposals will help in securing those goals. Concerns have*

been expressed about CFAs but we must not throw the baby out with the bathwater. CFAs can promote, and in the past, in the absence of viable alternatives, have promoted, access to justice, but they must not be allowed to bring the system into disrepute." Whether this will actually improve the situation remains to be seen.

Ireland may wish to consider the strengths and weaknesses of these initiatives in contemplating how to deal with the rising costs challenge of litigation. There must be questions too about prioritisation and management of funding in a country which spends so much on tribunals, whilst payments to solicitors and barristers for criminal legal aid amounted to E54.2m during 2010, some 10% of the current national estimated spend.

However, whilst there are circumstances in which there will be a public interest need for tribunals which will be costly but need never be as expensive as they have been to date, and whilst there will inevitably be highly complex, legally challenging commercial litigation , and individual cases necessitating litigation, and those must be provided for, there is increasing recognition in these islands and in North America that other ways of preventing and resolving disputes must be found to minimise the necessity for litigation.

So many of the issues which people belong to organisations like Legal Advice Centres are, as FLAC has shown, welfare, employment and matrimonial disputes. The current tribunal systems no longer provide the access to justice which was envisaged when they were created. Employment tribunals currently have waiting times of up to a year There are also complex problems for small businesses struggling to comply with the demands of the Tax and regulatory authorities. Obligations are not necessarily immediately clear. People can get into difficulties, not through negligence or malice but simply because the technical challenges in terms of compliance are confusing. Fines for non-compliance may be very high and may come as the last straw to a business struggling for survival in a harsh

economic climate. So what can be done?

In the first instance the question might be asked would better information about legal and welfare rights and obligations etc. reduce problems and disputes? Has enough been done to try and ensure that the complex communication needs of some welfare recipients are met? Can people talk to civil servants responsible for their cases? Are there policies that you can only communicate through written correspondence? Are there help lines which actually work? Are the forms decipherable, comprehensible? Is there additional material which would assist? Can government be persuaded to provide enhanced funding to facilitate preventative work?

When disputes do occur could more money be put into mediation systems. Obviously the word "mediation" has many meanings to different people. Different forms of mediation, some more formal such as mediative processes for commercial disputes, some less formal may help. The evidence from the Irish mediators is that on average resolving a E200,000 dispute costs E7,000 as opposed to E53,000 in the courts. One British MEP[3] indicates similar costs in the UK, with such a dispute lasting 333 days, costing E51,000 in the courts, and taking some 87 days and costing E9,000. Legal issues will still have to be tackled in the course of mediation, and such work will demand more of lawyers in some ways but mediation can provide a better result on many occasions, with success rates of up to 70%

In terms of crime too there are different ways of dealing with low level problems which may prevent both recidivism and convictions. I heard evidence at a Select Committee yesterday of how a police force in England is in some ways turning back the clock and returning a measure of discretion to police officers using restorative justice processes

3 Arlene McCarthy MEP 03.10.11

rather than cautions, prosecutions and convictions to deal with young people, thus avoiding criminalising them and causing consequential problems, keeping them out of custody. These can be win win solutions, reducing pressure on the custodial estate, and also reducing rates of re-offending.

Right across the justice system in virtually every country in the world, there are problems of access and cost. What has happened in the past is no longer sustainable. There are alternative ways of dealing with disputes. They will require changes to traditional working practices, but this would make the response to the citizen faced with a dispute more accessible, and ultimately would undoubtedly have the effect of making mechanisms for enabling justice both more effective and more efficient. Ireland spends some E500m each year on legal costs and services. The challenge must be to take that sum and to spend it in a more cost effective way so as to make justice more accessible to more people.

Baroness Nuala O'Loan DBE