News Letter

THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA

2021 VOLUME II

A strong sense of public trust, precaution & inter-generational equity with a proper judicial temperament will always provide a meaningful justice system even we face Multifaceted Catastrophe.

JUDICIAL SERVICE ASSOCIATION EXPRESSES HEARTIEST CONGRATULATIONS TO...

Hon. Justice L.T.B.Dehideniya

For His Lordship's appointment as
a member of the Judicial Service Commission.

****

Hon. Justice Arjuna Obeyesekere

For His Lordship's appointment as
a Judge of the Supreme Court

****

Hon. Justice K. Priyantha Fernando

For His Lordship's appointment as
the President of the Court of Appeal.

****

Hon. Justice B. Sashi Mahendran

For His Lordship's appointment as
a Judge of the Court of Appeal.

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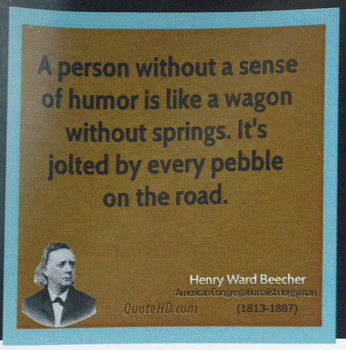
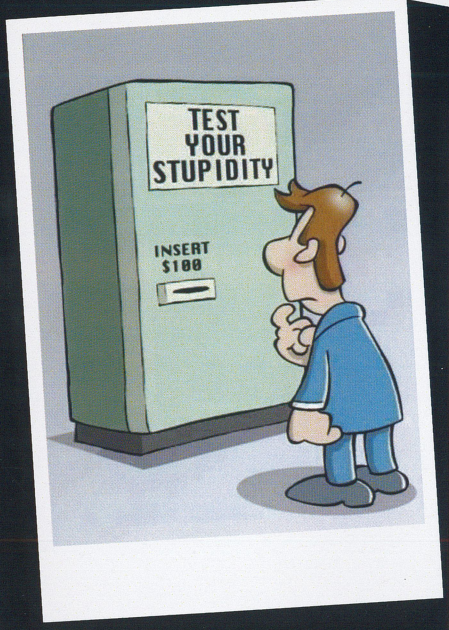
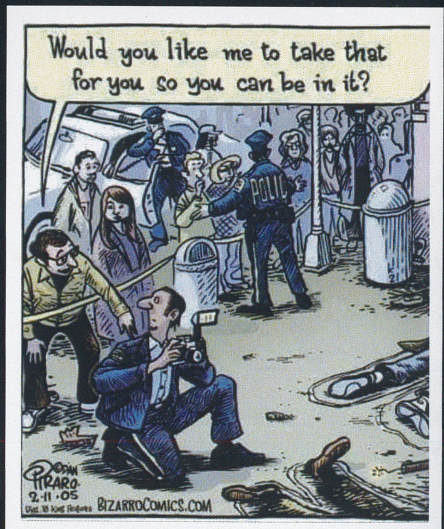
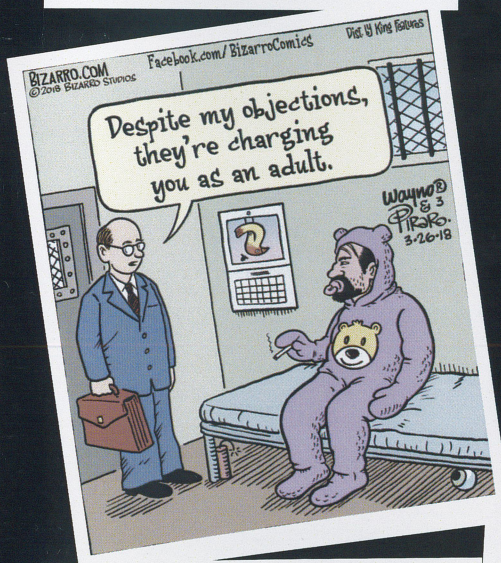
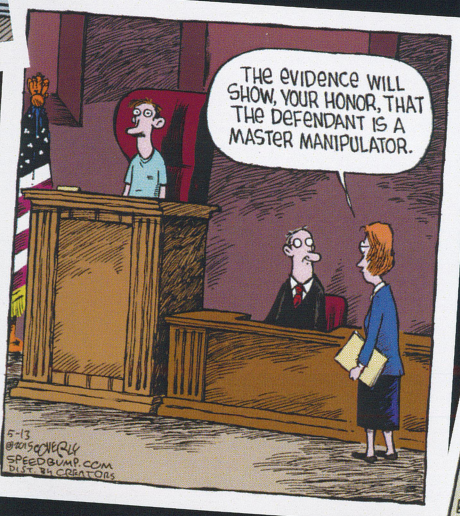


"Get up, you idiot. When I say, 'How do you plead?' I wanna know if you're 'guilty' or 'not guilty.'"

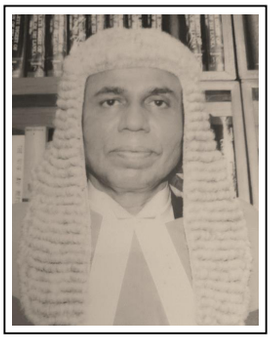








A Farewell to a Strong Pillar in the Judicial Sphere



Judicial Service Association takes this opportunity to express warm wishes and heartfelt gratitude to Hon. Justice Sisira de Abrew for an invaluable twenty-three years of continuous service to the Sri Lankan Judiciary. Justice de Abrew started his Judicial Service as a High Court Judge in 1998, after serving in the Attorney General's Department since 1982. His Lordship was later elevated as a Judge of the Court of Appeal in 2005 and was appointed as a Supreme Court judge in 2014, after serving as the President of the Court of Appeal. In May 2016, Justice de Abrew was appointed as a member of the Judicial Service Commission.

Judicial Service Association is pleased to mention His lordship's honourable dynamic role in the judiciary, especially in maintaining the independence of the judiciary, high standard of judicial conduct and undertaking the arduous task of developing the legal norms during his career.

We wish Justice de Abrew good health and joyous days in retirement.

Judicial Service Association.

Inside this News Letter

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Editorial

Quarantine, social distancing, and lockdown are a few additions to our vocabulary. Sanitisers, face masks, and hand-wash are new additions to our shopping list. PCR, rapid antigen, Sinopharm, AstraZeneca and Pfizer are often pronounced in the media. Covid-19 still controls us, and now it decides how we have to live. Our lifestyle and life pattern have changed to respond to the threat of the Coronavirus. People are worried about their lives and prepared to do whatever possible to protect them, even though the protective mechanisms and the health guidelines are not consistent and change according to the new findings. Have these changes made us happy? No one is bothered about it because we are not prepared to risk our lives. We accept these changes not because we like them but for our survival. Survival is not a new term to humankind; it is the fundamental theory of evolution. Therefore, the fittest will survive.

The judicial function is not an exception to the Covid-19 regime. Indiscriminate Covid-19 spread made the legislature thinking of an alternative mechanism for undisturbed court sittings. Immediate implementation of 'Remote Communication Technology' is contentious, but the idea of thinking of an alternative model is a noteworthy initiative. It should not be limited to virtual hearings or only finding alternatives to respond to the Covid pandemic. It is time to think about the other mode of alternative dispute resolution practices; for quick and qualitative disposal of disputes, the world actively engages in the recent past-for example, Judicial Mediation for civil and commercial litigations.

'Progress is impossible without change, and those who cannot change their minds cannot change anything' (George Bernard Shaw). Change does not mean conversion, but it is transformation. Imparting knowledge through education can provide wisdom to accelerate the sense of transformation. All notable inventions and celebrated ideologies, including democracy, were born during the dark ages. Therefore, we will treat these pandemic restrictions as an hour of a renaissance for imparting knowledge. The wisdom we achieve through knowledge will make us, the judicial officers, ready to face future societal challenges, as we all know and believe that the last resort of public trust, in the institutionalised constitutional democracy, is in the hands of the Judiciary.

This newsletter carries articles to help the members of the Judicial Service Association to enhance their legal knowledge to battle future societal challenges. I am grateful to the members who spent their valuable time writing articles despite heavy workload. Special thanks go to Dr. Nishara Mendis and Chandaka Jayasundara, PC, for their timely support in sharing knowledge in Laws relating to the Marine Environment.

Last but not least, I am thankful to Assistant Editor Mr. Harshana de Alwis for his invaluable support to make this News Letter successful.

A. A. Anandarajah.
Editor

International Governing Domains on the Law of the Sea; States' Obligations and the Rights on Marine Environment.

An interview with Dr. Nishara Mendis

Dr. Nishara Mendis is a Senior Lecturer at the Department of Public and International Law, Faculty of Law, University of Colombo and an Attorney-at-Law. She has an LLB (Hons) from the University of Colombo, Sri Lanka, an LLM from Yale Law School, United States and PhD from Maastricht University, The Netherlands. Dr. Mendis currently teaches the subjects of public international law, international humanitarian law and law of the sea for the LLB undergraduate programmeof the Faculty of Law, University of Colombo and is the Academic Co-Ordinator of the E-Diploma in Human rights for the Center for the Study of Human Rights. She has also taught human rights, international criminal law, international environmental law, globalization and democratization topics and research methodology for postgraduate programmes.

1) Marine pollution or the environmental degradation of the oceans is now considered a global problem. Can you please briefly explain to us in simple terms what is marine pollution?

The simplest definition would be a harmful change to the natural marine environment caused by human beings. This may be caused by the introduction of harm-causing substances into the marine environment or any other human-made changes such as sound pollution, changes in ocean temperature or effects of radiation.

There are several definitions of *marine pollution* which are useful to consider

1. The current definition used in the context of the United Nations (UN), and general international law, which is from the UN Glossary of Environment Statistics:

   "…direct or indirect introduction by humans of substances or energy into the marine environment (including estuaries), resulting in harm to living resources, hazards to human health, hindrances to marine activities including fishing, impairment of the quality of sea water and reduction of amenities".

2. The Marine Pollution Prevention Act No 35 of 2008 has the following definition which includes the above UN definition and adds to it further, in its interpretation section (Section 62).

   "pollution means, any direct or indirect alteration of the physical, thermal, chemical, biological or radioactive properties of any part of the marine environment by the discharge, emission or the deposit of wastes including the introduction by man, directly or indirectly of any substance or energy into marine life so as to effect any beneficial use adversely or to cause a condition which is hazardous or potentially hazardous to public health , safety or welfare of the animals, birds, wild life aquatic life or to plants of every description and hindrance to marine activity including fishing and other legitimate uses of the sea and impairment of quality of uses of sea water"

The following interpretations given by the act are also relevant:

> *"pollutant* means, any substance or any substance that is part of a class of substances, prescribed by the Minister to be a pollutant for the purpose of this Act, and includes nuclear waste and any waste contaminated by such substance whether in liquid solid or gaseous form which alters the quality of any segment or element of the receiving environment so as to effect any beneficial use adversely or is hazardous or potentially hazardous to health"
>
> *"harmful substance* means, any substance, which if introduced into sea, is liable to create hazards to human health, to harm living resource and marine life, to damage amenities or to interfere with other legitimate uses of the sea and includes any substance subject to control by this Act."

According to the following provisions United Nations Conference on the Law of the Sea (UNCLOS 1982), marine pollution can be from different sources.

- 207 – Land Based sources
- 208-9 - Sea bed activities (Continental Shelf and Area) including installations
- 210 – Dumping (directly dumping into the sea)
- 211 – Vessel source pollution
- 212 - Atmospheric pollution effecting the marine environment

2) What are the international governing domains concerning the Marine Environment before the 1958 United Nations Conference on the Law of the Sea? What are the conventional sources applicable for international marine environmental protection?

As for the 1st question: From 1911 onwards there were a number of multilateral treaties on hunting of seals, fishing of salmon and halibut and whaling, In 1926 the first draft convention to tackle pollution from ships discussed in Washington. In 1954 the International Convention for the Prevention of Pollution of the Sea by Oil was created and it has been amended later in 1962 and 1969.

As for the second question – all existing conventions which have not been replaced, mentioned above, plus the UNCLOS 1982 and other related international and regional conventions will be applicable. Note that thee first UNCLOS of 1958 is replaced by the 1982 UNCLOS.

3) How was the international crisis related to the marine environment delt before 1972?

Between 1958 and 1972, due to several significant oil spill disasters, particularly the Torrey Canyon incident of 1967, there were new multilateral treaties on this issue:

- 1969 International Convention on Civil Liability for Oil Pollution Damage - amended 1992 Connected with above are the International "Fund Conventions" of 1971 - replaced by 1992 "Fund Convention" and Protocol
- 1969 Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties – amended 1973, 1991 and 1996 to add other substances

The focus before 1972 was in limited areas only - on oil pollution and relating to particular species (see above). The 1960's and 70's saw an emerging international environmental movement and a key feature of the developments at the time was that States moved from ad hoc treaties to more holistic approach towards the global environment protection. The Stockholm Conference on the Human Environment 1972 and the establishment of the UNEP were key events.

Post 1972, the momentum for creating international environmental protection treaties increases, including for marine environmental protection and there were a number of new conventions in the following years:

- 1972 London Convention – Convention on the Prevention of Marine Pollution By Dumping of Wastes and other Matter – 1996 Protocol
- 1973 International Convention for the Prevention of pollution By Ships
- 1974 SOLAS Convention (Safety of life at sea) – standards for ships
- 1973/1978 MARPOL – International Convention for the Prevention of Pollution from Shipping
- 1990 International Convention on Oil Pollution Preparedness Response and Co-operation (OPRC)
- The Basel Convention with the Ban Amendment (1989) (1995) The London Convention Protocol (1996) – Ocean Dumping
- The Rotterdam Convention – hazardous chemical trade
- Stockholm Convention on Persistent Organic Pollutants, 2001- ("POPs Convention)

4) What are the significant achievements of the 1972 Stockholm Conference on the Human Environment? Please explain the shortcomings of the conference as well.

1972 *Stockholm Conference on the Human Environment* laid the foundation for global multilateral cooperation on environmental issues (including preparation of new conventions and action plans), the wider acceptance of the concept of sustainable development and the establishment of the UN Environment Programme (UNEP).

The conference had an important outcome document known as the Stockholm Declaration. Many of the Principles of the Stockholm Declaration have since crystallized into customary international law, and the wording has been used in numerous later treaties and cited by judges in international and domestic courts (including by the superior courts of Sri Lanka). Note that the Stockholm principles were also the basis of the Rio Declaration of 1992, which clarified and expanded some of the concepts further.

The Stockholm Conference was groundbreaking and visionary for its time, but there could be critiques made today of some of the anthropocentric (human-centered) views of the environment at the time, which were also raised then but today have become more evolved to include an ecosystems approaches and place humans within the environment, and as part of nature, rather than primarily as masters or exploiters of its recources.

5) 1982 United Nations Convention on the Law of the Sea (UNCLOS) is sometimes referred to as a "constitution of the oceans". Please tell us how UNCLOS helps for the Protection and Preservation of the Marine Environment?

The substantive provisions of UNCLOS 1982 is accepted as reflecting generally applicable principles of customary international law relating to the law of the sea. Part XII of the Convention is on Protection and preservation of the Marine Environment, Articles 192-237. The main areas covered include marine pollution, hazardous waste and protection of marine life. Note that according to Article 192, there is an overarching obligation of States: "States have the obligation to protect and preserve the marine environment". Furthermore, there is also UNCLOS Article 194 on Measures to prevent, reduce and control pollution of the marine environment. There are also provisions on the obligation to take individual and joint measures – best practical means and harmonized policies, to take all necessary measures not to cause cross-border pollution, to minimize sources of pollution – toxic, harmful or noxious (persistent) substances and pollution from vessels or installations and take steps for the protection of rare or fragile ecosystems and habitat of endangered species.

Article 237 is titled "consistency among international conventions for marine environmental protection" and clarifies the relationship between Part XII of UNCLOS and other international law relating to the marine environment as follows:

1. This part of UNCLOS is "without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention".
2. Such other obligations "should be carried out in a manner consistent with the general principles and objectives of this Convention".

6) What are the rights of coastal states and maritime states in Territorial Sea, Exclusive Economic Zone (EEZ) and High Sea?

This question has a long and complex answer which covers practically the entire study area of a Law of the Sea course. There are many different rights and obligations of coastal and other States in these 3 zones, as well as the other maritime zones of the contiguous zone, the continental shelf and deep sea bed. The short answer is that a coastal State has more rights (sovereignty) within the territorial sea and less rights and jurisdiction (sovereign rights over resources and related issues) comparatively in some of the other areas such as EEZ, Continental shelf) and only certain enforcement jurisdiction in limited subject matter in a Contiguous Zone. The High Seas is an area beyond national jurisdiction but there can be multilateral obligations and the freedoms common to all States.

7) What are the state obligations for the conservation of the ocean? Furthermore, how far a state is allowed to exploit resources for its economic growth?

State obligations for the conservation of the oceans can be found in a web of interconnecting principles and international treaty obligations. The regimes for the conservation of the oceans include

- International Environmental Law – principles, treaties and other documents
- International Law of the Sea - UNCLOS 1982 and other treaties
- Domestic environmental law and law relating to the marine environment

UNCLOS 1982 has a general obligation for conservation as in the 4th recital of its preamble as follows:

> *Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment…*

And the following provisions particularly deal with conservation of living resources:

- Article 61 and 62 Conservation and utilization of the living resources (in the EEZ)
- Article 116. Right to fish on the high seas
- Article 117. Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas
- Article 118. Cooperation of States in the conservation and management of living resources
- Article 119. Conservation of the living resources of the high seas
- Article 65 and 120. Marine mammals

As to the question, "how far a state is allowed to exploit resources for its economic growth"- this is a delicate balance that we generally refer to by the environmental law and governance term "sustainable development". It is generally understood that a State should exploit its resources within certain limits. The most widely accepted definition of sustainable development is as follows:

> "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs"
>
> *(Brundtland Commission Report – "Our Common Future", Report of the World Commission on Environment and Development, 1987)*

Articles 61 and 119 of UNCLOS refer to the 'maximum sustainable yield' concept for fisheries which means that a State has to conserve resources through "measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors".

8) What is the role of the International Maritime Organization (IMO) in preventing marine pollution? How far is it successful?

Although the IMO's original mandate was defined as 'maritime safety', a significant proportion of international marine pollution prevention laws, regulations, guidelines and frameworks have been introduced by and under the IMO (21 out of the 51 instruments for the regulation of international shipping that the IMO has adopted are directly environment-related).

The IMO introduced many measures to prevent and control pollution caused by ships and to deal with the pollution effects of maritime accidents. They are generally considered to be successful in reducing and mitigating ship source pollution. Key convention adopted by the IMO are the 1954 International Convention for the prevention of pollution of the sea by oil (OILPOL Convention) and the International Convention for

the Prevention of Pollution from Ships (1973, amended by Protocols of 1978 and 1997) known generally as the MARPOL. The MARPOL Convention addresses pollution from ships by oil, noxious liquid substances carried in bulk; harmful substances carried by sea in packaged form; sewage, garbage; and the prevention of air pollution from ships.

Other IMO treaties address the following issues: anti-fouling systems used on ships, the transfer of alien species by ships' ballast water, standards for port reception facilities and pollution preparedness and response and the environmentally sound recycling of ships. Since the IMO regulations cover almost all of the worlds merchant shipping, and the rate of accidents and pollution is far less than it would be without this international regulation, it can be said to be playing an important and successful role.

9) If ship source pollution occurs in various maritime zones, what are the remedies available for a coastal state under UNCLOS and the Customary International Law?

Clarification: UNCLOS and Customary International Law have rules and principles relevant to the topic of ship-based pollution, but they do not directly provide for *remedies.*

UNCLOS has a framework for inter-State dispute settlement (disputes between two or more States) – simply put, that States should resolve their disputes peacefully through resort to the Intentional Court of Justice, the International Tribunal for the Law of the Sea or Arbitration. In terms of marine pollution, there are a number of specific international treaties which define the rights and obligations of States as well. According to the UN Charter and Customary International Law, there is a responsibility to resolve any dispute peacefully as well.

With regard to ship-based pollution which occurs in maritime zones of a State's jurisdiction, the law of that State applies. If pollution occurs in Sri Lanka's territorial sea or EEZ, the Marine Pollution and Prevention Act No 35 of 2008 applies. The long title of this Act states that it is:

> "An act to provide for the prevention, control and reduction of pollution in the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka and for matters connected therewith or incidental thereto."

Section 48(I) of the Act states:

> 48. (I) Notwithstanding anything to the contrary in the Jurisdiction of Judicature Act, No. 2 of 1978, every offence under this Act committed in the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka shall be triable by a High Court of a Province established under Article 154P of the Constitution, the High Court sitting in any judicial zone of Sri Lanka or by the High Court exercising admiralty jurisdiction.

The act gives the power to detain ships for pollution within the territorial sea or EEZ (or foreshore or coastal zone) of Sri Lanka (Section 11) and to arrest persons for pollution within the territorial sea (or foreshore or coastal zone):

> 11. Notwithstanding any proceedings instituted under this Act, any authorized officer may detain any ship, if he has reasonable cause to believe that any oil, harmful substance or other pollutant has been discharged from the ship into the territorial waters or any other maritime zone, it's fore-shore and the coastal zone of Sri Lanka and the ship may be so detained until the owner, operator, master or the agent of the ship deposits with the Authority such sum of money or furnishes such security as would, in the opinion of the Authority, be adequate to meet the liability of the owner, operator, master or agent under this Act. Marine Pollution and Prevention Act, No. 35 of 2008.
>
> 12 (1) Any authorized officer may arrest without a warrant in the area other than within the area of the exclusive economic zone, any person who commits an offence under this Act or any regulation made thereunder and may produce him before a Judge of a High Court having jurisdiction or before the High Court exercising admiralty jurisdiction, as the case may be.

So if there is a ship-based pollution incident within Sri Lankan territorial waters or EEZ or coastal zone of Sri Lanka – there can be action taken and civil and criminal cases instituted in our domestic jurisdiction.

10) If a coastal state pollutes or allows others to pollute in the Territorial Sea or the Exclusive Economic Zone, what rights do the other states have to control it?

The territorial sea is an area of sovereignty similar to the land area of a State. Other States cannot interfere in the sovereignty and territorial integrity of a sovereign State, so one could not say that other States could "control" this behaviour without the consent of the coastal State. However, if there is a transboundary effect of the pollution and a violation of international obligations and it is possible that it could lead to international pressure or even an inter-State dispute, particularly by an affected neighbouring State. The duty not to cause transboundary harm is both customary international environmental law principle and is also included specifically in some treaties. There could also be general obligations to protect the environment in both customary and treaty-based international environmental law. Enforcement of these obligations can be difficult if there is no agreement or consent on the part of the coastal State.

11) Please explain how the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal applies to Marine Environmental Protection?

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted on 22 March 1989 and entered into force in 1992. Currently there are 199 States parties. There is also an Amendment to the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ("the Ban Amendment") which was adopted by the third meeting of the Conference of the Parties (COP) in 1995. The Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal was adopted by COP 5 in 1999.

It originally came about in response to the revelation that (mainly developed) countries had been transporting toxic waste to developing countries (particularly to Africa). The Basel Convention aims to regulate the trade in and transport of "hazardous wastes" based on their origin and/or composition and their characteristics. There are three prongs to the approach:

a) the reduction of hazardous waste generation and the promotion of environmentally sound management of hazardous wastes, wherever the place of disposal;
b) the restriction of transboundary movements of hazardous wastes except where it is perceived to be in accordance with the principles of environmentally sound management; and
c) a regulatory system applying to cases where transboundary movements are permissible.

The definition of "Hazardous Waste" for the purposes of the Basel Convention require that the waste is in the listed categories of Annex I and has the listed characteristics contained in Annex III of the Convention (being explosive, flammable, toxic, or corrosive).

Obviously most of this transportation of hazardous waste occur through maritime transport – so it is relevant for marine pollution since any maritime accident or casualty would result in leaks of this hazardous waste into the oceans.

In Sri Lanka , the implementation of the National obligations on Import, Export and Transit of waste listed in the Basel Convention is carried out by the CEA as the National Competent Authority. Recently (October 2020) the Court of Appeal of Sri Lanka ordered that 240 waste containers illegally imported in violation of the Basel Convention be sent back to the United Kingdom, as per the *National Solid Waste Management policy,* importation of post-consumer waste to Sri Lanka is prohibited (this policy is also an area under the authority of the Central Environmental Authority and National Environment Act).

International and Legal Perspective on Marine Pollution Disasters;

A discussion with Chandaka Jayasundere, Prsident's Counsel

Mr. Chandaka Jayasundere was enrolled as an Attorney-at-Law of the Supreme Court in 1991. He was appointed a President's Counsel in June 2017. He practices his law in Civil and Commercial Litigation in the District Courts, Commercial High Court and in the Appellate Courts.

In the year 2008, he obtained an LLM in International Trade Law from the Law Faculty of the University of Colombo.

Introduction

In terms of most international Conventions, in relation to Maritime Law, if a State is not party to the Conventions, local legislation becomes operative. In the context of Sri Lanka however, a hybrid application of international Convention/international law principles and local laws are applicable.

The applicable provisions under international law are derived from the recognised sources such as, customary international law; treaties/conventions; general principles of law; judicial decisions; and juristic opinion. While customary international law and treaties/conventions are considered to be the more authoritative sources of international law, the rule as to which of these two sources takes precedence is not so clear. However, given the fact that much of the recognised principles and norms relating to maritime law have now been codified into Conventions, the authoritative source of law for the matter at hand, would be the Conventions that are in operation.

With regard to the applicability of the relevant provisions of international law to the Sri Lankan Legal System, two schools of thought are in existence: the monist school; and the dualist school. Monism considers that the international law regime and in turn all legal principles related thereto, form one cohesive system of law. In other words, international law principles have a direct application to the local legal system, no specific adoption process is required on the part of the local legal system. Dualism considers that the international law regime and the local legal system form two separate systems. Therefore, international law principles have to be expressly adopted by the local legal system.

Sri Lanka, subsequent to the Supreme Court judgement delivered in the case of ***Singarasa V. Attorney General***[1], was identified as a dualist legal system. Therefore, the principles of international law will be considered separate and distinct from the Sri Lankan Legal System. The corollary of this, specifically in relation to the relevance of Conventions to the Sri Lankan legal system, is that a Convention would need to be formally ratified by the State by way of legislation in order for the Convention to have a binding effect in Sri Lanka. It must be noted that the mere signing of the Convention by Sri Lanka, would be insufficient for this purpose.

This Article proceeds on the basis of answers to specific questions that have been raised.

Marine Pollution and Prevention Act No. 35 of 2008 ("MPPA") contains an extensive definition of the "marine environment". Can you please explain the marine environment in simple terms with some examples? What are the other important laws governing the protection of the marine environment?

The long title to the Act states that it is an Act to provide for the prevention, control and reduction of pollution in the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka and for matters connected therewith or incidental thereto.

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1 2013 (1) SLR 245

It is difficult to give a precise definition of the marine environment due to the very expansive definition given in the Act. Section 62 of the Act defines the 'marine environment' as ***"the factors of the surroundings of human beings and the biological functions effecting animals and plants of every description including land, oil, water, atmosphere, climate, sound and odours, taste, within the marine eco-sphere as defined by the Act".*** The "environment" is defined as the "physical factors of the surroundings of human beings including the land, soil, water, atmosphere, climate, sounds, odours, tastes and the biological factors of animals and plants of every description."

As such, the applicability of the Act can be to the physical surroundings of the biological community of organisms in the marine ecosphere. The marine ecosystem can be the open seas, the foreshore, coastal zone and what is under water (the benthic Zone).

For example, the foreshore is the shore area between the mean high-water line (+0.6m from the mean sea level) and the mean low water line (-0.6m from the mean sea level). The Benthic Zone is everything under water including the sea bed). The Coastal Zone is defined in the Coastal Conservation Act[2] to mean that area lying within a limit of three hundred meters landwards of the Mean High-Water line and a limit of two kilometers seawards of the Mean Low Water line.

Another example of the marine environment can be ascertained by the provisions of section 34 of the MPPA which provides for civil liability due to a maritime casualty or a polluting incident.

Section 34 provides for the payment of compensation for any damage caused by the discharge, escape or dumping of any oil, harmful substances or other pollutant in to the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka or *any interests related* thereto. Section 34(2) defines *'any interests related to the territorial waters of Sri Lanka or any other maritime zone, its fore-shore of Sri Lanka'* to include *"(a) marine, coastal, port or estuarine activities including fisheries activities; (b) the promotion of tourism and the preservation and development of tourist attractions in the territorial waters of Sri Lanka or any other maritime zone or on the fore-shore including beaches and coral reefs; (c) the health of the coastal population and their wellbeing; and (d) the protection and conservation of living marine resources and wild life"*.

Therefore, although strictly not part of the 'marine environment' the above activities in relation to the 'marine environment' comes within the purview of the MPPA in respect of civil liability.

Explain the scope of strict liability criminal offence called "Discharge or escape of harmful substance or other pollutants to territorial waters of Sri Lanka" in terms of Section 26 of the Marine Pollution and Prevention Act No. 35 of 2008?

Section 26 of the MPPA provides that **if** any oil, harmful substance or other pollutant is discharged or escapes into the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka from, inter alia, any ship, apparatus, off shore installation, or from a pipeline **then**, the owner, operator, master or the agent of the ship; or the owner or the person in charge or the operator of the apparatus; or the operation; pipeline or **shall be guilty of an offence** under the Act and shall be liable on conviction to fine not less than rupees four million and not exceeding rupees fifteen million.

It is therefore clear that the mere fact of the discharge or escape of oil or harmful substance or other pollutant is sufficient to attract liability. As such, evidence of animus, intention or mens rea is not required to attract liability. This is the concept of 'strict liability'.

The English Law concept of strict liability is not applicable in Sri Lanka. In Sri Lanka for 'strict liability' to be applicable, it has to be in a situation where there is no mental element stipulated either specifically or by implication in the Statute.

2 Act No. 57 of 1981 as amended

In that regard in ***Perera vs. Munaweera***[3] the Supreme Court held that *"Where the definition of an offence contains words of absolute and unqualified prohibition, the prosecution need only establish beyond reasonable doubt the commission of the prohibited act, and it is not required in addition to establish that the accused acted with any specific intention or knowledge"*

Explain the historical context and the development of this offence concerning the Discharge of Harmful Substances/Pollution and the dumping under Section 27 of MPPA?

The concept of strict liability as included in the MPPA finds its source from Article 4 of the International Convention for the Prevention of Pollution from Ships the Marine Pollution (MARPOL). Article 4 provides inter alia, that *any violation of the requirements of the Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration of the ship concerned wherever the violation occurs.* It further provides that *If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law.*

Article 4(2) specifies that *any violation of the requirements of the Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that Party. Whenever such a violation occurs, that Party shall either: (a). cause proceedings to be taken in accordance with its law; or (b). furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred.*

Article 4(4) further provides that *the penalties specified under the law of a Party pursuant to the article shall be adequate in severity to discourage violations of the Convention and shall be equally severe irrespective of where the violations occur.*

The Civil Liabilities for Oil Pollution Damage Convention of 1969 which was replaced by the 1992 Civil Liability for Oil Pollution Damage Convention (CLC) also follows the principle of 'strict liability'. It must be noted that this Convention deals with the liability for damages caused by oil pollution. The concept of criminal liability for marine pollution arises

The CLC places the liability for such damage on the owner of the ship from which the polluting oil escaped or was discharged. Subject to a number of specific exceptions, this liability is strict; it is the duty of the owner to prove in each case that any of the exceptions should in fact operate. However, except where the owner has been guilty of actual fault, they may limit liability in respect of any one incident.

The exemptions that are available to the ship owner is only if the owner proves that: (a) the damage resulted from an act of war or a grave natural disaster; or (b) the damage was wholly caused by sabotage by a third party; or (c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

However, the only exemptions that are provided in the MPPA is at section 33 which provides that "No person shall be made liable to any offence under section 24 or 26, if (a) the oil or harmful substance or other pollutant is discharged or dumped in consequence of the removal by the Authority of sunk, stranded or abandoned vessels in the exercise of any power conferred by any written law or any act done on the written instructions of the Minister; and (b) the substances containing oil, harmful substances or other pollutants are discharged or dumped by the Authority, for the purpose of combating a specific incident of pollution by mitigating or eliminating the damage therefrom.

Who can be sued to maintain an action for damages? Does the damage extend beyond any party owner, operator, or master of a ship to the country of origin? Or to subjects of International Law?

As set out in section 26 and 34 the persons liable under criminal and civil liability are:

3 56 N.L.R 433 at 438

- where the discharge or escape is from a ship, the owner, operator, master or the agent of the ship; or
- where the discharge or escape occurs during the course of transferring oil, harmful substances or a pollutant to or from a ship, the owner or the master of the ship or where the discharge or escape is from any apparatus used for transferring oil, harmful substances or a pollutant, the owner or the person in charge of the apparatus; or
- where the discharge or escape is from an off-shore installation or as a result of any operation for the exploration of the seabed or subsoil or the exploration of the natural resources thereof, the owner or the occupier of that installation or the person carrying on the operation or the person in charge of the operation; or
- where the discharge or escape is from a pipe line, the owner or operator of the pipe line; or
- where the discharge or escape is from a place on land, the owner or the occupier of that place, or if the discharge or escape is caused by the act of another person who is in that place without the permission of the owner or occupier, that person,

With regard to the role of the country of origin, the State where the ship is registered (Flag State), Article 94 of the United Nations Convention of the Law of the Sea (UNCLOS) stipulates that, the flag State is under the duty to exercise effective jurisdiction and control over administrative, technical and social matters on their ships on the high seas.

Specifically Article 94(6) specifies that the Flag State must carry out an investigation whenever another state reports inadequate exercise of control or jurisdiction over any ship flying its flag and take control or jurisdiction over any ship flying its flag and take any remedial action where appropriate and Article 94(7) specifies that the Flag State Must carry out or cooperate with other States in the carrying out of Carry out or cooperate with other States in the carrying out of investigations in any case of marine casualty or incident of navigation.

The Flag State duties, with respect to ships registered under a particular flag, as listed under Article 94 are not meant to be exhaustive. They are complemented by the international laws and regulations adopted by the relevant international laws and regulations adopted by the relevant international organizations (IMO and ILO).

Under the provisions of Article 4(2)(b) and 4(3) the Administration of the Country where the incident occurs may furnish to the Administration of the ship (Flag State) such information and evidence as may be in its possession that a violation has occurred; and where information or evidence with respect to any violation of the Convention by a ship is furnished to the Administration of that ship (Flag State), the Administration shall promptly inform the Party which has furnished the information or evidence, and the Organization, of the action taken.

What is the damage recoverable under Civil Liability in terms of Section 34(1)(a) of the MPPA damage caused to "territorial waters, any other marine zone, its offshore and the coastal zone of Sri Lanka"?

What are the limitations of Civil Liability set out in the International Convention on the Civil Liability for Pollution Damage 1992?

Section 34 of the MPPA provides as follows:

> *Where any act referred to in section 24 or section 26, results in the pollution of the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka, the owner or the operator of the ship …… shall be liable for:*
>
> > ***any damage caused*** *by the discharge, escape or dumping of any oil, harmful substances or other pollutant in to the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone of Sri Lanka under such Law or to the fore-shore or any interests related thereto;*

> ***the costs of any measures taken*** *for the purposes of* ***preventing, reducing or removing any damage*** *caused by the discharge, escape or dumping of any oil, harmful substance or pollutant into the territorial waters of Sri Lanka or any other maritime zone, its fore-shore and the coastal zone or any interests related thereto.*

As such, the damage that is recoverable are the value of any damage that has been caused and the costs of any measures taken for the purposes of preventing, reducing or removing any damage caused by the discharge, escape or dumping of any oil, harmful substance or pollutant. This is unlimited and only subject to the provisions of section 35.

Section 34(2) further provides that 'interests related to the territorial waters of Sri Lanka or any other maritime zone, its fore-shore of Sri Lanka' includes:

- *marine, coastal, port or estuarine activities including fisheries activities;*
- *the promotion of tourism and the preservation and development of tourist attractions in the territorial waters of Sri Lanka or any other maritime zone or on the fore-shore including beaches and coral reefs;*
- *the health of the coastal population and their wellbeing; and*
- *the protection and conservation of living marine resources and wild life.*

It is to be noted with regard to the civil liability that, section 35(1) (a) of the MPPA provides, inter alia, that the liability in respect of any one incident under section 34 shall be limited in accordance with such of the provisions of the International Convention on the Civil Liability for Pollution Damage, 1992 as may be incorporated into regulations made under this Act. Section 35(1) (b) provides that the maximum liability incurred by the owner or operator of a ship …… shall be limited in accordance with the provisions of the International Convention on the Civil Liability for Pollution Damage, 1992 as may be incorporated into regulations made under the MPPA.

However, section 35(2) provides that, where any act referred to in section 34 occurs due to the negligence of the owner, or operator of a ship …… such person shall not be entitled to avail himself of the limitations provided in subsection (1) of this section.

Therefore, whereas the limitations in section 35(1) will apply normally, if it can be proved that the acts specified in section 34 occurs due to negligence of the party concerned then again, the damage that can be recovered in unlimited.

It is axiomatic, that the damage claimed has to be proved. The concept of 'he who alleges must prove' has been given effect to in section 101 of the Evidence Ordinance.

The mitigation of loss and damage is another aspect that should be focused on. Recognised and applicable legal principles dictate that an onus is cast upon an injured/affected party to mitigate the loss and damage that can be caused by an incident of this nature.

Currently, a controversial discussion takes place about Polluter Pays Principles in the Environmental Law.

Can the 'polluter pays' principles be applied to a context where irreparable damage has caused the marine environment where the damages transcend generations, and there is scientific uncertainty?

In the Judgements of Wattegedara Wijebanda Vs Conservator General of Forests & Others [2009 (1) SLR 337] and Centre for Environmental Justice Vs Anura Satharasinghe Conservator General Department of Forest Conservation and others [CA (Writ) 291/2015 dated 16th November 2020], The apex courts made individuals responsible for the environmental degradation.

In that context, how far is it possible to seek a public law remedy for marine environmental pollution when an individual or a legal person has caused it?

The scope of damage has been set out in an earlier answer.

The Polluter Pays Principle

The 'polluter pays' principle is that "The polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to society or the exceeding of an acceptable level (standard) of pollution[4]". This definition places on the polluter, the responsibility for the cost of reduction of the pollution caused by his/her actions. Furthermore, the polluter must ensure that the environment is in an acceptable state.

The 'Polluter Pays' Principle is now considered one of the core principles of sustainable development. It was first formally articulated in 1972 by the Council of the Organization for Economic Co-operation and Development (OECD). Since it has been used extensively in environmental governance and included into international and domestic environmental instruments. The International instruments include both soft law (persuasive) and hard law (binding) documents e.g. The Rio Declaration on Environment and Development; and the International Convention on Oil Pollution Preparedness, Response and Co-operation. It is noticeable that polluter pays principles is included in ship pollution conventions developed by the IMO and UN"

This perspective can be captured from the Organisation for Economic Co-operation and Development (OECD), United Nations (UN) and the European Community (EC) point of view. The OECD formulated the polluter-pays principle and recognised it as an internationally agreed principle in 1972. The principle was formulated as an economic principle and was meant to allocate the cost of pollution control. The polluter pays principle is also recognised at the UN level in Principle 16 of the Rio Declaration on Environment and Development (1992). According to the preamble of this declaration, the proclamations in the declaration were made while '...working towards international agreements. The polluter-pays principle is also recognised under the European Community Treaty.

The polluter-pays principal has been recognized by the Sri Lankan Courts in several decisions – Ravindra Gunawardana Kariyawasam Vs Central Environment Authority[5] ("Chunnakam Case") and Centre for Environmental Justice (Guarantee) Ltd V Anura Sarathsinghe, Conservation General[6].

Therefore, under the polluter-pays principal the shipowner should be held liable to bear the cost of measures to reduce pollution according to the extent of either the damage done to society, and further pay damages caused on the environment, economy, private entities such as hotels, fishing community and those who engage in tourism industry.

Inter-generational Claims

Whether damages can be claimed on inter-generational basis is difficult to answer as the concept in itself has not been recognised by any Statute or Judgement of the Sri Lankan Courts. However, with regard to the duties and obligations of a State to protect the environment in general and with specific regard to inter-generational rights the goals of the UN Decade on Ecosystem Restoration 2021-2030 clearly link the needs of future generations in its ecological restoration initiative. However, this is not a hard law obligation such as a treaty/ convention – but more like an action plan for States, with targets to achieve by 2030. It should be noted that international environmental law often resorts to soft law – persuasive – methods such as these.

Intergenerational equity aspect for ocean governance is also increasingly argued by scholars and that intergenerational equity has been supported by the Judge Weeramantry and Trinidade in the International Court of Justice in several cases[7].

4 https://stats.oecd.org/glossary/detail.asp?ID=2074#:~:text=The%20polluter%2Dpays%20principle%20is,level%20(standard)%20of%20pollution.

5 http://www.supremecourt.lk/images/documents/sc_fr_141_2015.pdf

6 https://elaw.org/system/files/attachments/publicresource/LK_CentreforEnvironmentalJustice_CA_16.11.2020.pdf

7 Gabcikovo-Nagymaros Project (Hungary/ Slovakia), Judgment, I.C.J. Reports 1997
Pulp Mills on the River Uruguay (Argentina v. Uruguay), Separate Opinion of Judge Cançado Trindade, Judgment, I.C.J. Reports 2010

There are two cases in India and the Philippines where this concept of inter-generational liability is discussed and recognised[8].

Claims – Scientific Uncertainty

It is arguable whether damages can be claimed where there is scientific uncertainty. As set out above, the primary evidentiary principle that 'he who asserts must prove' is applicable even in an incident of a maritime disaster. Such proof with regard to the damage to the environment must be proved in terms of the applicable burden of proof. With regard to the offence in section 26 it will have to be proved beyond reasonable doubt and in the case of civil liability in terms of section 34 the burden will be to prove it on a balance of probability.

In that regard, even the United Nations Convention on the Law of the Sea in Article 220(6) read with Article 211(6) of UNCLOS stipulates that where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings.

Applicability of Public Law

With regard to the applicability of public law in the case of a maritime disaster, the provisions in the relevant laws in general and the MPPA in particular are sufficient to hold liable the polluter (as stipulated in sections 26 and 34) and as such there is no necessity in such a statutory background to seek any public law remedies. Unless of course, the public authorities i.e., the Marine Environment Protection Authority under the MPPA, or the Director General of Merchant Shipping does not adequately carry out their respective statutory duties.

Main International Conventions in relation to Maritime Pollution

United Nations Convention on the Law of the Sea 1982

The UNCLOS 1982 was ratified by Sri Lanka on 19th July 1994.

It must be noted that the Convention stipulates duties and obligations of the State Parties to the Convention. Any individual who has suffered damage due to a Maritime Environmental Disaster is entitled to the recovery of such damages through the statutory mechanism of the State Party.

Article 192 (General obligations) stipulates that States have the obligation to protect and preserve the marine environment.

UNCLOS can be seen as a broad framework convention on marine environment, in terms of Part XII on the maritime environment being without prejudice to the specific obligations States have under prior or future marine environment related conventions and agreements which are in accordance with the general principles of UNCLOS (See Article 237 - Obligations under other conventions on the protection and preservation of the marine environment)

Article 221 (Measures to avoid pollution arising from maritime casualties) stipulates that nothing in the particular part of the Convention shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

8 M. C. Mehta v. Union of India and others, Supreme Court of India, December 20, 1986. 1987 SCR (1) 819.
Oposa et al. v. Fulgencio S. Factoran, Jr. et al (G.R. No. 101083), Supreme Court of the Philippines, 30 July 1993.

The UNCLOS Article 235 (Responsibility and liability) stipulates that the States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law. In that regard, States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

The article further stipulates that, with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

With regard to the general right of coastal States to enforce it laws Article 220(6) read with Article 211(6) of UNCLOS stipulates that where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

The International Convention for the Prevention of Pollution from Ships (MARPOL)

This Convention is the main international Convention covering the prevention of pollution of the marine environment by ships from operational or accidental causes. The MARPOL Convention was adopted on 2nd November, 1973 by the International Maritime Organisation (IMO). An additional Protocol was adopted in response to a spate of tanker accidents in 1976-1977. This protocol is referred to as the 1978 Protocol.

MARPOL regulates inter alia the design and equipment of ships; ensures proper systems of certification and inspection; sets out a State's obligation to prevent marine pollution and provide facilities for the disposal of oil waste and chemicals.

MARPOL currently includes six technical Annexes. The Annexes are listed out below, with the specification as to whether the same has been ratified by Sri Lanka.

Annex I:	Regulation for prevention of pollution by oil – Ratified
Annex II:	Regulation for control of pollution by Noxious Liquid Substance in bulk – Ratified
Annex III:	Regulation for prevention of pollution by harmful substance carried at sea in packaged form – Ratified
Annex IV:	Regulation for prevention of pollution by sewage from ships – Ratified
Annex V:	Regulation for prevention of pollution by Garbage from ships – Ratified
Annex VI:	Regulation for prevention of Air pollution from ships – Not Ratified

For the administration of MARPOL, the flag State of the Vessel is also relevant (Article 2(5)).

The parties to the Convention undertake to give effect to the provisions of MARPOL and those Annexes by which the relevant State is bound, in order to prevent the pollution of the marine environment by the discharge of harmful substances or effluents containing such substances in contravention of the Convention (Article 1).

For the purposes of MARPOL, a harmful substance has been defined to mean any substance which, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea, and includes any substance subject to control by the Convention (Article 2(2)).

Any violation of the provisions of MARPOL within the jurisdiction of any State which is party to the Convention shall be prohibited and sanctions shall be established under the law of that State. Whenever such a violation occurs, that State shall either cause proceedings to be taken in accordance with its law; or furnish to the administration of the ship such information and evidence as may be in its possession that a violation has occurred (Article 4).

A report of an incident shall be made without delay to the fullest extent possible in accordance with the provisions of Protocol I to MARPOL (Article 8).

Conventions relating to the Pollution from Oil Tankers[9]

As concerns pollution from oil tankers, the relevant international legal framework for liability and compensation is very robust and well developed, providing significant compensation for loss or damage arising from oil pollution incidents.

Relevant international conventions, collectively known as the CLC-IOPC Fund regime, have been developed and improved upon, primarily in the aftermath of some particularly large oil spills. The first of these, the 1969 Civil Liability Convention (CLC)2 and the 1971 Fund Convention were negotiated following the Torrey Canyon disaster in 1967, representing a clear legislative response of the international community to an oil pollution incident which – at the time – was of unprecedented proportions. The 1969 CLC and 1971 Fund Convention were subsequently amended, leading to the adoption of the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol which today represent the most advanced and modern legal instruments in the field.

Is there any other of legislation available in Sri Lanka, following the provisions of UNCLOS to protect and preserve marine environments, including the protection of sensitive ecosystems?

Certain offences as set out in the Penal Code may be applicable in the imposition of penal sanctions on the crew members. However, the provisions of the Penal Code may be of limited relevance in seeking compensation on the part of the State. In the conducting of investigations into the conduct on the part of the crewmembers, the willful failure to provide authorities with required information will be relevant.

The relevant provisions in the Penal Code of Sri Lanka can be identified as follows –

- Section 261 - Public nuisance
- Section 277 - Negligent conduct with respect to poisonous substances
- Section 278 - Negligent conduct with respect to combustible matter
- Section 279 - Negligent conduct with respect to explosive substances

Other Legislation

Jurisdiction is granted to Sri Lankan Courts to try offences and take specific action under the provisions of the following Acts of Parliament. However, the ability to claim compensation under the provisions of these Acts are restricted.

- Fauna and Flora Protection Ordinance
- Fisheries and Aquatic Resources Act No. 2 of 1996
- National Environmental Act No. 47 of 1980
- Merchant Shipping Act No. 52 of 1971
- Sri Lanka Disaster Management Act No. 13 of 2005
- Sri Lanka Ports Authority Act No. 51 of 1979

9 These Conventions relate to only Pollution from Oil Tankers and does not relate to all maritime pollution incidents. For example by the discharge of other pollutants such as harmful substances or other pollutants by non-Tanker vessels

Other International Law Conventions Concerning Marine Environmental Protection:

Basel Convention and Stockholm Convention

Awakening environmental awareness and corresponding tightening of environmental regulations in the industrialized world in the 1970's and 1980's had led to increasing public resistance to the disposal of hazardous wastes- in accordance with what became known as the NIMBY (Not In My Back Yard) syndrome- and to an escalation of disposal costs. This in turn led some operators to seek cheap disposal options for hazardous wastes in Eastern Europe and the developing world. It was against this backdrop that the Basel Convention was negotiated in the late 1980's and it's thrust at the time of its adoption was to combat the "toxic trade" as it was termed. The Convention entered into force in 1992.

The Convention aims to protect human health and the environment against the adverse effects resulting from the generation, transboundary movements and management of hazardous wastes and other wastes. The Basel Convention regulates the transboundary movements of hazardous wastes and other wastes and obliges its Parties to ensure that such wastes are managed and disposed of in an environmentally sound manner.

The Convention covers toxic, poisonous, explosive, corrosive, flammable, ecotoxic and infectious wastes. Parties also have an obligation to minimize the quantities that are transported, to treat and dispose of wastes as close as possible to their place of generation and to prevent or minimize the generation of wastes at source.[10]

The overarching objective of the Basel Convention is to protect human health and the environment against the adverse effects of hazardous wastes. Its scope of application covers a wide range of wastes defined as "hazardous wastes" based on their origin and/or composition and their characteristics, as well as two types of wastes defined as "other wastes"- household waste and incinerator ash.

The Stockholm Convention on Persistent Organic Pollutants is a treaty that aims to protect human health and the environment from the effects of persistent organic pollutants (POPs). The Convention entered into force on May 17, 2004. POPs are considered toxic, have the potential to accumulate in unhealthy quantities in humans and animals, stable and thus resistant to natural breakdown and can be transported over long distances through the atmosphere and oceans.

The Stockholm Convention, which currently regulates 29 POPs, requires parties to adopt a range of control measures to reduce and, where feasible, eliminate the release of POPs. For intentionally produced POPs, parties must prohibit or restrict their production and use, subject to certain exemptions. The Stockholm Convention also requires parties to restrict trade in such substances. For unintentionally produced POPs, the Stockholm Convention requires countries to develop national action plans to address releases and to apply "Best Available Techniques" to control them. The Stockholm Convention also aims to ensure the sound management of stockpiles and wastes that contain POPs.

The issue of POPs per se does not have a direct correlation to maritime disasters, other than the fact that the ships that are involved in a maritime disaster may be carrying POPs as defined in the Stockholm Convention. Here again, the provisions in the UNCLOS, MARPOL and the MPPA and the Penal Code in Sri Lanka are sufficient to meet the challenges in that regard.

10 https://www.unep.org/resources/report/basel-convention-control-transboundary-movements-hazardous-wastes

A few FAQ's pertaining to the Liability under Sec 25(1) of the Debt Recovery Act

Priyantha Liyanage
Magistrate, Fort.

1. Does a post-dated cheque exonerate the liability?

   A cheque is not invalid by reason of its being post-dated (See ***Krishnappa Chetty Vs Carpen Chetty 15 NLR 243)*** An anti-dated or post-dated cheque is a valid cheque (Sec. 13(2) of the Bills of Exchange Ordinance) Post-dated cheques are given for many reasons, the commonest of which is the availability of funds at a particular time in future.

2. Can the drawer be liable when the cheque that was dishonoured was an undated cheque?

   A cheque cannot be held invalid merely because it is not dated (Vide Sec 3(4) (a) of the Bills of Exchange Ordinance No. 25 of 1927(BEO). The holder can write the date before presenting it to the bank. It is the responsibility of the drawer to retain funds in the account to meet the cheque during the period of its validity. Therefore, the mere fact that the cheque is undated is no defence. However, if specific instruction has been given by the drawer as to the date (such as a period of time) and the cheque has been presented to the bank contrary to such instruction, that may be a valid defence of absence of mental element, depending on the circumstances of the case.

3. How long a cheque is valid?

   A cheque becomes a stale cheque after six months according to the banking practice of UK. The same practice is followed by Sri Lankan banks. Accordingly, a cheque should be presented to the bank before six months.

4. Can the drawer be liable when the cheque that was dishonoured was a signed blank cheque that was filled by the complainant?

   In terms of Sec 20 of the BEO, if a cheque is delivered, with the signature of the drawer, to be filled by the accepter, he has a prima facie authority to fill up the omission (including the amount) in any way he thinks fit within a reasonable time and strictly in accordance with the authority given. Therefore, even a blank cheque leaf, signed and handed over by the accused, which is towards some payment, would attract the liability under Sec 25. This is supported by the Indian judgement of ***Bir Singh Vs Mukesh Kumar,*** (2019) 4 SCC 197.

5. Can a person be liable under Sec 25 if the cheque that was dishonoured was given as a security for repayment of the debt or liability?

   The expression "security cheque" is not statutorily identified by BEO or any other statute. Cheque by its nature is a negotiable instrument. A cheque is not just a paper that can be retained as a security. Every valid cheque is viable to be presented to a bank. If, on the date on which the cheque is issued, liability or debt existed the drawer cannot say that it was given as 'security'. (See also ***Sampelly Satyanarayana Rao Vs Indian Renewable Energy Development Agency Limited 2016 SCC 954- SC India)*** On the other hand the term "security '' itself is usually applied to an obligation, pledge, mortgage, deposit, lien, etc. So this defence which is very common in cases under Sec 25 has no merit. It is noteworthy in this regard that if this defence is accepted the whole purpose of the Sec 25 is vitiated. The purpose for bring a civil liability into a criminal liability is to strengthen the credibility of cheques.

6. Where a third-party cheque is given to the complainant, can that third party be liable under Sec 25 if the cheque got bounced?

   A cheque is a negotiable instrument. The civil liability of the drawer lasts until it is paid by the bank. So as the criminal liability under Sec 25 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 amended by Act No. 9 of 1994 (Debt Recovery Act). Therefore, the holder who received it for a valuable consideration from any person can sue the drawer under Sec 25 of the DRA, unless the cheque is crossed with "Not Negotiable" though there was no transaction between the complainant and the drawer, irrespective of any dispute between the drawer and the giver.

7. Is the existence of a debt or a liability a sine qua non to make a person criminally liable under Sec 25?
   A Bill of Exchange is defined in the ordinance as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand. To pay for what? Undoubtedly a debt or to discharge a liability. On the other hand, the Supreme Court in ***Officer in Charge, CID Vs Soris (2006) 3 Sri L R 375*** approved the contention of the appellant that section 25(1) (a) casts criminal responsibility on any person who transacts business with any institution or person who draws a cheque without sufficient funds. The combined effect of these two propositions is that in order to make a person liable under Sec 25 there should be a debt to be paid or liability to be discharged. In other words, a person who draws a cheque as a donation or a gift or draws a cheque under coercion cannot be held liable under this section.
8. On whom the burden lies to prove the debt or liability?
   Sec 139 of the Negotiable Instrument Act of India provides for a presumption that holder of a cheque received the cheque for discharge of any debt or other liability. Our Debt Recovery Act does not provide for such presumption. Unless the law provides, a presumption cannot be drawn in the interpretation of penal statutes- N.S. Bindra,11th Edition, Pg. 697. Therefore, the existence of a debt or liability should be proved by the prosecution. It is noted here that once that is proved by the prosecution an inference can be drawn in favour of the holder that the cheque was drawn to pay a debt or liability. An ipse dixit statement of the accused cannot exonerate his liability under Sec 25 in that circumstances.
9. Is the liability under Sec 25 (1) a strict liability?
   Sec 25(1) consists of three parts in two limbs.
   (a) knowingly draws a cheque which is dishonoured by a bank for want of funds
   (b) gives an order to a banker to pay a sum of money, which payment is not made by reason of there being no obligation an such banker to make payment or the order given being subsequently countermanded with a dishonest intention

   It is obvious that the mental element in (a) above is knowledge.

   Two interpretations are possible with regard to the mental element in (b) above. Firstly, the dishonest intention at the end of the limb (b) is common to both parts mentioned in limb(b). Then there is no place for the argument that the first part of limb(b) is a strict liability offence. Secondly one can also interpret that the mental element is not mentioned in the first part of limb (b). Still it should be interpreted so as to include the mental element to the first part. The reason being; whenever any provision is silent as to the *mens rea* there is a presumption that, in order to give effect to the will of the parliament, the mental element is required ***[Sweet Vs Parsley (1970) AC 132]***. The principle that Sri Lanka follows is that the exclusion of mental element should be done by clear words of the statute ***(Thasthakeer Vs Jayasekara 75 NLR 358)*** In many instances the courts have permitted the availability of the general exception of mistake of facts mentioned in Sec 72 of the penal code where the mental element is silent in a penal section. In ***Van Der Hultes Vs A.G. [(1989)I SLR 204]*** it was held that the mental element is an essential ingredient of an offence under Poisons Opium and Dangerous Drugs Ordinance on the basis that the mental element has not been ruled out by the statute. This principle should be applicable to Debt Recovery Act as well. Accordingly, the liability under the first part of limb (b) is not strict liability.
10. Is the defence of payment of dues available to an accused?
    A common defence that is taken when a person is charged with Sec 25 is that he paid the dues in full or partly before the action was instituted. This civil defence cannot be available in a criminal action. A crime is completed when the physical and the mental elements of the crime are met. once a crime is committed it cannot be reverted. Therefore, the restitution is no defence for an accused who is charged with an offence under Sec 25 but it is a mitigatory factor at the sentence hearing.
11. How the date of the offence is decided?
    According to Sec. 13 (1) of the BEO if the cheque is dated the same is deemed to be the date of drawing unless contrary is proved. However, if the cheque is a post-dated or an anti-dated cheque the date of the drawing can be found in the evidence of the holder.

PREVENTION OF COVID-19 IN COURTS AND PRISONS

Keerthi Kumburuhena*

Magistrate/ Addl. District Judge, Bandarawela

1. Introduction

The fast spreading infectious disease, Covid-19 (Corona Virus Disease), caused by a newly discovered virulent virus called 'Corona virus', was declared a global pandemic on March 11, 2020 by the World Health Organisation. It continues to spread across the globe, with more than 225 million confirmed positive cases and 4.6 million deaths in approximately 200 countries. Only 5.6 billion doses of vaccine have been administered as at 16, September 2021[1]. In Sri Lanka, 497,805 positive cases and 11,817 deaths have been confirmed[2] and 24.4 million doses of vaccine have been administered by that date[3].

Mass immunization is considered the most effective method of prevention of the pandemic though, achieving desired targets through this method is a time taking and costly process. In this backdrop, the other methods advocated by the authorities could be readily applicable at no cost or negligible cost.

According to the circulars[4] and health guidelines issued by the Judicial Service Commission, Director General of Health Services and Ministry of Public Services, measures are taken within courts to prevent spread of the pandemic, such as strict adherence to basic Covid-19 guidelines, maintaining social distancing, preventing transmission of respiratory droplets and aerosols, virtual hearing of cases and taking measures to reduce prison overcrowding. This article explains how these measures are implemented in court houses with special reference to the Bandarawela Magistrate's Court.

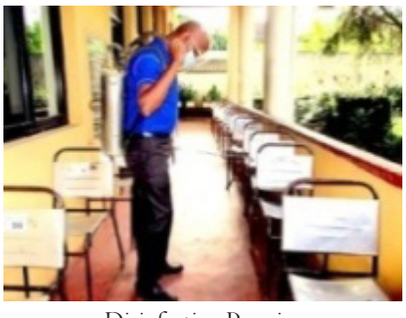
2. Adherence to Covid-19 Guidelines

The Covid-19 guidelines namely social distancing, use of face masks, checking body temperature, cleaning hands with disinfectant soaps and liquids, recording personal details and regularly disinfecting the premises are some of the measures currently adopted at the Bandarawela Magistrate's Court.

Body temperature of every person who enters the court premises, is checked at the entrance, and those who have high fever or any other Covid-19 symptoms, are not allowed admission. Sanitizing and hand washing facilities are provided at the main entrance and points of entry to office and open court. No one is permitted to enter the court premises without wearing a face mask properly. Personal details such as name, address, NIC number, contact number, case number and each person's reason for visiting, are all recorded at the main entrance.

Checking Body Temperature and Proper Wearing of Face Masks

Cleaning Hands with Disinfectant Soaps and Liquids



Disinfecting Premises

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3. Maintaining Social Distancing in Court Premises

Social distancing is one of the most effective preventive measures in the control of Covid-19. It is essential to ensure that social distancing guidelines issued by the Director General of Health Services are strictly adhered to at all times. In order to achieve this objective, one of important measures taken is to request only the least required court staff to attend for work, and that on a rotational basis. Another measure in this regard is granting permission for remandees and members of the public to enter the open court only in situations where their presence is absolutely necessary for proceeding with matters. Hence, lawyers are requested to advise their clients not to visit the court premises, unless their presence is allowed by the court. Public gathering inside and outside the court house is not permitted, and taking up cases is done on a staggered basis to ensure a lesser number of lawyers and litigants being present in the court house at any given time.

Following model illustrates how social distancing is maintained at the Bandarawela Magistrate's Court. The daily case list on a staggered basis, is published at the main entrance. It gives directions to litigants to move into four locations inside the premises, marked A, B, C and D. They can comfortably sit and wait in these areas, until their cases are called. Seats are arranged, conforming to the one-metre distance requirement. Each seat is numbered, and the relevant number is allocated to the litigant at the entrance, based on the case list. Loud speakers are installed in these locations to amplify the interpreter's voice. Those who come to pay arrears of fines are directed straight to the office with a view to reducing congestion in open court.

When a Covid-19 infected person enters the court premises, it is easy to identify his movements and the exact location, since his case number, reason for visiting and personal details are recorded at the entrance. In this manner, it is easy to trace his contacts and pass the information to the health authorities for PCR (Polymerase Chain Reaction) test, and subsequent follow-up with other preventive steps. First contacts of the case could possibly be among the litigants, lawyers, government officers, police and prison officers, court staff or members of the public present in court.

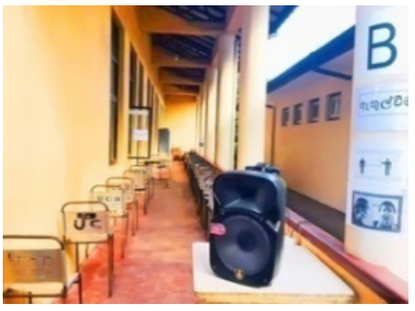
All transactions such as inquiries, payment of fines, obtaining certified copies, signing bail bonds and filing motions and other documents are made only through the four counters (windows), standing in the veranda outside court office. When an infected person presents himself at a counter for services, that particular counter could be easily identified, since his personal details are recorded at the entrance. Under this arrangement, the contacts are traced subjected to PCR and quarantined, causing no interruption to the smooth functioning of the court. On the other hand, it also reduces the cost and time spent on unnecessary PCR tests.

For Calling *(9.30 A.M.)*	New Plaints *(10.30 A.M.)*	Motion Cases *(11.00 A.M.)*	Remand Cases *(11.30 A.M.)*	For Trial *(1.30 P.M.)*
A	B	C	Online	D
X	X	X	X	X
X	X	X	X	X
X	X	X	X	X

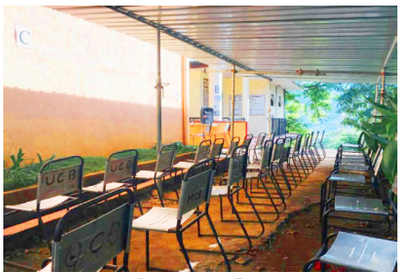
Staggered Case List

Registration and Seating Arrangement

Location A



Location B


Location C

Location D


Service Counters

4. Preventing Transmission of Respiratory Droplets and Aerosols

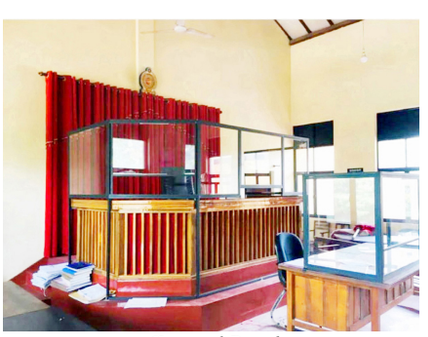
Covid-19 spreads when tiny liquid particles from an infected person's mouth or nose enter the body of a healthy person, as the former speaks, coughs, sneezes, or breathes. These particles range from larger respiratory droplets to smaller aerosols. A person could be infected when droplets or aerosols that contain the virus, are inhaled or come into contact with the mouth, nose or eyes. The virus could spread faster in poorly lit, ill ventilated and overcrowded housing conditions. It is possible for the aerosols to remain suspended in the air or travel a distance even beyond a metre. Persons may also be infected when they touch either their mouth, nose or eyes, after touching contaminated surfaces without cleaning hands with sanitizer or soap and water[5].

At the Bandarawela Magistrate's Court, following measures are carried out to control the transmission of respiratory droplets and aerosols in the open court. While the bench, interpreter's table, witness box and the dock are covered by transparent materials like glass and polythene, separate openings are provided for the passage of case records and other documents, in order to achieve the desired results.

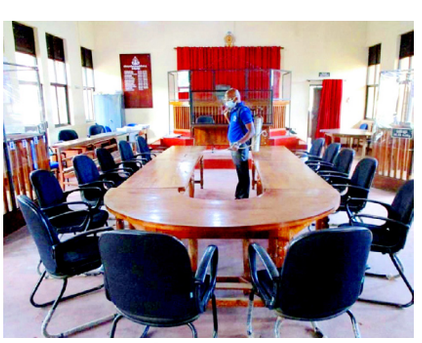
As a measure to reduce congestion in the open court and prison cell, litigants are made to pay fines directly to the office without waiting inside the open court, after their cases conclude. The matters of arrears of fines are called only at the office. During the court proceedings, all windows and doors are kept wide open to facilitate inflow of light and ventilation in plenty. End of every day, the open court is completely disinfected by spraying disinfectants.


Covered Witness Box


Covered Dock


Covered Bench


Covered Interpreter's Table


Disinfecting Open Court

5. Virtual Hearing of Cases

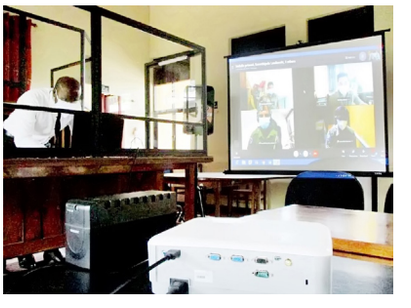
In order to control spread of Covid-19 within the court premises, granting of bail and extension of remand period of suspects in custody, are done through the use of electronic means like Skype video conferencing technology. Lawyers could appear on behalf of their clients and make their bail applications and submissions by using this technique from their offices, without being physically present in court. Those who do not have electronic facilities and resources, are welcome to present themselves in court and make their submissions.

Following paragraphs supported by illustrations, display how the virtual hearings of cases are taken up at the Bandarawela Magistrate's Court.

While officers of the six police stations produce suspects under their custody for bail matters, prison officers produce remandees for remand extension matters via Skype. The investigation reports and new plaints are submitted by fax. A web camera fixed in the open court provides opportunity to prison and police officers, suspects, remandees and lawyers for watching the court proceedings, a process as good as their being present inside the court house.

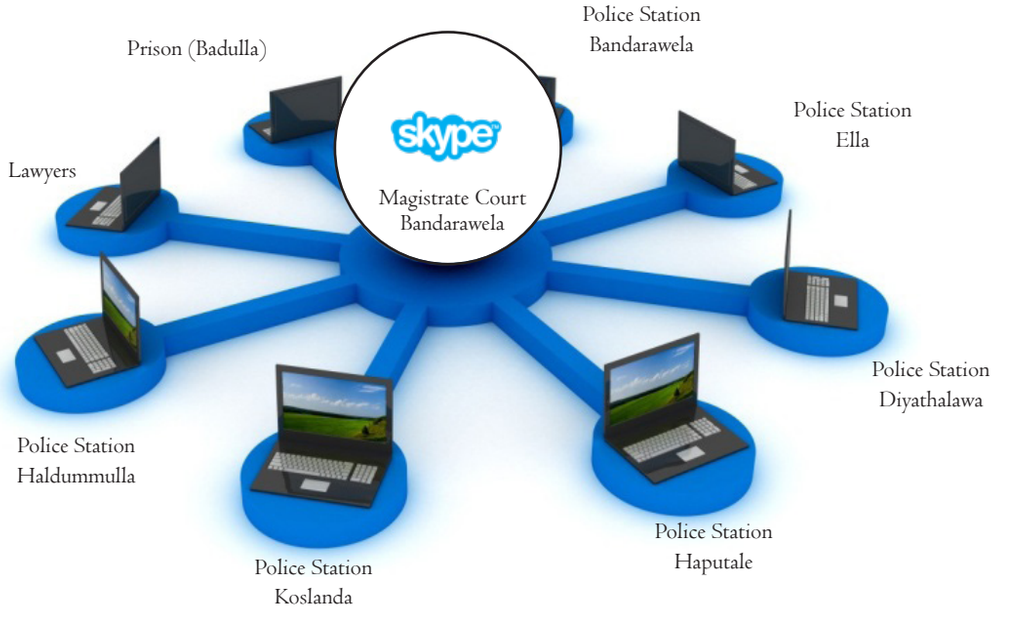
What is displayed on the laptop monitor is being projected to a fairly large tripod screen, so that those who are in the open court could have a clear view of all parties involved in the process. A speaker fixed in the open court serves the purpose of amplifying their voices. This method helps those in the open court to listen to and clearly understand the court proceedings. With this arrangement, unnecessary congestion inside the court house is effectively controlled.

Virtual Hearing



Arrangement of Equipments

Display on Tripod Screen



Video Conferencing Network

6. Measures to Reduce Prison Overcrowding

6.1 Granting of Bail

In order to minimise the spread of Covid-19 in prisons, guidelines have been issued by the Judicial Service Commission with regard to granting of bail.[6] By Circular No.13, JSC expects from all Magistrates and Additional Magistrates to adhere strictly to Section 03 (1) of the Release of Remand Prisoners Act No.08 of 1991.[7] JSC also has reminded all Judges the importance of adhering to the guiding principles relating to granting of bail, embodied in Section 02 of the Bail Act No.30 of 1997.[8] The Circular further states that in instances where a person is languishing in remand custody or where a person is likely to be remanded due to his inability to furnish bail, despite bail having been granted by a competent court, Magistrates and High Court Judges may exercise their discretion and order that such bail be furnished within a specific time period, and until such time may consider the release of such person upon entering into a bond without sureties.[9]

6.2 Issuing Community Based Correction Orders

Community Based Correction (CBC) is an effective method to reduce prison overcrowding that contributes towards prevention of Covid-19 among both prisoners and prison staff. It gives an opportunity to place minor offenders in society for correction, instead keeping them inside prison. Such orders are issued under Section 5 (1) of the CBC Act No.46 of 1999 for the offences, for which imprisonment is not mandatory on the one hand, and on the other the penalty does not include a term of imprisonment exceeding 2 years.

When an offender is referred for rehabilitation under CBC he is exposed to various community based programmes, namely counseling, religious activities, work camps, community development projects, vocational training and skill development, conducted by the CBC branch at the Bandarawela Magistrate's Court. The Court has referred 574 offenders for such programmes during the period from 2018 to mid-2021. These programmes positively contribute towards correction of offenders on the one hand, and the control of prison overcrowding on the other, which eventually result in control of Covid-19 within prisons. Following are the benefits of CBC.

a) Reduce Prison Overcrowding

CBC provides for the correction of minor offenders convicted in cases like narcotic drug offences, excise offences, appearing in public places drunk, gambling, rioting, public nuisance, traffic offences, theft, cheating, mines and mineral offences, forest offences etc. In 2020, there were 8,961 such offenders had been referred for CBC by courts.[10]

Most of these minor offences are caused by addictions rather than by organised crimes. Such offenders are first referred for counselling. The screening of offenders is done by doctors who decide whether to treat them as outdoor patients or keep them indoor, based on case by case basis. During the period they are under medical care, their family members are exposed to a process of counselling, in order to condition the latter to make the former comfortable in the family. After treatment, steps are also taken to rehabilitate the corrected by providing them with some vocational training and being placed in employment.[11]

b) Solution for Default of Fines

Out of a total of 19,856 offenders imprisoned in 2020, a whopping figure of 14,655 falls into the category of not having the financial capacity to pay the fines imposed on them by courts.[12] This figure stands at 73.8 %. Most of these fines are as small as Rs. 1,500 or slightly high.

In 2020, there were 599 persons imprisoned for default of maintenance payments.[13] If they are kept under CBC, they get the opportunity to engage themselves in some economic activity, which perhaps might empower them financially to discharge the obligations towards their families.

c) Preventing Minor Offenders becoming Hard-Core Criminals

CBC provides an alternative sentencing to imprisonment and prevents the possibility of a minor offender from becoming a hard-core criminal while in prison. In 2020, 19,856 convicts were imprisoned for various offences.[14] Among them, there were 10,559 first time offenders[15], and that accounts to 53.2% of the total number convicted. If these persons were sent for CBC, the re-offending rate would have been reduced, because there was no chance for them to mingle with hard-core criminals.

d) Family Life and Social Interaction

Correction of minor offenders by engaging them in economic, social and spiritual development programmes, is one of the main benefits of the CBC. After correction, they are subject to an effective follow up. By this exercise, offenders are not denied of their family life or social interaction. The breadwinners among them also get the opportunity to support their families by engaging in their usual economic activities.

e) Cost factor in CBC as against Imprisonment

The cost of correcting offenders under CBC is very much less when compared to the cost of keeping them in prison. In the mean time, contribution of offenders to the national economy by way of free labour under CBC, is an additional benefit.

In the year 2020, 8,961 convicts have been referred for CBC by Courts[16]. Had they been in prison, it would have cost the state a colossal some of money, because prison has to spend, Rs.21,450/- per month on each inmate[17]. On the above rate, cost to the state in keeping 8961 heads in prison could be estimated at Rs.192 million per month (21,450 x 8,961), as against a cost incurred on all correction programmes for the whole year, stand at such a low figure of even less than 2 million (Rs. 1,852,119/-).[18]

On the other hand, 14,655 convicts have been sent to prison, simply because they failed to pay the fines imposed on them by court. Had this plethora of unfortunate men being referred for CBC, the saving to the state would have been an enormous sum of Rs.314 million (21,450 x14,655) per month, which is several times larger, compared to all fines put together.

Conclusion

Strict adherence to Covid-19 guidelines contribute towards preventing spread of the pandemic in court houses. Covering the contact points inside the court house blocks the transmission of respiratory droplets and aerosols that contain the virus. Taking steps to reduce congestion, facilitating ventilation and disinfecting premises, are found to be effective measures in the control of the disease. The virtual hearing of cases through video conferencing technology minimises congestion and the risks of transmission of the virus within court houses. Community Based Correction contributes towards reducing prison overcrowding, thus preventing the spread of the pandemic in prisons.

At present, the incidence of Covid-19 reported within the jurisdiction of the Bandaraawela Magistrate's Court is rather high. In a population of 254,413, a number as large as 4,354 positive cases have been reported as at 16th September, out of which 142 deaths have been confirmed[19] which is 3.26 % compared to the average country death rate of 2.36 % . This shows a very high mortality rate.

In this appalling backdrop, the situation has been effectively managed at the Bandarwela Magistrate's Court. Amongst the court staff, the bar, government officers including Police and Prison, litigants, remandees and the members of the public attending court, not a single person contracted Covid-19 from and within the court premises.

This success could be attributed to the stringent adherence to the guidelines stipulated in Judicial Service Commission Circulars, JSC/SEC/COR 1-17, Health Guidelines of the Director General of Health Services and the Ministry of Public Services. With the implementation of these measures, unqualified success could be achieved by any court in the field of prevention of Covid-19.

Endnotes

1. World Health Organisation, Covid-19 Dashboard: Global Situation <https://covid19.who.int> Accessed 16 September 2021.
2. Health Promotion Bureau, Ministry of Health, Covid-19 Situation Report < https://www.hpb.health.gov.lk/en> Accessed 16 September 2021.
3. Epidemiological Unit, Ministry of Health, Covid-19 Epidemiological Report-Sri Lanka <http://www.epid.gov.lk/web/> Accessed 16 September 2021.
4. JSC Circulars issued for Covid-19 Pandemic, JSC/SEC/COR 1-17.
5. World Health Organisation, Coronavirus Disease (COVID-19): How is it transmitted?, <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted> Accessed 16 September 2021.
6. JSC Circulars No. JSC/SEC/COR 2- 13, Circular No. 442 and ; Circular Letter No. JSC/SEC/CIR/2020 dated 30.11.2020
7. JSC Circular No. COR 13, Guideline I
8. ibid, Guideline II
9. ibid, Guideline III
10. Department of Community Based Corrections, Annual Performance Report 2020, p 7.
11. ibid Annual Performance Report 2019, p 6.
12. Department of Prisons, Prison Statistics of Sri Lanka 2021 (Prisons 2021) vol 40, p 77.
13. ibid p 39
14. ibid p 10.
15. ibid p 45
16. CBC, Annual Performance Report 2020, p 7.
17. Prison Statistics, page 82
18. CBC Annual Performance Report 2020, p 8 and 9
19. Medical Officer of Health (MOH) Offices, Bandarawela, Ella, Haputhale and Haldummulla, Covid-19 Situation Report as at 16 September 2021.

JSALR 2021 /II//I

B.R. Chandrasena,

Defendant- Appellant.

Vs

A. M. Lokubanda (Deceased)

Plaintiff – Respondent.

Maradedde Gedara Ratnayake Mudiyanselage Bandara Menike,

Substituted Plaintiff – Respondent.

Case No : SC - Appeal No. 20/2010
SC/HCCA/LA No. 321/09

Before : **Jayantha Jayasuriya, PC, CJ.**
P. Padman Surasena, J.
E. A. G. R. Amarasekara, J.

Rei-vindicatio on a permit under Section 19(2) of the Land Development Ordinance - Is prayer for ejectment only a consequential relief to the declaratory relief? - Definition of permit holder under Section 2 of the LDO - Scope of _rei -vindicatio_ action and the possessory action and actions filed under Sections 5, 35, and 217 of the Civil Procedure Code - Cause of Action under Section 5 of the Civil Procedure Code neither _rei-vindicatio_ nor declaration of title to dispossess a wrongdoer.

Decided On : 18.12.2020.

Held: _Per_ E. A. G. R. Amarasekera, J.

The paragraph 2 of the plaint aforesaid reads as follows;

''නඩුවට විෂය වී ඇති පහත උපලේඛනයේ සවිස්තරව දක්වා ඇති ඉඩම සඳහා වර්ෂ 1974. 10. 16 පොළොන්නරුවේ දිසාපතිතුමා අංක 7 දරණ බී පත්‍රය පැමිණිලිකරුට ප්‍රධානය කොට ඇති අතර මෙම ඉඩමේ හිමිකරු පැමිණිලිකරු වේ.''

The Plaintiff's prayer for relief in his plaint reads as follows;

''1. පහත උප ලේඛනයේ සවිස්තරව දක්වා ඇති ඉඩමේ හිමිකරු තමා ලෙස හිමිකරුගේ ප්‍රකාශයක් ද,

2. විත්තිකරුත්, ඔහුගේ නියෝජිතයන්, සේවකයන්, නෙරපා හැර භුක්තිය ලබා ගැනීමට නියෝගයක් ද,

3. කන්නයකට රුපියල් 5000/- බැගින් වර්ෂ 1980 සිට අය කර ගැනීම නියෝගයක් ද,

4. නඩු ගාස්තු ලෙස අදාල අනුයුක්ත සහන දීමනා ද වේ.''

The Sinhala word "හිමිකම" found in the prayer is generally used to connote title to a thing or property but on certain occasions it is used to connote 'entitlement' or 'right' one has over a thing or property. For example, if one says "මට බදුකරු ලෙස ඉඩමෙහි සිටීමට හිමිකමක් ඇත", it does not indicate that he has the title to the land but he has a right or is entitled to remain in the land as the lessee. **The prayer in the Plaint has to be understood in accordance with what he has pleaded in the body of the Plaint.** It is clear from what the Plaintiff has pleaded in the body of the plaint, that he filed this case to get his entitlement or right to the land in the schedule to the plaint asserted and enforced based on a permit that was issued to him on 16.10.1974.

Rei vindicatio action is generally an action based on the title or ownership to a property in issue. It is said that from the right of ownership springs the vindication of a thing, that is to say, an action in rem by which we sue for a thing which is ours but in the

possession of another- vide Voet 6.1.2.1 In **Pathirana Vs Jayasundara (1955)** 58 NLR 169, at 172, Gratiaen J quoted Maasdorp to state that the Plaintiff's ownership of the thing is the very essence of the *rei vindicatio*. It was held in ***Luwis Singho and others Vs Ponnamperuma (1996) 2 SLR 320*** in a *rei vindicatio* action the cause of action is based on the sole ground of violation of right of ownership. Accordingly, if the title holder is deprived of the possession of the property, he can file a *rei vindicatio* action to get the trespasser or one who has the possession of the property without his consent evicted. However, as per section 2 of the Land Development Ordinance (hereinafter sometimes referred to as the Ordinance) permit holder is considered as the owner only when he has paid all the sums which he is required to pay under subsection (2) of section 19 and has complied with all the other conditions specified in the permit. It appears that prior to the amendment made in 1981 by Act No. 27 of 1981 it was only the grantee, who got title under a grant, was considered as the owner. One may argue until the permit holder fulfills such conditions he cannot be considered as the owner or title holder and as such he cannot file a *rei vindicatio* action. In ***Palisena Vs Perera 56NLR 407*** it was held as follows;

> *"It is very clear from the language of the ordinance and of the particular permit P1 issued to the Plaintiff that a permit holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in Civil Procedure"(emphasis by underlining is mine).*

Hence in my view **Palisena Vs Perera** is not a decision that identifies that any permit holder under the said Ordinance is eligible to file a *rei vindicatio* action.

Once the issues are raised the pleadings recede to the background {**Haniffi Vs Nallamma (1998)** 1 Sri LR 73, **Dharmasiri Vs Wikrematuanga (2002)** 2 Sri LR 218}.

Thus, in my view, the trial commenced and proceeded on to find whether the Plaintiff has the right or entitlement to hold the property on the strength of the permit he relies on or whether it is the Defendant who has the right or entitlement to hold the property on the strength of a permit his predecessor appears to have been given

Attanayake Vs Aladin (1997) 3 Sri LR 386 was a case filed for recovery of possession of a certain paddy field, on the basis of it being granted on a yearly permit to the Plaintiff of the said case. The Court of appeal correctly identified that it did not fall within the scope of a possessory action but stating that our law conceives only two types of remedies that a dispossessed individual could seek, namely *rei vindicatio* action and possessory action, identified the said case as a *rei vindicatio* action and further relying on **Palisena Vs Perera (supra)** dismissal of the Plaintiff's action by the District Court was confirmed on the ground that there was no declaratory relief prayed as to the title and prayer for ejectment is only a consequential relief to the declaratory relief.

Hence, in the aforesaid case declaratory relief was considered as a must in a *rei vindicato* action. Further a case filed even on the basis of an annual permit was identified as a *rei vindicatio* action. However, as mentioned before, *rei vindicatio* action is based on the title or ownership (dominion) to the property and violation of rights of ownership. The interpretation given to the term 'owner' in terms of section 2 of the Land Development Ordinance as well as limitations on disposition imposed by the said Act, make it difficult to recognize a permit holder who does not fall within the section 2 of the Land Development Ordinance as an owner of the land given on a permit.

Since *rei vindicatio* is based on ownership and violation of rights of ownership, strict proof of title is needed in a proper *rei vindicatio* action.

Even though, **Attanayake Vs Aladin (supra)** held that our common Law recognizes two actions, namely *rei vindicatio* and possessory action as remedies that can be sought by an individual who is dispossessed, our law has developed and recognized a valid cause of action on certain occasions to a dispossessed individual when strict proof of title or ownership is not necessary to evict a person who is in unlawful possession. [For ex: Strict proof is not necessary if a

lessor files an action to evict the lessee (as per section 116 of the Evidence Ordinance) or the landlord files an action on a contractual relationship (landlord-tenant).]

Thus, our law has now recognized certain actions that may not fall within the ambit of *rei vindicatio* or possessory action where a dispossessed individual can file for the eviction of the wrongdoer. Similarly, in my view if one gets his right to possession by a statutorily proclaimed process, and when that right is violated by someone who enjoys and possess the property, and even if it does not fall within the scope of *rei vindicatio* action proper or possessory action, sections 5, 35, and 217 of the Civil Procedure Code are sufficient enough to recognize such violation as a cause of action, to recognize it as an action for recovery of property and to provide the remedy either by declaring the entitlement of the permit holder or commanding the person in possession to yield up the possession of the immovable property or both the said reliefs.

However, the statement of law made in the said **Attanayake Vs Aladin (supra),** that when a declaratory remedy is not sought for the consequential relief for ejectment shall fail, does not seem to present the correct position of Law. It has not considered the decision of the same court made in **T. B. Jayasinghe Vs Kiriwanegedara Tikiri Banda (1988)** II CALR 24 in coming to the said conclusion which clearly held where title to the property is proved, mere failure to ask for a declaration of title to the property will not prevent one from claiming relief of ejectment. **Even Dharmasiri Vs Wickramatunga (2002)** 2 Sri LR 218 has held that the absence in the prayer for a declaration of title cause no prejudice, if in the body of the plaint, the title is pleaded and issues were framed and accepted by court on the title so pleaded. Thus, it is clear even in a rei vindicatio or a declaration of title action, if the issues are raised as to the title and it is proved, even though there is no prayer for declaration of title, the prayer for ejectment can remain as a standalone valid relief. What is necessary is title (in relation to a *rei vindicatio* or declaration of title action) or entitlement (in relation to other matters praying for eviction) to be proved in relation to the property in issue by strict proof or otherwise as the case may be.

Each relief given as decrees under section 217 of the Civil Procedure Code can standalone as a separate relief. This does not change the legal position that in a *rei vindicatio* action or a declaration of title action, if the title is not proved and/or declaratory relief as to the title is failed, no relief for ejectment can be given, since those actions are based on the title of the Plaintiff.

But in an action filed by a permit holder under the Land Development Ordinance, who cannot be considered as an owner under section 2, it is my view that even if he fails in proving his ownership to the land or getting the declaratory relief to declare him as the owner or title holder, he is still eligible to eject the trespasser, if he can prove that he is the permit holder, since he has the right to possess due to the permit given through statutorily proclaimed process. It must be noted that a permit holder is not merely a licensee whose right to possess can be terminated by giving a notice. There is statutorily proclaimed procedure to cancel a permit. Till such process is taken place the permit holder is the one who has the right to enjoy and possess the property; It is a right given through a process asserted by statutory law but not as a right gained through in its real sense as an attribute of ownership which under common law acquires by *occupatio* (seizure-mainly in relation to movable property), accession, prescription, delivery and transfer *(Traditio)* etc.

In certain occasions of these modes of acquisition of property, such as prescription, one may commence the possession prior to the acquisition of the ownership to the property. However, one's right to claim possession as the owner begins with the acquisition of ownership to the property. Thus, right to possession as owner follows the acquisition of ownership. A permit may be given under the Land Development Ordinance anticipating a grant to be given in the future but right to possess starts as the permit holder; As such right to possession precedes the acquisition of the property as the owner.

Hence, in my view, it is not proper to identify an action filed by a permit holder, who is not considered as an owner as per the interpretation given in section 2 of the said ordinance, to claim the property on the strength of a permit given under the Land Development Ordinance, as a proper *rei vindicatio* action. It is an action based on his right to possess on the strength of the permit given and the cause of action caused by the violation of that right.

Anyhow, it is my considered view whether this action is termed as a *rei vindicatio* action or not

the Plaintiff is entitled to file the action in the manner pleaded in the plaint for the reasons given below;

1. In term of Section 5 of the Civil Procedure Code (hereinafter sometimes referred to as CPC or the Code) an action means a proceeding for the prevention or redress of a wrong. Such an action is constituted when an application to court is made for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise invite its interference -vide Section 6 of the said code. Further a cause of action means the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury – vide Section 5 of the said code. In ***Lowe Vs Fernando*** **16 NLR 398** it was held,

   '…….the expression "cause of action" generally imparts two things, viz., a right in the Plaintiff and a violation of it by the Defendant, and "cause of action means the whole cause of action, i.e., all the facts which together constitute the Plaintiff's right to maintain the action" (Dicey's Parties to an Action Ch, XI., section. A), or, as it has been otherwise put, "the media upon which the Plaintiff asks the Court to arrive at a conclusion in his favour" (Lord Watson's Judgment in Chand Kaur v. Pratab Singh)'.

2. In the case at hand, the Plaintiff prayed for a redress of a wrong caused by the possession of the defendant of the land which he indicates that he is entitled to possess and enjoy on the strength of a permit issued to him in 1974. Accordingly, he has shown a cause of action.

3. In terms of section 188 of Civil Procedure Code, after the judgment the court has to enter a decree specifying the relief granted or other determinations of the action, and in terms of Section 217 (c) and (g) respectively, such a decree among other things may include order of court commanding to yield up possession of immovable property as well as a declaration of a right or status. Thus, he has prayed for an obtainable relief from the Court.

4. Hence, it is clear the Plaintiff had complained to court of a cause of action and asked for relief that can be obtainable through courts since he has prayed for a declaration as one who has the "හිමිකම" (as said before which can be interpreted as title or an entitlement as the case may be) and to put him in possession by ejecting the defendant and his agents. Even if one gives the strict interpretation to the term "හිමිකම" limiting its meaning to title or ownership to the land, the court is not barred in giving the relief praying for ejectment when the permit of the Plaintiff is proved unless the Defendant proves a better entitlement to the land. **It is true a court cannot grant relief which is not prayed for, but a court is not barred from granting a lesser relief encompassed in the main relief prayed for.** If the Plaintiff is able to prove he has a valid permit, he has the right to possess and enjoy. If he is deprived of that right by the Defendant, he has a cause of action against the Defendant unless the Defendant has a better entitlement. Therefore, what is important in this case is to decide whether the Plaintiff had a valid permit at the time of instituting the action, during the action and at the time of the Judgment.

The appeal is dismissed with costs.

JSALR 2021/II/II

Thiththalapitige Ruban Perera, (Deceased)
Thiththalapitige Vipula Namal Priyadharshana Perera,
3rd Defendant-Respondent-Appellant

Vs

1. **Thiththalapitige Tilakaratne,**
   Rukgahawila, Walpola.
   (Plaintiff-Appellant-Respondent)
2. **Thiththalapitige Wilbert Perera,**
   Rukgahawila, Walpola.

2nd Defendant-Respondent-Respondent

SC Appeal No: SC/Appeal/125/2016
SC LA No : SC/HC/CALA/290/2015
Before : **Sisira J. De Abrew, J.**
S. Thurairaja, P.C., J.
Mahinda Samayawardhena, J.
Decided on : 21.05.2021

Partition Law- identification of the corpus and consequent ipso facto failure of action - the necessity of producing comprehensive pedigree - a preliminary plan under Section 16 and evidentiary value of preliminary plan under Section 18(2) - application to partition a larger land under Section 19(2) of the partition law - the burden of proof of pedigree - prescription against co-owners

Held: *per* **Mahinda Samayawardhena, J.**

The 3rd Defendant only contested the plaintiff's action.

After trial, the learned District Judge dismissed the Plaintiff's action, without answering the issues on the basis that the land sought to be partitioned had not been properly identified. In addition, the learned District Judge also briefly stated that the Plaintiff had failed to present a comprehensive pedigree.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court and entered Judgment as prayed for by the Plaintiff. It is from this Judgment of the High Court that the 3rd Defendant preferred this appeal with this Court granting leave to appeal predominantly on three questions of law:

a. Whether the corpus has been properly identified?
b. Whether the Plaintiff proved his pedigree?, and
c. Whether the Court considered the 3rd Defendant's paper title and prescriptive title?

It is the contention of the 3rd Defendant that notwithstanding the land to be partitioned as described in the schedule to the plaint is about three acres, the Preliminary Plan depicts only a land in extent of 1acre, 3roods and 3.46 perches and therefore the Plaintiff's action shall fail as the corpus has not been properly identified.

In a partition action, if the corpus cannot be identified, *ipso facto*, the action shall fail. There is no necessity to investigate title until the corpus is properly identified. The decision that the corpus has not been properly identified decides the fate of the action without further ado. This underscores the great care with which this decision shall be taken by Court. It shall not be used as a convenient method to summarily dispose of long-drawn-out and complicated partition actions without embarking on the arduous task of investigating the title of each party.

The decision of the learned District Judge in the instant case that the corpus has not been identified is erroneous

It is significant to note that the two deeds marked 3V1 of 1930 and 3V2 of 1976 by the 3rd Defendant, also the land is described in the same manner as it is described in the schedule to the Plaint.

Simply put, the land described in the schedule to the plaint is a reproduction of the land described in the title deeds of both the Plaintiff and the 3rd Defendant.

A commission to prepare the Preliminary Plan was issued to the Surveyor in terms of section 16 of the Partition Law, No. 21 of 1977, as amended. The Surveyor sent the Preliminary Plan and Report to Court in accordance with section 18. [As per the Preliminary Plan, the extent of the surveyed land is 1 Acre, 3 Roods and 3.46 Perches]

The Surveyor states in his Report that the Plaintiff and the 2nd and 3rd Defendants were present at the

time of the survey and all three of them showed him the land to be surveyed. At the time of the survey, the 3rd Defendant had not told the surveyor that a larger land was to be surveyed. The 3rd Defendant does not dispute the content of this Report.

Section 16(2) of the Partition Law reads as follows:

The commission issued to a surveyor under subsection (1) of this section shall be substantially in the form set out in the Second Schedule to this Law and shall have attached thereto a copy of the plaint certified as a true copy by the registered attorney for the Plaintiff. The court may, on such terms as to costs of survey or otherwise, issue a commission at the instance of any party to the action, authorizing the surveyor to survey any larger or smaller land than that pointed out by the Plaintiff where such party claims that such survey is necessary for the adjudication of the action.

The Surveyor in his Report answers the question "Whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint" in the affirmative.

[After the Court received the Preliminary Plan and Report, the 3rd Defendant filed a statement of claim. Thereafter, on the second date of trial, Plaintiff gave evidence. The 3rd Defendant, fully represented by counsel, did not contest Plaintiff's evidence; and the Court fixed the case for Judgment. As per Journal Entry No. 18, on the date of the Judgment, the 3rd Defendant (after apparently retaining another Counsel) made an application to refix the case for trial and sought permission for a commission to be issued to prepare an alternative plan. The Court allowed this application as there was no objection from the other parties. However, no steps were taken by the 3rd Defendant to issue a commission for an alternative plan. Thereafter, the 3rd Defendant informed Court on the commission returnable date that he did not require an alternative plan but only wanted to amend the statement of claim. This was allowed, and the amended statement of claim was subsequently tendered. In this amended statement of claim, the 3rd Defendant stresses that Plaintiff cannot maintain the action as the entire land to be partitioned is not depicted in the Preliminary Plan. But the 3rd Defendant does not specify the portion of land not surveyed or even the approximate extent of that portion].

Held:

The conduct of the 3rd Defendant was contrary to section 19(2) of the Partition Law, which lays down the procedure to be followed by a Defendant who seeks to have a larger land partitioned. Section 19(2) reads as follows:

19(2)(a) Where a Defendant seeks to have a larger land than that sought to be partitioned by the Plaintiff made the subject-matter of the action in order to obtain a decree for the partition or, sale of such larger land under the provisions of this Law, his statement of claim shall include a statement of the particulars required by section 4 in respect of such larger land; and he shall comply with the requirements of section 5, as if his statement of claim were a plaint under this Law in respect of such larger land.

(b) Where any defendant seeks to have a larger land made the subject-matter of the action as provided in paragraph (a) of this subsection, the court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a lis pendens affecting such larger land shall be filed in court, and the estimated costs of survey of such larger land as determined by court shall be deposited in court.

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(g) Where the requirements of section 12 as hereinbefore modified are complied with, the court shall order summonses and notices of action as provided in paragraph (e) of this subsection to issue and shall also order the issue of a commission for the survey of the larger land, and the provisions of sections 16, 17 and 18 shall accordingly apply in relation to such survey.

The 3rd Defendant did not take any steps required by law to have a larger land than that sought to be partitioned by the Plaintiff made the subject matter of the action. If the 3rd Defendant wanted to enlarge the corpus, he ought to have taken steps to file an

amended plaint *inter alia* naming new parties as Defendants, because according to the Preliminary Plan there are several claimants to the adjoining lands on all four boundaries. All those alleged owners are third parties.

At the trial, the 3rd Defendant raised the unspecific issue whether the land described in the schedule to the plaint is not depicted in the Preliminary Plan. He did so in an attempt to dismiss the action, as he is in possession of the entire land.

Soon after raising issues, the Plaintiff gave evidence. In his evidence, he marked the Preliminary Plan and the Report stating that the former depicts the land to be partitioned. Even at that point, the 3rd Defendant did not make an application to mark them subject to proof. Section 18(2) enacts *inter alia* that the Preliminary Plan and Report can be used as evidence without further proof. However under the proviso to section 18(2), the 3rd Defendant could have called the Surveyor to give evidence. This was not done.

The 3rd Defendant states in his evidence that he has been in possession of the land depicted in the Preliminary Plan from the time he was born in 1942 and that his parents lived on the land before him. He further adds that he became entitled to the land by paternal inheritance and Deeds. The Deeds he refers to are 3V1 and 3V2. This means, although 3V1 and 3V2 describe a land in extent of about 3 acres (the same land which is described in the schedule to the plaint), in point of fact, the land on the ground has continuously been as depicted in the Preliminary Plan.

The Surveyor went to the land to prepare the Preliminary Plan in the year 1998, i.e. 68 years after the execution of the 3rd Defendant's Deed 3V1 of 1930. In 3V1, there is mention of another Deed executed in 1922. This means the Surveyor went to the land 76 years after the execution of the earliest known Deed. One cannot expect the boundaries of land in Gampaha to remain unchanged for 76 years.

The Nittambuwa-Urapola high road shown in the Preliminary Plan running along the northern boundary and the canal running along the southern boundary are of recent origin and did not exist in the 1920s.

It is relevant to note that in the old Deeds tendered by both parties, the boundaries are described by the names of the owners of the adjoining lands at that time. In the Preliminary Plan, the Surveyor records the existing boundaries. In doing so, he gives the names of the present owners. The Plaintiff in his evidence has also stated so.

Without analysing the evidence from the proper perspective, the learned District Judge made a superficial comparison of the boundaries and extent of the land described in the schedule to the plaint which is based on old Deeds with the existing boundaries and extent of the land as depicted in the Preliminary Plan to conveniently conclude that the land has not been properly identified. On this basis, without examining the evidence on the pedigrees of the parties and without answering the issues raised at the trial, the action was summarily dismissed. This is erroneous.

The land to be partitioned has been properly identified. I answer the questions of law on the identification of the corpus against the 3rd Defendant.

Let me now turn to the questions of law whereby the 3rd Defendant states that the Plaintiff failed to prove his title according to law, and that the Court failed to properly consider the 3rd Defendant's paper title and prescriptive title.

According to the evidence of the 3rd Defendant, he claims title to the land on paternal inheritance, deeds, and prescription.

To prove paternal inheritance, the 3rd Defendant produces Deed No. 10216 marked 3V1. This Deed is referred to in paragraph 3 of the plaint. By virtue of this Deed, the 3rd Defendant's father Thiththalapitige Luwis Perera got an undivided 1/24 share of the land and upon his death, the 3rd Defendant, who is one of his three children (the other two being the 1st and 2nd Defendants), inherited an undivided 1/72 share.

The only other Deed the 3rd Defendant relies on to prove title is Deed No. 56 marked 3V2. This Deed is referred to in paragraph 8 of the plaint. By this Deed, a person by the name of Sibel Nona transferred an undivided (1/2 x 1/3) 12/72 share of the land to the 3rd Defendant.

The Plaintiff does not dispute Deeds 3V1 and 3V2. The 3rd Defendant is entitled to those undivided rights which amount in total to a 13/72 share of the land. The High Court has allotted this share to the 3rd Defendant.

There can be no dispute that the 3rd Defendant is a co-owner of the land. There is no evidence to say the 3rd Defendant acquired prescriptive title to the entire land against all the co-owners. There shall be cogent evidence to successfully claim prescriptive title against co-owners. Mere continuous long possession of the entire common property by one co-owner does not constitute prescriptive possession against all the co-owners. It is clear that the plea of prescriptive title by the 3rd Defendant was only an afterthought. Such a plea was not vigorously pursued at the trial or before this Court.

At the argument before this Court, learned Counsel for the 3rd Defendant submitted that although the Plaintiff states in paragraph 2 of the Plaint that by Deed Nos. 1403 and 1433 marked P2 and P3 respectively, Luwis Perera transferred an undivided 3/24 share to the Plaintiff, the transferor is not Luwis Perera, but some others. These others are not strangers. The transferors of P2 and P3 are the 1st to 3rd Defendants who are the children of Luwis Perera. They transferred the said share by right of paternal inheritance. This is stated in the Deeds.

P2 and P3 as well as other Deeds marked by the Plaintiff were not marked subject to proof. A partition case is not a criminal case to secure a dismissal by creating doubts of the Plaintiff's pedigree in the mind of the District Judge. The Plaintiff need not prove his pedigree beyond reasonable doubt but on a balance of probabilities. P2 and P3 are not fraudulent Deeds.

It is true that in a partition action the Plaintiff shall unfold the full pedigree. However, this does not mean that he shall unfold a perfect pedigree starting from the very first deed ever executed on the land. It is not possible to trace the very first deed or the very first original owner of the land. We must stop tracing back at a convenient point. What constitutes this convenient point shall be decided on a case by case basis and not by way of a rigid formula. This point was lucidly explained in the Court of Appeal case of Magilin Perera v. Abraham Perera [1986] 2 Sri LR 208 at 210-211 by Gunawardene, J. with the agreement of G.P.S. De Silva, J. (later C.J.) in the following manner:

When a partition action is instituted the Plaintiff must perforce indicate an original owner or owners of the land. A Plaintiff having to commence at some point, such owner or owners need not necessarily be the very first owner or owners and even if it be so claimed such claim need not necessarily and in every instance be correct because when such an original owner is shown it could theoretically and actually be possible to go back to still an earlier owner. Such questions being rooted in antiquity it would be correct to say as a general statement that it could be well-nigh impossible to trace back the very first owner of the land. The fact that there was or may have been an original owner or owners in the same chain of title, prior to the one shown by the Plaintiff if it be so established need not necessarily result in the case of the Plaintiff failing. In like manner if it be seen that the original owner is in point of fact someone lower down in the chain of title than the one shown by the Plaintiff that again by itself need not ordinarily defeat the plaintiff's action. Therefore, in actual practice it is the usual, and in my view sensible, attitude of the Courts that it would not be reasonable to expect proof within very high degrees of probability on questions such as those relating to the original ownership of land. Courts by and large countenance infirmities in this regard, if infirmities they be, in an approach which is realistic rather than legalistic, as to do otherwise would be to put the relief given by partition decrees outside the reach of very many persons seeking to end their co-ownership.

The Plaintiff has proved his title on the balance of probabilities. The 3rd Defendant's claim on inheritance and Deeds has been accepted while his claim on prescription has been rightly rejected. The questions of law raised on these points are answered against the 3rd Defendant.

The Judgment of the High Court is affirmed and the appeal of the 3rd Defendant is dismissed with costs.

Legal NEWS

[Cardinal Gorge Pell is a famous Australian cardinal of the Catholic Church. He was appointed as the first prefect of the Secretariat for the Economy by Pope Francis in 2014. He was charged for child sexual abuse, and the media gave the case much publicity as he was a famous finger. We would like to report the news and the decisions of the Australian courts for the benefit of the members. Like Sri Lanka, the Australian court system having originated in the Adversarial nature of the English Common Law System.]

Cardinal George Pell: Australian media fined A$1.1 million over trial reports

A dozen of Australia's largest media organisations have been fined more than $1m for contempt of court over their coverage of Cardinal George Pell's child sexual abuse conviction.

Victorian Supreme Court Judge John Dixon ruled the media groups had breached the ban and mentioned that "usurped the function of the court in the protection of the proper administration of justice".

The outlets admitted to breaching a legal order in 2018, which banned them from reporting the verdict at the time.

Judge Dixon rejected the media companies' submission that the breaches of the suppression order were due to "an honest but mistaken belief that their reporting would not contravene the order".

The media, Judge Dixon found, "took it upon themselves" to decide "where the balance ought to lie" between Pell's right to a fair trial and the public's right to know.

Some of Australia's most prominent media groups are among those fined. The reporting ban - enforced through a legal order - was brought in at Cardinal Pell's 2018 trial.

Under the suppression order, the court banned journalists from reporting any detail of the sexual abuse case, including his conviction, when a jury ruled it in December 2018. It was to prevent the possibility of prejudice affecting a separate trial he was to face on other charges.

The court later lifted the suppression order in February 2019. But several outlets published reports referring to his case shortly after his conviction. Much of that coverage in December 2018 criticised the secrecy of the case without naming Cardinal Pell specifically.

Newspaper headlines included: "Nation's biggest story: The story we can't report"; and "Secret scandal. It's Australia's biggest story. A high-profile person found guilty of a terrible crime. The world is reading about it, but we can't tell you a word."

The High Court of Australia, the apex court in the country, later overturned the guilty verdict against Cardinal Pell on appeal.

Judge Dixon also said editorial attacks on the suppression order "constituted a blatant and willful defiance of the court's authority".

"[They] took it upon themselves to determine where the balance ought to lie between Pell's right to a fair second trial... and the public's right to know," read a summary of the court judgement.

[Courtesy 'BBC' and 'The Guardian'.]

[for more information browse at https://www.bbc.com/news/world-australia-57353654 and https://www.theguardian.com/australia-news/2021/jun/04/cardinal-george-pell-news-organisations-contempt-court-fined-more-than-1m-over-reporting-of-sexual-abuse-verdict]

What happened in Cardinal Pell's Case?

Cardinal Gorge Pell was charged with one charge of sexual penetration of a child under 16 years and four charges of committing an act of indecency with or in the presence of a child under the age of 16 years.

The jury at the first trial was unable to agree on its verdicts, resulting in a hung jury.

In the second trial at the Victorian County Court, a jury unanimously found Pell guilty of all five charges in 2018. The jury believed the complainant and rejected Pell's defence. Chief Judge Kidd sentenced Pell to 6 years in prison.

Pell appealed to the Court of Appeal, Victoria, against the decision on the grounds that the verdicts were unreasonable and could not be supported by the evidence. The majority judgement (2:1) concluded that the jury had not been compelled to entertain a doubt as to Pell's guilt. Therefore, the original verdict of guilty was upheld. (George Pell Vs The Queen [2019] VSCA 186)

Pell sought leave to appeal to the High Court of Australia, the apex court of the country. A full bench of the High Court of Australia (7 Justices) unanimously allowed the appeal and quashed Pell's convictions, and entered a judgement of acquittal. [(Pell Vs The Queen [2020] HCA 12.). The Judgement is available at http://eresources.hcourt.gov.au/showCase/2020/HCA/12]

Evidence and the reasons for the Judgement of acquittal

The victims of the alleged offending were two Cathedral choirboys, "A" and "B", at St Patrick's Cathedral, East Melbourne. "A" made his first complaint about the alleged assaults in June 2015. By the time "A" made his complaint, "B" had died in accidental circumstances. As a result, Complainant B never gave a statement or provided any evidence to the police regarding the alleged crimes.

At trial

As per the testimony of the complainant 'A', two incidents of sexual assault took place. The first was, following a Sunday solemn Mass, he and B had broken away from the procession at a point, and they made their way down the corridor to the priests' sacristy, where they found a bottle of red altar wine. When they had barely taken a couple of swigs from the bottle, the applicant (Cardinal Pell) appeared in the doorway, standing alone in his robes. He challenged them, saying, "what are you doing in here?" or "you're in trouble", and he subsequently sexually assaulted A and B by doing several acts of indecency.

At least a month after the first incident, again following Sunday solemn Mass at the Cathedral, "A" was processing with the choir back along the sacristy corridor, the applicant appeared and pushed "A" against the wall and sexually assaulted him again. A did not say anything, nor did he tell B about this second incident.

Pell did not give evidence in the trial; however, a video recorded interview with the police was used in evidence where Pell emphatically denied the allegations. In the video recorded interview, the applicant said that he and his master of ceremonies were at the front of the Cathedral after Mass "as I always did" and that the sacristan and his assistant would have been in the sacristy cleaning up and bringing out the vessels and other items from the Mass.

Opportunity Evidence

The prosecution case against Cardinal Pell relied upon almost entirely on complainant A's evidence. The other evidence led by the prosecution largely concerned clergy and choir practices at St Patrick's Cathedral at the relevant time. This other evidence came to be referred to as the "opportunity evidence".

The prosecution proposed to call 23 witnesses involved in the conduct of Mass at the Cathedral at the time of the alleged offences.The prosecution was granted leave under section 192A of the Evidence

Act 2008 (Vic) to cross-examine a number of their witnesses on topics such as whether the applicant was always in the company of another when he was robed and whether the applicant always greeted congregants on the steps of the Cathedral following Sunday Mass.

[As per section 192A, where a question arises in any proceedings, being a question about the admissibility or use of evidence proposed to be adduced, the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.]

The critical issue at trial, and subsequently on the appeal was whether the opportunity evidence created a reasonable doubt that the offending alleged by complainant "A" could have occurred.

High Court of Australia observed;

"the function of the court of criminal appeal in determining if a verdict of the jury is unreasonable or cannot be supported having regard to the evidence is to…examine the record to see whether, either by reasons of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence – the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt". [at para 39 of the Judgement]

The High Court stated that the honesty of the opportunity witnesses were not in question, and Pell's master of ceremonies evidence was unchallenged. [at para 101 of the Judgement.]

The High Court analysed the appeal based on the cardinal criminal law principles such as ***the presumption of innocence*** and ***Reasonable doubt*** to evaluate whether Pell's conviction was admissible?

1. <u>The presumption of innocence</u>

   The presumption of innocence is the principle that a person is considered to be innocent and not guilty until the prosecution proves guilt beyond a reasonable doubt. In a criminal case, the prosecution is required to prove the case beyond all reasonable doubt, and if there is any evidence that would raise doubt, then the accused cannot be convicted. The prosecution is not required to prove the guilt of the accused "beyond any possible doubt" but beyond a reasonable doubt.

The High Court noted that instead of requiring the prosecution to eliminate all reasonable doubt, the Court of Appeal required Pell to prove the offending was impossible.

As the High Court said, *"The majority in the Court of Appeal's judgement proceeded by asking in relation to each piece of evidence that was inconsistent with A's account, whether it was nonetheless realistically possible that that account was true".* [at para 41of the Judgement.]

Therefore, the High Court held that the Court of Appeal majority erred because the burden of proof is onthe prosecution to, as dissenting Judge Weinberg noted, "exclude the reasonable possibility that the applicant did not commit the offences". [at para 42 of the Judgement]

The High Court found that even though the Court of Appeal consistently stated that the prosecution had the burden of proof, their method of reasoning and the process they adopted to arrive at their decision did, in fact, reverse the burden of proof.

2. <u>Reasonable doubt</u>

The High Court noted that to accept A's account of the first incident would also require acceptance of a number of compounding improbabilities arising at the same point. These being:

(i) *"contrary to the applicants' practice, he did not stand on the steps of the Cathedral greeting congregants for ten minutes or longer;*

(ii) *contrary to long-standing church practice, the applicant returned unaccompanied to the priests' sacristy in his ceremonial vestments;*

(iii) *from the time A and B reentered the Cathedral to the conclusion of the assault, an interval of some five to six minutes, no other person entered the priests' sacristy."* [at para 57 of the Judgement.]

The High Court observed that *"The Court of Appeal majority took into account the evidence*

of four witnesses in concluding not only that it was possible that the applicant was alone and robed in contravention of centuries-old church law, but that the evidence of witnesses to the contrary did not raise a reasonable doubt as to the applicant's guilt" [at Para 94 of the Judgement.]

The Court of Appeal assessed A's evidence as thoroughly credible and reliable. The High Court did not dispute this finding; its observation was as follows;

"It remains that the evidence of witnesses, whose honesty was not in question, (i) placed the applicant on the steps of the Cathedral for at least ten minutes after Mass on 15 and 22 December 1996; (ii) placed him in the company of Portelli (The applicant's master of ceremonies) *when he returned to the priests' sacristy to remove his vestments; and (iii) described continuous traffic into and out of the priests' sacristy for ten to 15 minutes after the altar servers completed their bows to the crucifix."* [at para 118 of the Judgement.]

The High Court concluded for the first incident that when you consider the compounding improbabilities caused by the unchallenged evidence summaries in (i), (ii) and (iii) required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt. [at para 119 of the Judgement.]

The High Court stated that A's evidence of the second incident *"suffers from the same deficiency as the evidence of the assaults involved in the first incident"*. [at para 125 of the Judgement.]

"The unchallenged evidence of the applicant's invariable practice of greeting congregants after Sunday solemn Mass, and the unchallenged evidence of the requirement of the Catholic church practice that the applicant always be accompanied when in the Cathedral, were inconsistent with acceptance of A's evidence of the second incident." [at para 127 of the Judgement.]

The High Court further said, *"ought to have caused a jury, acting rationally, to entertain a doubt as to the applicant's guilt of the offence charged in the second incident."*

For these reasons, the High Court allowed) the appeal and quashed the appellant's convictions and entered a judgement of acquittal.

Reactions after acquittal

Pell's acquittal by the High Court divided public opinion in Australia. The supporters of Pell welcomed the judgement as it was and well-evaluated the facts and probabilities of the evidence in whole, as they believed that "the media contributing to an intense and unjustified public hatred of him and prejudicial environment in which to conduct a trial". There is a divided opinion of the judgement that "it would be regrettable if the outcome of the case made it less likely that victims of sexual abuse will report offences against them".

George Pell's successful appeal hinged on the tricky question of witnesses

Professor Mirko Bagaric

Professor Mirko Bagaric, the Dean of Law Swinburne University and Director of the Evidence-based Criminal Justice and Sentencing Project, wrote a sound analytical observation about the judgment under "*George Pell's successful appeal hinged on the tricky question of witnesses*" on the ABC's opinion blog. We reproduce few paragraphs for the benefit of our members. [The article is available at https://www.abc.net.au/news/2020-04-08/george-pell-aquitted-high-court-sexual-abuse/12130064]

The High Court, in acquitting Pell, clarified the approach that judges and jurors should take in evaluating the persuasiveness of witness testimony.

But it is important to highlight that this decision did not undermine the principle that sexual offenders can be convicted solely on the basis of evidence from the complaint.

The outcome of the decision is confined to the unusual facts of the case, and this is the most important message that must be taken from the judgment.

Child sexual abuse, by its intrinsic nature, is a private act. It is rare that there would be witnesses other than the victim. It has taken decades for police, prosecution

authorities and the courts to understand that the lack of corroborating evidence in sexual offence cases does not mean the prosecution will fail. The outcome of the decision in the case of Pell does not change that reality.

The central issue in the Pell judgement was how the courts should weigh evidence given by a credible witness if it is at odds with other evidence that casts doubt on the witness's story.

The only direct evidence against Pell was the testimony of one complainant. The trial judge found the complainant to be a credible witness.

So did two Victorian Appeal Court judges. Chief Justice Anne Ferguson and Victorian Court of Appeal president Chris Maxwell stated: "Both the content of what [the complainant] said and the way in which he said it — including the language he used — appeared to us to be entirely authentic".

The other member of the Victorian Appeal Court, Justice Mark Weinberg, disagreed. He stated that the "complainant's allegations against the applicant were, to one degree or another, implausible".

A difference in methodology, not just opinion

This was not just a difference in opinion but a difference in methodology in determining guilt and innocence in cases where the main direct evidence is from a single witness.

In assessing the credibility of the witness, Ferguson CJ and Maxwell P paid considerable attention to the demeanour of the witness. Weinberg J assessed the credibility of the witness not so much by how he said things but by reference to its objective plausibility.

He was of the view that it was simply unlikely that the offences could have been committed in the manner described given the setting in which they allegedly occurred.

The High Court was provided with the opportunity to clarify this tension.

It did so by stating that in assessing the evidence, the court must objectively consider how improbable it is that the evidence is incorrect.

Thus, the High Court noted that it was not reasonable to find that Pell had the opportunity to commit the alleged offences given "his practice of greeting congregants on or near the Cathedral steps after Sunday solemn Mass".

There is no suggestion the witness was unreliable

Importantly, the High Court did not suggest that the witness was dishonest or unreliable.

Rather, it is the case that in criminal proceedings, the prosecution has to establish guilt beyond reasonable doubt, and it is difficult to reach this threshold when there is evidence suggesting that the complainant's evidence may not be plausible given objective constraints associated with the narrative.

The Cardinal Pell judgement is one of the most polarising decisions in Australia's history. It has been handed down following the royal commission into child sexual abuse and the many deeply disturbing accounts of the sexual abuse of children which formed part of the inquiry.

The work of the royal commission has made incredible progress in putting in place processes for victims of child sexual abuse to secure justice against perpetrators and organisations responsible for such acts.

The royal commission, in particular, highlighted the difficulties that victims of sexual abuse have in reporting offences against them.

The institutional obstacles they confront in having their legal claims acted upon and the immense suffering that they experience — often lasting a lifetime.

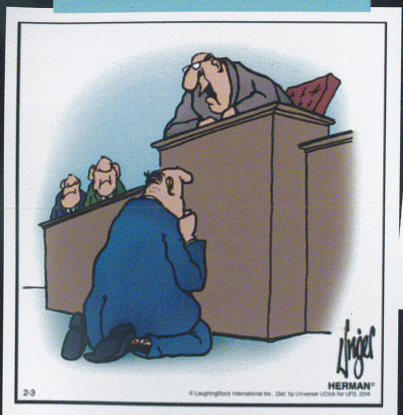
The High Court's decision logically does not undermine any of these matters.

Many victims of child sexual abuse may feel that in acquitting Pell, the High Court is inferring that reasonable doubt exists for many of those seeking justice for abuse committed against them.

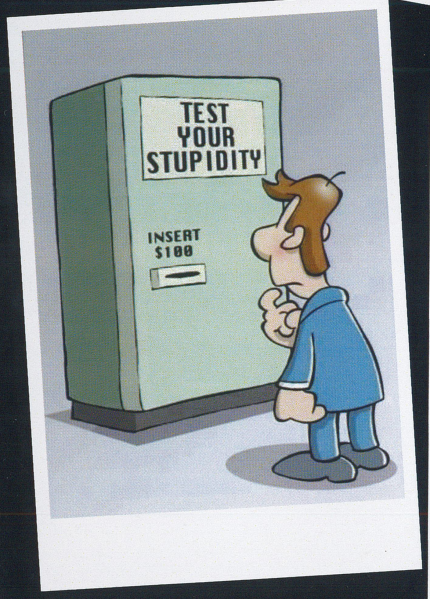
But it is important to understand that the High Court's decision is about one case — Pell vs The Queen — and its decision logically does not undermine any other case.

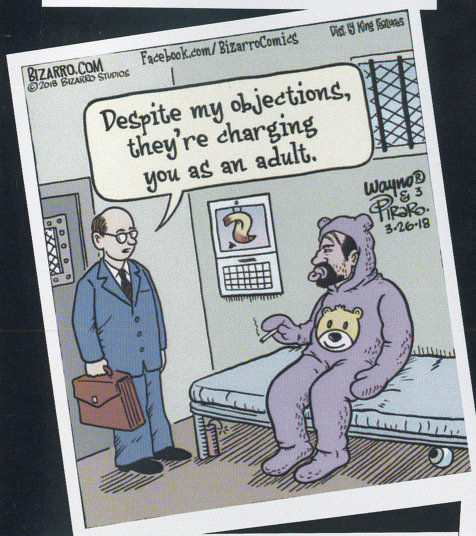
A person without a sense of humor is like a wagon without springs. It's jolted by every pebble on the road.

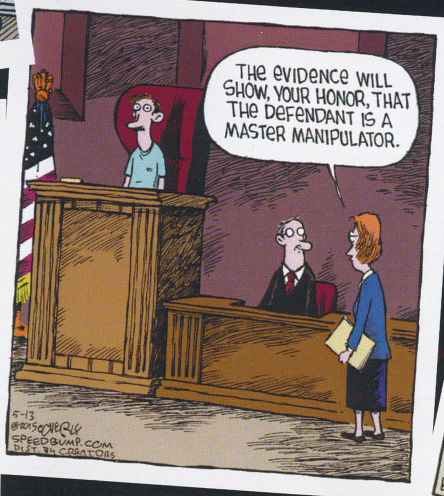
Henry Ward Beecher
American Congregationalist clergyman
QuoteHD.com (1813-1887)



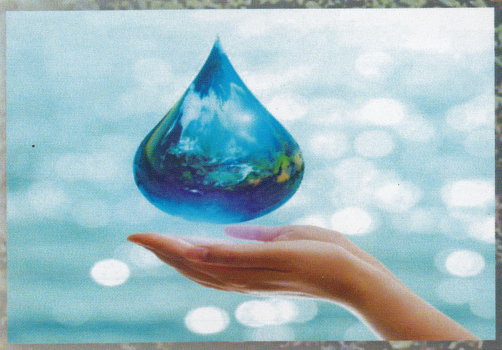
"Get up, you idiot. When I say, 'How do you plead?' I wanna know if you're 'guilty' or 'not guilty.'"

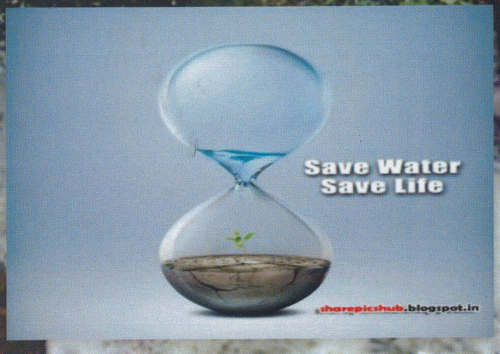






When water fails, function of the nature cease....





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