the broader principles which underline the relationship between Parliament and the courts".

Unfortunately, these "broader principles" are themselves ambiguous. Controversy has long attached both to what counts as a "proceeding" within the protection of article 9, and to whether the courts or Parliament should have the final say in determining the issue (*cf. Stockdale* v. *Hansard* (1839) 9 Ad. & E. 1; *Case of the Sheriff of Middlesex* (1840) 11 Ad. & E. 273; *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271). More broadly, the boundaries of the "wider principle" enunciated in *Prebble* are also uncertain, given that it appears to rest on some notion of separation of powers, a concept which has long been open to divergent interpretations (*cf. Liyanage* v. *R.* [1967] A.C. 259, *R.* v. *Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 A.C. 513). In consquence—and as the Master of the Rolls' reasoning implies—it is difficult to see how the judgment in *ex p. Fayed* could have been based on more than an intuitive assessment of the nature of the office of Commissioner for Standards. Given the history of Parliamentary privilege, this is perhaps unsurprising—but since the case fell within an area characterised by Lord Woolf as being of constitutional "sensitivity and importance", we are left with the question of whether greater clarity might not be desirable in determining the ambit of some of our basic constitutional rules.

NICHOLAS BAMFORTH

THE CRIMINALISATION OF HARASSMENT

HARASSMENT and stalking have joined the ranks of road rage, dangerous dogs and gun ownership as "crimes" that have captured the public imagination in the last decade of this century. It is indeed a horrifying ordeal for any victim and the law has been quick to respond: the House of Lords has interpreted the provisions of the Offences Against the Person Act 1861 so as to cover such conduct; and Parliament has recently passed the Protection from Harassment Act 1997.

The House of Lords in *R.* v. *Ireland* and *R.* v. *Burstow* [1997] 3 W.L.R. 534 heard two appeals from separate Court of Appeal decisions (*R.* v. *Ireland* [1997] Q.B. 114 (noted [1997] C.L.J. 11) and *R.* v. *Burstow* [1997] 1 Cr. App. R. 144 (noted [1997] C.L.J. 251)). *Ireland* involved persistent silent telephone calls and *Burstow* a course of harassing conduct that included photographing, following and telephoning the victim. The House of Lords upheld Ireland's conviction of assault occasioning actual bodily harm contrary to

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Offences Against the Person Act 1861 s. 47 and Burstow's of inflicting grievous bodily harm contrary to section 20 of the same Act. Lords Steyn and Hope, giving the leading judgments, identified three issues that were raised by the appeals.

The first was whether psychiatric illness could constitute "actual bodily harm" or "grievous bodily harm". The House of Lords accepted that it could if a victim's condition fell within the medical definition of a "recognisable psychiatric illness", rather than being merely a state of fear or other emotion. Although this is not the most natural meaning of "bodily harm", to decide otherwise would be to draw a highly artificial distinction between "body and mind", Lord Steyn explained. This is an example of the courts being willing to be flexible with the rather archaic wording of the 1861 legislation to enable it to deal with contemporary issues raised in the law relating to offences of violence.

The second issue was the meaning of "inflict" for the purposes of section 20, particularly as contrasted with the term "cause" in the more serious section 18 offence. Counsel for Burstow had tried to argue that "inflict", unlike "cause", required a direct application of force. Lord Steyn rejected this interpretation because it would place an artificial barrier in the way of a conviction of inflicting serious psychological injuries contrary to section 20. The House of Lords also rejected the argument that an infliction required an assault, reasoning that had Parliament intended there to be such a requirement the statute would have said so in so many words. However, when it came to explaining the distinction between "cause" and "inflict", no clear definitions were provided. Lord Steyn was content to say that "in the context of the Act of 1861 there is no radical divergence between the meaning of the two words", although he added that they were not synonymous. Lord Hope suggested that the distinction between the two words was that "inflict" suggests that the consequence for the victim was unpleasant, whereas "cause" does not. He went on to argue that as sections 18 and 20 concern inflicting or causing grievous bodily harm the words were indistinguishable in this context. This does not quite follow, because some "victims" may find the infliction of harm pleasurable (see *e.g. R.* v. *Brown* [1994] A.C. 252). It now seems clear that whatever the exact differentiation between the two words, only exceptionally, if ever, will that distinction be relevant.

There is a good argument that, given that grievous bodily harm now includes psychological injuries, there should be a narrow definition of "inflict". Traditionally the law has been wary of punishing the causing of psychological injuries because many of the situations in which psychological harm is occasioned are unsuitable

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for the criminal law (*e.g.* a parent telling off a child, a lover ending a relationship). If a woman breaks off her relationship with her boyfriend, aware that this may well cause him to suffer a very serious depression, there would be no assault as is necessary for the purposes of a conviction under section 47, nor the requisite intention for a section 18 offence. A conviction for the section 20 offence, however, would now be available unless the jury decided that it was "reasonable" for the defendant to act in this way. This is because part of the definition of *Cunningham* recklessness (which is the *mens rea* for the section 20 offence) is that the risk must be an unreasonable one to take. It would be better if infliction required some notion of attack, be that a physical or psychological attack, so that section 20 could cover cases of stalking but not the ending of relationships.

The third issue for their Lordships was whether there was an assault in *Ireland.* As the accused had pleaded guilty the question was simply whether on the facts there could have been an assault. The real doubt in this case was whether there was a fear of immediate violence as required for an assault. The House of Lords held that there could have been an assault, arguing that by telephoning the victim and keeping silent the defendant was impliedly sending a message that "he knew who and where" the victim was and this might cause the victim to fear that the defendant would come round to her house—"what else would she be terrified about?" Lord Steyn concluded there was "the *possibility* of immediate personal violence" and this could have caused the psychological injuries. This indicates that the law takes a more generous interpretation of immediacy than was previously thought. The fear of violence need not be of imminent violence—fear that violence may occur in a few minutes' time was sufficient; and the victim need only fear that violence *might* occur. This seems a sensible development but it signifies an important shift in the nature of "assault". No longer can assault be regarded as essentially a crime of violence, closely linked to attempts to injure, but rather it is now better seen as linked to offences involving threats.

The Protection from Harassment Act 1997 contains two new criminal offences. The offence in section 1 concerns pursuing a course of conduct which amounts to harassment of another and which the defendant knows, or ought to know, amounts to harassment of the other. There is no definition of harassment, except that it includes "alarming the person or causing the person distress". The offence is not committed if, *inter alia,* "in the particular circumstances the pursuit of the course of conduct was reasonable". This is a remarkably wide offence which, no doubt, police and

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prosecutors will be unsure how best to utilise. It would seem to be available for incidents ranging from disputes between neighbours to wolf-whistles from building sites. Unless there is judicial interpretation limiting the meaning of this offence, it would appear to be a significant extension of the criminal law, with little guidance given on its precise limitations.

The section 4 offence occurs where, as a result of the defendant's conduct, the victim fears on at least two occasions that violence will be used and the defendant knows or ought to have known that the conduct would cause such fear. As Offences Against the Person Act 1861, s. 47, carries the same maximum sentence as the new section 4 offence, it may be preferred by a prosecutor for two main reasons. First, the new section 4 offence requires the conduct to take place on at least two occasions, whereas it is clear that a single incident can form the basis of a section 47 offence. Secondly, the section 4 offence requires proof that the victim would suffer significant harm, whereas it is enough for the section 47 offence if the victim believes that she *might* suffer harm. However, section 4 will be needed in cases where the victim has not suffered a medically recognised illness. This may not be very often given that stress was included as one of the illnesses accepted as sufficient for actual bodily harm in *Ireland.*

It is commendable that Parliament and the courts have decided that the law should address the issues of stalking and seriously harassing conduct, but if the criminal law is to deal with these areas without threatening values our society holds dear, such as freedom of speech, the offences need to be far more tightly and carefully defined.

JONATHAN HERRING

CLARIFYING ACCESSORIAL LIABILITY

THE main question for the House of Lords in *Powell and English* [1997] 3 W.L.R. 959 concerned when a defendant, who was participating in the commission of one crime, could be found liable for other crimes which were committed by the principal. For example, if an accessory was assisting the principal in the commission of a burglary and the principal committed murder, when should the accessory himself be convicted of murder? In answering this question the House of Lords has finally resolved a number of doubts relating to the ambit of accessorial liability. As a result of this case a number of principles can be identified concerning the liability of accessories for crimes committed by the principal.

(1) The accessory will be convicted of murder if he foresees that

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