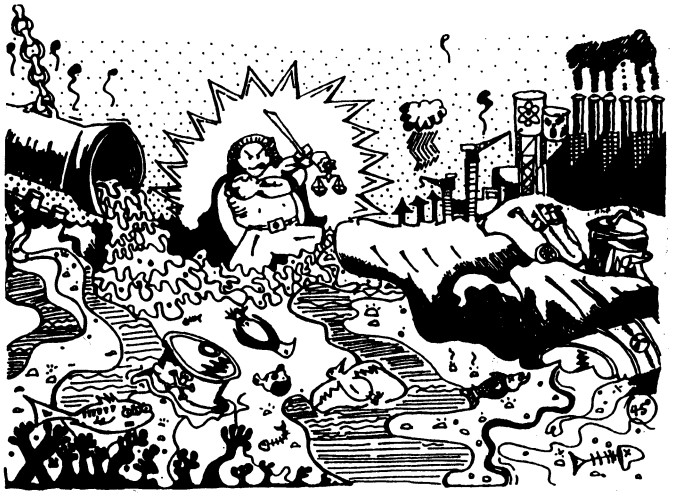

In a system with no contingency fees and no orders for professional costs, the industrial disease cases have been run for little or no fee. Within the limits of the system, compensation has been sought for victims of the pollution diseases, though often thwarted by government and bureaucracy. Prevention being preferable to an elusive and inadequate cure, the JFBA proposed the existence of an environmental right, as a fundamental human right, as early as 1970.

In theory, the environmental right flows from constitutional provisions which guarantee individual dignity and the right to a standard of wholesome living. The natural environment, as an asset of all people, should be above any consideration of private property and economic interest. The right to enjoy and to be a part of that environment is fundamental to the human condition, and that right should therefore be the basis for an injunction to prevent damage to the environment. So goes the theory. The simplicity of its premise is easily understood on learning of the full horror of the industrial diseases.

Although the theory of a fundamental environmental right is alive and well, in the real world of litigation and enforcement it is scarcely an embryo. What effective rights to the environment there are in Australia are statutory or in the common law. In either case, standing to litigate is dependent on a private right akin to a property right. The requirement for a property right is the very antithesis of an environmental right. Conventional legal theory raises standing as a major barrier to the practicality of an environmental right.

But in Japan they are trying. The codified civil system has a short history in Japan, with no indigenous basis and a post-war, Anglo-American influence. The Supreme Court can be arbitrary in its decisions, interpreting codes and statutes as necessary to get the desired and 'just' result. Precedents can be followed or ignored as can opinions of academics.

Time and again the JFBA has tried to injunct industrial development on the basis that nearby residents have a right to the environment. Applicants have consistently been denied standing, although this is usually only decided on appeal; plaintiffs are often successful in the lower courts. The Supreme Court interprets the constitutional guarantees of dignity and standards of living conventionally. The guarantees translate into duties of the State, not rights of the individual — an individual's interest in constitutional guarantees is reflective, not concrete. And besides, say the courts, if we are to consider an environmental right, perceptions of the environment are fluid, not universal and constant. It is therefore sufficient to protect personal and property rights, rather than to look for a right common to all.

The Japanese Supreme Court in 1981 denied residents near Osaka airport an injunction against night flights. Although the residents who started the case in 1969 had been successful through the lower courts, the Supreme Court saw no civil 'right' to a healthy environment.

But there have been victories. In lower courts applicants have succeeded by showing a common interest in maintaining a state of affairs. The right to cross a road, or the right to not have to live near a freeway, may not strike us as a legal interest to found an injunction, but it has impressed the Japanese District Courts.

A definition of 'necessary standing' which emerges is defined, first, by close geographical residence; second, by long, though not necessarily economic use of the existing environment; and third, by real anticipation of change which does not necessarily threaten harm, but may simply threaten disruption without social advantage.

The need to balance competing rights is a curious issue when considering the environment. It involves not competing environmental rights, but competition between an environmental right and a right to use private property. The relatively flexible Japanese code-and-precedent system may allow for the consolidation of this right as an enforceable legal right. It is a beginning.

Simon Rice is a Sydney lawyer who researched these issues in Japan.

CRIMINAL LAW

Conspiracy defined

An English decision on conspiracy dealt with the political context in which such a charge exists. BARBARA ANNE HOCKING discusses.

The advantages which a charge of conspiracy affords the prosecution have long been recognised. It is an offence characterised by vagueness and indeterminate boundaries. With its essentially 'utilitarian' rationale, it has provided state prosecutors with a formidable weapon in relation to an earlier intervention into contemplated criminal activity than that permitted by the related inchoate offences of incitement and attempts.[1] The offence is 'predominantly mental'[2] and inevitably it has been applied to a range of conduct and activities. Where the offence has been used politically, it has been characterised as 'an impressive illustration of judicial bias'.[3] Yet the modern relevance of conspiracy remains that it has as its most substantive rationale the prevention of the greater

'social menace'[4] posed by group as opposed to individual contemplation of criminal activity. In Britain, despite the *Criminal Law Act* 1977, common law conspiracy is still providing a useful adjunct to legislative political activity, most noticeably in relation to the ambit of the Prevention of Terrorism legislation. This case note considers the recent case of *Regina v Desmond Ellis*,[5] in which the definition and ambit of conspiracy is pronounced on in a political context. Ellis, a committed IRA activist, was on trial for alleged involvement in the mainland bombing campaign.

Ellis' involvement in the storage, manufacture, assembly and checking of explosive devices and various other related equipment does not appear to have been in dispute in the arguments before the court. The Crown alleged that this very activity, and not the immediate causing of the explosions, comprised his involvement in the conspiracy. That there was indeed a conspiracy at the material time to cause explosions likely to endanger life or cause serious injury to property in England was conceded by the defence. The critical question was whether Ellis conspired with the other conspirators, or more than one of them, to cause by an explosive substance an explosion of a nature likely to endanger life, or cause serious injury to property in England.

Therefore, the case concerns the critical legal distinction between Ellis' involvement in the storage and manufacture of explosives and the involvement in the mainland bombing campaign which might provide proof of being party to the conspiracy. In his summing up, Mr Justice Swinton Thomas stressed that not only must Ellis have been party to the agreement alleged against him but that he intended to play some part in carrying that agreement out. As a means of illustrating how participation in a conspiracy is effected, His Honour drew on two hypothetical situations. The first concerned two people engaged over a period of time in stealing money from their employers. One takes the money from the till and then hands it over to the second man who removes it from the premises. If on any particular day, the first man surreptitiously takes fifty pounds out of his pocket and hands it over to the second man, it is 'abundantly clear' that the second man knows without being told where the money has come from. The second situation concerned two car thieves, one being the man who steals the cars and the other the man who receives them and alters the number plates and other distinguishing features. If the first man then leaves a car at the garage and then quickly disappears, nobody 'needs to be told' that the car is a stolen car. His Honour concludes that these provide conclusive situations.

> Obviously in both those examples a jury would have little difficulty in coming to a conclusion, without anything being said, that the second man knows full well what the first man is about. [at 5]

Yet the outcome of the Ellis trial was not so conclusive. His Honour summed up the proof requirement of conspiracy in terms that stressed the significance of agreement while underwriting the notion of agreement with intention.

> You must be sure that he agreed with one of the individuals named in the indictment, or other persons, that one or more of them would cause, by an explosive substance, an explosion, or explosions, likely to endanger life or cause serious injury to property in England. And that he intended to play some part in putting that agreement into effect'. [at 2]

The line of authority that led to the Ellis trial would appear to be that laid down in the *Somchai case*,[6] in which the Privy Council recognised the validity of extending conspiracy's boundaries to cover conspiracies entered into abroad with the purpose of committing a crime in England.[7] A conspiracy hatched and plotted abroad is therefore justiciable in England where the proposed harm was intended for England. The overt act requirement of conspiracy is not critical: it is the notion of agreement that constitutes the essence of the offence. Under this line of authority, which also includes the *Stonehouse case*,[8] it is the effects of the conspiracy's actions rather than the acts pursuant to the conspiracy itself which are significant at law.

The line of authority that led to the *Ellis case* also includes his own trial in *Ellis v O'Dea* (1989) IR 530 and sentences already served in Ireland: this prompted Ellis' counsel to claim that he was facing a form of double jeopardy and being tried for offences for which he had already served sentence in Ireland.[9] In the courts of judgment, Justice Walsh in that case referred to the inherent dangers in the conspiracy charge, in particular, in the context of the case, to the danger of the special rules of evidence that attach to conspiracy charges falling foul of the constitutional guarantees of fair procedures. Admissions of a co-accused founding a basis for conviction might well infringe such guarantees.[10] Conspiracy has always been very much judge made law and the expanding jurisdictional scope of conspiracy illustrated in cases such as *Sansom*[11] and *Somchai*[12] can therefore be interestingly counterbalanced by the judicial caution and stringent search for definition that is particularly evidenced in the *Ellis cases*.

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4. King, R., 'The Control of Organised Crime in America', (1951) 4 *Stanford Law Review*, 52 at p.60.
5. Central Criminal Court, No. T910328, Old Bailey, London, 29 October 1991.
6. *Liangsiriprasert v United States* (1990) 3 WLR 606.
7. One effect of the *Somchai case* is arguably to extend the jurisdiction of British courts to cover uncompleted terrorist plots planned outside Britain.
8. *Director of Public Prosecutions v Stonehouse* (1978) AC 55.
9. *The Guardian*, 31.10.91.
10. (1989) IR 530 at p.538.
11. *Reg v Sansom* (1991) 2 WLR 366.
12. above, ref. 6.