Neutral Citation Number: [2013] IEHC 104

THE HIGH COURT

[2012 No. 8738 P]

BETWEEN/

DEIRDRE SULLIVAN

PLAINTIFF

AND

GERARD BOYLAN, GERARD BOYLAN

BUILDING CONTRACTORS LTD. AND PATRICK MCCARTAN (No.2)

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on 12th March, 2013

1. Few things are more important in life than the security of one's own dwelling and the right to come and go from that abode without interference. It is a right which perhaps most of us take for granted. It is only when that security has been threatened by intruders - such as in the aftermath of a burglary – that we realise that how important that sense of safety, security and a general sense of repose from the cares of the world actually is. It is precisely for those reasons that Article 40.5 of the Constitution safeguards the inviolability of the dwelling: see generally *The People (Director of Public Prosecutions) v. Barnes* [2006] IECCA 165, [2007] 3 I.R. 130, per Hardiman J.

2. In this judgment I am now called upon to make an award of damages following a finding by me that the third defendant had gravely infringed the constitutional rights of this plaintiff in my first judgment in this matter: *Sullivan v. Boylan* [2012] IEHC 389. While the details of the ordeal to which the plaintiff was subjected by the third defendant are recorded in that judgment, it may be helpful if the background facts are briefly recapitulated.

3. The plaintiff, Ms. Sullivan, lives alone in Clontarf, Dublin 3. She engaged the first and second defendants (whom I shall collectively describe as "Boylan contractors") in December, 2011 to build an extension to her property and to carry out certain refurbishments works. The works commenced in February, 2012 and ceased in May, 2012. By April, Ms. Sullivan had paid €84,000 of the initial contract sum of €91,250. There was subsequently a dispute as to whether certain contracted works had been carried out or whether instead certain additional work had to be performed over and above that which had originally been contracted for. In sum, therefore, the issue is whether Ms. Sullivan owes the Boylan contractors €7,000.00 (approximately) or €20,000.00 (approximately) or perhaps nothing at all.

4. It is clear nevertheless that there is a legitimate argument regarding the existence of any such debt or, if there is a debt, the amount of same. The Boylan contractors decided, however, to put the matter into the hands of a debt collector, Patrick McCartan. It is the latter's conduct which gave rise to these proceedings and which required to be restrained by injunction.

The Conduct of Mr. McCartan

5. The first contact which Ms. Sullivan had with Mr. McCartan was on 1st August, 2012. She received a telephone call from him during which Mr. McCartan identified himself as someone who worked with financial institutions. He said that he had heard from Mr. Boylan and wanted to hear her side of the story. She had understood Mr. McCartan to be some kind of intermediary, and while Mr. McCartan sought a meeting, Ms. Sullivan indicated that she would get back to him.

6. Ms. Sullivan did not have to wait long for Mr. McCartan. He turned up unannounced on the 3rd August, and appears to have allowed himself through the front door. Ms. Sullivan, whilst surprised, was not taken aback by this because Mr. McCartan did not then behave aggressively. He identified himself as the person who had rung earlier, and she invited him further into the house to show the difficulties which had arisen on the construction works. Mr. McCartan did not say that he was a debt collector but rather indicated that - or, at least appeared to indicate that - there might be some room for a constructive engagement between Ms. Sullivan and Mr. Boylan. Ms. Sullivan was quite happy with that meeting.

7. Matters changed for the worst on the 8th August, 2012, when Ms. Sullivan received an email from Mr. McCartan claiming she owed the sum of €23,783 to the Boylan contractors. The email was in the following terms:-

> "I can have Mr. Boylan accept if paid by Friday the sum of €20,000.00 of which payment must be made [directly to a particular bank account]. Failure for this to appear in the account by Friday 12 noon, my instructions are to act immediately and secure judgment and park our vehicle DEBT COLLECTOR fully signage outside your house and place of work. I really would prefer an amicable agreement to settle, however I have a responsibility to my client to collect as per instructions with less interruption from yourself. You do not need any more grief from neighbours and the site of a large van with signage directed and with your details is something that should be avoided. I expect your reply and settlement as per instructions above."

It was purportedly signed in the name of Greenbank Solutions Credit License 564337 licensed to operate in the UK, Ireland, USA, and Europe.

8. On receipt of this email Ms. Sullivan contacted her solicitor who, in turn, sent a letter to Mr. Boylan asking him to desist. On the 10th August, Mr. McCartan contacted Ms. Sullivan by telephone. She explained that she had instructed her solicitor to handle matters with Mr. Boylan. Shortly after that she received a text message from Mr. McCartan in the following terms:-

> "Deirdre you have refused to co-operate, I gave you a week and no reply. I am assuming no payment has been made. I have it made quite clear a full €23k is now required plus 10% our fee or we will expose you on this debt and will get it."

She received approximately seven further phone calls from Mr. McCartan from the same telephone number later that afternoon, but she did not answer them.

9. Not surprisingly, Ms. Sullivan was extremely distressed by this persistent calling and she sent him a text message asking him to

desist from this. Giving evidence before me at the damages hearing on 1st March, 2013, Ms. Sullivan explained that she found this series of threatening phone calls very distressing and frightening and she felt that she was being watched.

10. She then received a further text message from Mr. McCartan in the following terms:-

> "My calls and presence will continue. You created the problem and agreed with me. I … will embarrass you to your neighbours if you continue also a charge will be placed on your property and a judgment. Your choice as my client is correct."

Ms. Sullivan's solicitor, Mr. MacGuill, then wrote a further letter to Mr. McCartan asking him to desist from this conduct and drawing his attention to the provisions of s. 10 and s. 11 of the Non-Fatal Offences Against the Person Act 1997 ("the Act of 1997"), and indicating that any further direct approaches to her for the sums in dispute would be referred to the Gardaí.

11. Unfortunately, however, Mr. McCartan did not desist. He sent her an email on the 15th August in the following terms:-

> "Dear Madam,
>
> Unfortunately for you and your lies this matter is now being in possession and legal charge being obtained immediately please do not insult me with a letter of a so called solicitor with no letter heading or qualifications why has he to hide all you have a minimum of three days to pay or your broader investments and business will be of interest to the Revenue, do not underestimate my knowledge of your hidden undeclared properties and business."

Ms. Sullivan comments in her affidavit that:-

> "I have no undeclared properties and business. I had had issued in relation to foreign property [which] were sorted out with the Revenue Commissioners a number of years ago with the assistance of a tax adviser. I do not know how Mr. Boylan or Mr. McCartan obtained access to that information."

The harassment nonetheless continued unabated, as another email followed:-

> "Dear Madam,
>
> Your non-cooperation adds to our increased demand for payment due to Mr. Boylan. If you decline to acknowledge as from tomorrow as previously indicated we will cause you severe embarrassment, your neighbours have also indicated they will not tolerate increased traffic or nuisance operations causing inconvenience to their access. We are within our rights and failure by you to settle your debt will only add to your discomfort in the area. You owe the money so pay up and save yourself all this embarrassment. We look forward to your early settlement.
>
> Greenbank Collections Licensed Debt Collectors."

Worse was to follow. On Friday 24th August Ms. Sullivan received an email from Mr. McCartan as follows:-

> "We will be in attendance after 4.00pm for full debt otherwise our van will maintain a spot outside your house to highlight your refusal to settle."

There then followed a text message:-

> "We are sitting outside till you come out with payment €25,000 or we start knocking on doors and telling the neighbours."

12. Ms. Sullivan was extremely alarmed by this, but felt that she had no option but to return home immediately from work. She found a large Northern Ireland registered white van parked directly in front of her house with the signage - "Licensed Debt Collectors" – prominently displayed. Ms. Sullivan recognised Mr. McCartan and spoke to him. She drew attention to the fact that her architect was finalising her report on the disputed works. Ms. Sullivan was very distressed and in her agitated state she called Mr. McCartan a criminal. While it is clear from her affidavit that she was contrite about having made that statement, one must adjudge it to be pardonable in the circumstances given the extreme distress to which she had been subjected. Mr. McCartan indicated that he took exception to her remark and telephoned Mr. Boylan. However, there was an altercation between Mr. McCartan and Ms. Sullivan and a very unsatisfactory subsequent conversation between Mr. Boylan and Ms. Sullivan.

13. As indicated, Ms. Sullivan was extremely distressed as a result of this and drove to Clontarf Garda Station. Ms. Sullivan found the Gardaí very sympathetic and they had not previously been aware of Mr. McCartan's presence outside her house. They accompanied her back to her house where after discussions with Mr. McCartan the Gardaí indicated that he would leave shortly. The Gardaí acknowledged, however, that they were powerless to stop him coming back. The Gardaí were also plainly of the view that they could take no steps as such to stop Mr. McCartan parking his vehicle with the debt collection signage directly outside Ms. Sullivan's house.

14. Shortly after he had parked his van outside her house, Mr. McCartan then sent Ms. Sullivan another text in the following terms:-

> "Madam, solicitors are money grabbing hoods without the mask. Do not threaten me with an uneducated [solicitor] as most were fraud in the good times. You have till Monday to have €20k in my account or else the Garda said I can park outside if I want. Your neighbours are not impressed and we will be back if you refuse to pay with your name in large print Monday. As for your remark a full apology and I will have you for every euro you may have as I have you taped. Monday?"

(I have redacted some of the coarser language used).

Ms. Sullivan was naturally extremely frightened and shocked to receive this text message. She spoke with Garda Hanrahan of Clontarf Garda Station who had been present earlier that day. While Garda Hanrahan advised her to retain all emails and text messages, Ms. Sullivan formed the view that the Gardaí considered the Mr. McCartan was within his rights in parking the vehicle outside her front door.

15. Matters came to a head on Monday 27th August, 2012, when Mr. McGuill sought undertakings on behalf of Ms. Sullivan from both

Mr. Boylan and Mr. McCartan prior to making an application to this Court. The prospect of litigation did not, however, daunt Mr. McCartan in the least. The telephone calls kept coming and on that morning he had sent an email saying that she had "one hour" to contact him with payment as otherwise "the van goes back, and seizure of goods will take place [and] a vigil will be maintained outside your home to let everyone know how deceptive your are." Further emails along similar lines were sent later that day and, as it happens, on the 28th and 29th August.

16. It was against this background that the application for an interlocutory injunction was first made to me on the following day, Tuesday, 28th August. While I granted certain relief *ex parte*, the matter was adjourned on a number of occasions to enable the defendants to put their side of the case. Although the Boylan contractors have subsequently given appropriate undertakings to the Court and have terminated Mr. McCartan's retainer, Mr. McCartan has never appeared and has not been represented at any of these hearings.

17. I accordingly granted the plaintiff an interlocutory injunction restraining Mr. McCartan from effectively watching and besetting her home. I subsequently granted a permanent injunction restraining Mr. McCartan from engaging in such conduct.

18. It is clear that Ms. Sullivan found the entire episode frightening and deeply traumatic. She felt that there was no one to whom she could turn, as her parents were elderly and she did not want to cause them needless anxiety. She lost weight and she was prescribed a mild sleeping tablet by reason of the extreme stress to which she had been subjected.

19. As I observed in the course of the original judgment:-

> "… it has to be said that it is, frankly, difficult to speak with moderation in respect of the conduct of Mr. McCartan. His behaviour has, however, been contemptible, irresponsible and outrageous. He has sought to harass, bully, defame, vilify and intimidate Ms. Sullivan and to all but imprison her in her own home. It is behaviour which in a civilised society cannot be tolerated for an instant and it represents conduct which this Court cannot and will not allow."

The findings in the first judgment

20. In the course of the first judgment I concluded that Mr. McCartan's conduct amounted to a *prima facie* breach of ss. 10 and 11 of the Non-Fatal Offences against the Person Act 1997 ("the Act of 1997") . These sections provide:-

> "10(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.
>
> (2) For the purposes of this section a person harasses another where—
>
> (a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and
>
> (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.
>
> (3) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may, specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.
>
> (4) A person who fails to comply with the terms of an order under subsection (3) shall be guilty of an offence.
>
> (5) If on the evidence the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make an order under subsection (3) upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do.
>
> (6) A person guilty of an offence under this section shall be liable—
>
> (a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both, or
>
> (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.
>
> 11.(1) A person who makes any demand for payment of a debt shall be guilty of an offence if—
> (a) the demands by reason of their frequency are calculated to subject the debtor or a member of the family of the debtor to alarm, distress or humiliation, or
>
> (b) the person falsely represents that criminal proceedings lie for non-payment of the debt, or
>
> (c) the person falsely represents that he or she is authorised in some official capacity to enforce payment, or
>
> (d) the person utters a document falsely represented to have an official character."

21. As I pointed out in that judgment, there can be little doubt but that Mr. McCartan has harassed Ms. Sullivan by "persistently following, watching, pestering, besetting or communicating with her" within the meaning of s. 10(1) of the Act of 1997, not least when she made it perfectly clear to him that such conduct was to stop. While Mr. McCartan was perfectly entitled to assert a demand for payment on behalf of the Boylan contractors, he was not entitled to make demands which by reason of their frequency were calculated - in the words of s. 11(1) of the Act of 1997 - "to subject the debtor or a member of the family of the debtor to alarm, distress or humiliation". The demands made here were clearly intended to alarm and humiliate Ms. Sullivan. This, indeed, was the entire object of the exercise. Here it may be observed that the act of parking a van with the display sign "licensed debt collector"

directly outside her house coupled with the threat to start ringing on the doors of her neighbours speaks for itself.

22. I went on to hold that the third defendant's conduct had involved a breach of her constitutional rights to the protection of the person (Article 40.3.2) and the inviolability of the dwelling (Article 40.5):-

> "The fact, moreover, that Mr. McCartan unblushingly continued with his practice of harassing the plaintiff even after the Gardaí had spoken to him points to the objective necessity for judicial intervention if the plaintiff's right to secure the protection of her person (Article 40.3.2) and her dwelling (Article 40.5) is to be effective and not merely illusory.
>
> ...In the present case it requires little imagination to visualise the acute mental distress which Ms. Sullivan suffered as a result of this this outrageous conduct. The citizen's right to the security of his or her person necessarily implies that the subjection by unlawful means of any person to what would objectively be regarded as acute mental distress must be regarded as amounting in itself to a breach of Article 40.3.2.
>
> Nor could she find that repose from the cares of world presupposed by Article 40.5 – again to adopt the words of Hardiman J. in O'Brien – in the comfort of her own dwelling. The Irish language text of Article 40.5 ("Is slán do gach saoránach a ionad cónaithe….") captures and expresses the essence of the English language word ("inviolability") by stressing the concepts of safety and security of the dwelling. Here again all of this was compromised by the actions of Mr. McCartan. One might ask: who in such circumstances would feel safe in their house if, prior to entering or exiting their own private dwelling, they were effectively forced to run the gauntlet of passing what amounts to a picket bearing unpleasant messages by a menacing stranger, especially where these messages were designed to intimidate and humiliate?"

23. Here the calculated and persistent pattern of Mr. McCartan's conduct may be emphasised. All of us may be upset by occasional rudeness, brusqueness or even angry words uttered in the heat of the moment and, of course, none of us are ourselves without sin in that regard as well. Such upset must be accepted as part of the give and take of everyday life, even if we do not like it when it occurs. What was objectionable about Mr. McCartan's conduct – and that which brought it to the point of constitutional transgression – was its persistent, premeditated, unyielding and oppressive character.

The remedies for this unlawful conduct

24. In the light of these findings, it now falls to this Court to devise appropriate remedies in order to vindicate Ms. Sullivan's constitutional rights which have been so outrageously violated by Mr. McCartan's quite deplorable conduct. Article 40.3.2 and Article 40.5 are, of course, self-executing provisions which apply to both State actors and private citizens alike. There is absolutely no doubt but that a plaintiff whose constitutional rights have been infringed in this fashion can, in principle, at least, sue for breach of these rights: see, *e.g., Meskell v. Córas Iompair Eireann* [1973] I.R. 121, per Walsh J., *Hanrahan v. Merck, Sharpe & Dohme Ltd.* [1988] I.R. 629, per Henchy J. and *Grant v. Roche Products Ltd.* [2008] IESC 35, [2008] 4 I.R. 679 per Hardiman J.

25. It is true that in *Hanrahan* Henchy J. envisaged that this would be done only where the existing tort law was "basically ineffective" to protect constitutional rights. But it is far from clear that the existing law of torts sufficiently or adequately protects the constitutional interests of the plaintiff in the present case. It is true that, as might be expected, there are *features* of tort law which *to some degree* cover *some* of the interests which the plaintiff here seeks to vindicate. The principal nominate torts which might serve for this purpose are, of course, an action in private nuisance and the rule in *Wilkinson v. Downton* [1897] 2 Q.B. 57. We may consider each of these torts in turn.

The law of nuisance

26. It would be tempting to attempt to shoehorn the plaintiff's claim within the established boundaries of the law of nuisance. But here it must be recalled that the law of nuisance complements ownership of land and the scope of that tort requires to be understood in that historical context. As Professor Newark explained in his classic article, "*The Boundaries of Nuisance*" (1949) 65 L.Q.R. 480, 488-489:-

> "In true cases of nuisance the interest of the plaintiff which is invaded *is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner*. A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens. It is for this reason that the plaintiff in an action for nuisance must show some title to realty." (emphasis added)

27. This passage (and perhaps especially the words which I have taken the liberty of emphasising) sums up the conceptual reason why the law of nuisance would be "basically ineffective" in the *Hanrahan* sense to protect the interests safeguarded by Article 40.5. Nuisance is designed to protect ownership of land, whereas Article 40.5 protects the rights of the residents of a dwelling to security, protection against all-comers and privacy which are all necessary features of the inviolability of the dwelling. These are rights which are enjoyed by all who reside in the dwelling and not simply by those who have legal title to that property. It might be said that whereas nuisance protects the proprietary interests of those with title to the dwelling, Article 40.5 is fundamentally directed at protecting the privacy interests of those who reside in a dwelling against the world at large. Nuisance, in other words, is an established tort relating to land, whereas Article 40.5 is concerned with the protection of the person as it relates to the protection of the security and privacy interests of those resident in a particular dwelling, even if they have no proprietary rights in respect of that dwelling.

28. This is borne out by developments in the United Kingdom within the last twenty years or so, starting with the decision of the English Court of Appeal in *Khorasandjian v. Bush* [1993] Q.B. 727. In this case an 18 year old young woman had formed a romantic relationship with an older man. When that relationship ended, the older man pestered and harassed her in a most intolerable fashion. In the Court of Appeal one of the issues was whether the courts had jurisdiction to grant an injunction restraining the defendant from endeavouring to contact her by telephoning her at her parent's home where she resided. A majority of the Court held that it had such a jurisdiction, but it is clear that the reasoning in that case – whatever about the actual result – did not survive the subsequent decision of the House of Lords in *Hunter v. Canary Wharf Ltd.* [1997] UKHL 14, [1997] A.C. 655.

29. In *Hunter* Lord Goff summarised thus the issues in *Khorasandjian* ([1997] A.C. 655, 690-691):-

> "An injunction was granted restraining the defendant from various forms of activity directed at the plaintiff, and this included an order restraining him from "harassing, pestering or communicating with" the plaintiff. The question before the Court of Appeal was whether the judge had jurisdiction to grant such an injunction, in relation to telephone calls

made to the plaintiff at her parents' home. The home was the property of the plaintiff's mother, and it was recognised that her mother could complain of persistent and unwanted telephone calls made to her; but it was submitted that the plaintiff, as a mere licensee in her mother's house, could not invoke the tort of private nuisance to complain of unwanted and harassing telephone calls made to her in her mother's home. The majority of the Court of Appeal (Peter Gibson J. dissenting) rejected this submission, relying on the decision of the Appellate Division of the Alberta Supreme Court in *Motherwell v. Motherwell* (1976) 73 D.L.R. (3d) 62. In that case, the Appellate Division not only recognised that the legal owner of property could obtain an injunction, on the ground of private nuisance, to restrain persistent harassment by unwanted telephone calls to his home, but also that the same remedy was open to his wife who had no interest in the property. In the Court of Appeal Peter Gibson J. dissented on the ground that it was wrong in principle that a mere licensee or someone without any interest in, or right to occupy, the relevant land should be able to sue in private nuisance."

30. In a powerful judgment Lord Goff then proceeded to show how *Motherwell v. Motherwell* was based on a misunderstanding of earlier English cases regarding the entitlement of a mere licensee to sue in private nuisance. He then said ([1997] AC 655, 691-692):-

> "This conclusion was very largely based on the decision of the Court of Appeal in *Foster v. Warblington U.D.C.* [1906] 1 K.B. 648, which Clement J.A. understood to establish a distinction between "one who is 'merely present'" and "occupancy of a substantial nature", and that in the latter case the occupier was entitled to sue in private nuisance. However *Foster* does not in my opinion provide authority for the proposition that a person in the position of a mere licensee, such as a wife or husband in her or his spouse's house, is entitled to sue in that action. This misunderstanding must, I fear, undermine the authority of *Motherwell* on this point; and in so far as the decision of the Court of Appeal in *Khorasandjian v. Bush* is founded upon *Motherwell* it is likewise undermined.
>
> But I must go further. If a plaintiff, such as the daughter of the householder in *Khorasandjian v. Bush*, is harassed by abusive telephone calls, the gravamen of the complaint lies in the harassment which is just as much an abuse, or indeed an invasion of her privacy, whether she is pestered in this way in her mother's or her husband's house, or she is staying with a friend, or is at her place of work, or even in her car with a mobile phone. In truth, what the Court of Appeal appears to have been doing was to exploit the law of private nuisance in order to create by the back door a tort of harassment which was only partially effective in that it was artificially limited to harassment which takes place in her home. I myself do not consider that this is a satisfactory manner in which to develop the law... In any event, a tort of harassment has now received statutory recognition: see the Protection from Harassment Act 1997. We are therefore no longer troubled with the question whether the common law should be developed to provide such a remedy.
>
> It follows that, on the authorities as they stand, an action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally…. this category may include a person in actual possession who has no right to be there; and in any event a reversioner can sue in so far his reversionary interest is affected. But a mere licensee on the land has no right to sue."

The rule in *Wilkinson v. Downton*

31. Much the same can also be said with regard to *Wilkinson v. Downton*. In that case the defendant falsely told the plaintiff as a practical joke that her husband had been injured in an accident involving a horse-drawn vehicle and that he was lying prostrate on the ground with his legs broken and that he had summoned her to fetch him. While the plaintiff's husband returned safely by train from the races at Harlow that evening, the effects on the plaintiff were nonetheless dramatic. She became violently ill, her hair turned white and she seems to have suffered a severe psychiatric illness as a result.

32. The plaintiff sued for damages in an action on the case. Wright J. held the defendant liable on the ground that ([1897] 2 Q.B. 57,58-59):-

> "he had wilfully done an act calculated to cause physical harm to the plaintiff, that is to say, to infringe her legal right to personal safety and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification for the act."

33. Quite apart from the fact that, as McMahon and Binchy, *Law of Torts* (Dublin, 2000) observe at para. 22.28 the "precise scope of the tort is somewhat uncertain", the rule in *Wilkinson v. Downton* protects only some – but by no means all – of the interests safeguarded by Article 40.3.2. This is indeed illustrated by the facts of the present case.

34. An essential element of the tort in *Wilkinson v. Downton* is that the words were spoken falsely and were calculated to cause physical harm. One might, of course, say that in one sense Mr. McCartan spoke falsely in asserting that monies were due. Critically, however, he believed this to be true and, in any event, it may well be that when their dispute is finally resolved Ms. Sullivan may possibly find herself having to pay a particular sum to the Boylan contractors. But even if he had spoken the truth, it would not in the least have excused his behaviour or avoided an infringement of Article 40.3.2 and Article 40.5.

35. One might equally contend that the actions of the Mr. McCartan were calculated to physical harm to Ms. Sullivan and that they did in fact do so. It would nevertheless be artificial to extend the rule in *Wilkinson v. Downton* in this fashion. In the latter case the *injuria* was the acute physical harm which the plaintiff had suffered. It is true that in the present case Ms. Sullivan lost weight and in the end was prescribed a mild sedative to assist her to have sleeping pattern restored.

36. But there the comparisons end, as unlike *Wilkinson v. Downton*, the claim here is not really for physical injury at all. It is rather for the acute distress caused by the outrageous invasion of her personal space which is the very essence of the inviolability guarantee in Article 40.5. This guarantee is complemented by the protection of the person in Article 40.3.2, the effect of which, if I may venture to repeat what I said in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, is that:-

> "By solemnly committing the State to protecting the person, Article 40.3.2 protects not simply the integrity of the human body, but also the integrity of the human mind and personality."

I might further repeat what I said on this point in *Sullivan (No.1)*:

> "In the present case it requires little imagination to visualise the acute mental distress which Ms. Sullivan suffered as a result of this outrageous conduct. The citizen's right to the security of his or her person necessarily implies that the subjection by unlawful means of any person to what would objectively be regarded as acute mental distress must be regarded as amounting in itself to a breach of Article 40.3.2."

37. Of course, the ancient Roman jurist would have had no difficulty at all in recognising what occurred in the present case as actionable *iniuria,* a tort which "protected the personality or personhood": see Birks, "*Harassment and Hubris*" (1997) 32 Irish Jurist 1, 6. Reflecting this Roman inheritance, most continental civil codes would also readily permit an *actio iniuriarum* in respect of conduct of this kind.

In some civil law jurisdictions traditional tort law on this subject has, moreover, been supplemented and augmented by the judicial invocation of relevant constitutional guarantees. This has been particularly true in Germany where the Basic Law's guarantees in terms of human dignity and the protection of the person are in terms very similar to our own constitutional guarantees: see, e.g., Zweigert and Kötz, *An Introduction to Comparative Law* (Oxford, 1992) at 729-730.

38. All of this is merely to say that the common law might well yet develop unaided to match its civilian counterparts so that in time that the law of nuisance and the rule in *Wilkinson v. Downton* would be regarded as just distinct sub-rules of a more general tort which protected human dignity and the person. As it happens, save in part for the fact that a statutory tort of harassment was created in the United Kingdom by the Protection from Harassment Act 1997, there might well have been English developments along these lines in the intervening period.

39. Indeed, in his concurring judgment in *Hunter*, Lord Hoffman may be thought to have contemplated that such might well occur ([1997] A.C. 655, 707):

> "The perceived gap in *Khorasandjian v. Bush* [1993] Q.B. 727 was the absence of a tort of intentional harassment causing distress without actual bodily or psychiatric illness. This limitation is thought to arise out of cases like *Wilkinson v. Downton* [1897] 2 Q.B. 57 and *Janvier v. Sweeney* [1919] 2 K.B. 316. The law of harassment has now been put on a statutory basis (see the Protection from Harassment Act 1997) and it is unnecessary to consider how the common law might have developed. But as at present advised, I see no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence: see *Hicks v. Chief Constable of the South Yorkshire Police* [1992] 2 All E.R. 65. The policy considerations are quite different. I do not therefore say that *Khorasandjian v. Bush* [1993] Q.B. 727 was wrongly decided. But it must be seen as a case on intentional harassment, not nuisance."

40. This view was shared by Professor Birks in his masterly essay on the topic, "*Harassment and Hubris*". As the original essay had been written before the decision of the House of Lords in *Hunter* and the enactment (in the UK) of the Protection from Harassment Act 1997, he subsequently argued in a postscript to that essay:

> "One of the things which the lecture says is that the case of *Khorasandijian v. Bush* was stretching the limits of the tort of nuisance to make it do some of the work of a tort of harassment, and it argues that the resources lay at hand to do that work more directly and more comprehensively. The new statute, introducing civil and criminal redress, took the pressure off the tort of nuisance, allowing the House of Lords to say in *Hunter v. Canary Wharf Limited* that *Khorasandijian* had indeed overstretched the tort of nuisance and was to that extent wrong."

41. These views were also echoed by Professor Glazebrook who argued ("*Wilkinson v. Downton: A Centenary Postscript*" (1997) 32 *Irish Jurist* 46, 48):

> "So, if *Wilkinson v. Downton* is authority for anything, it is for the proposition that it is a tort to cause another anxiety, worry or distress when this is done intentionally, unjustifiably and inexcusably. It is not necessary, as some often suppose, that the anxiety, worry and distress should have resulted in illness. Illness is not part of the cause of action any more than physical injury is part of the cause of action in trespass to the person…."

42. Nevertheless, Lord Hoffmann himself subsequently seemed to rule out the development of such liability in *Wainright v. Home Office* [2004] 2 A.C. 406 (a case involving the strip searching of visitors to a prison) when he said ([2004] 2 A.C. 406, 426) that *Wilkinson v. Downton* "does not provide a remedy for distress which does not amount to recognised psychiatric injury."

43. But just because the common law *might* have so developed or might yet so develop at some stage in the future does not take from the fact that the *existing* law of torts is still basically ineffective to protect the plaintiff in a case of this kind. It is true that – just as with the UK – our law of harassment has been placed on a statutory footing (s. 10 of the 1997 Act), but in this jurisdiction – unlike the UK Act - this is confined to the criminalisation of such conduct and does not address the question of remedies in tort. The fact that there is no statutory right to recover damages for this wrong simply underscores the basic ineffectiveness of traditional tort law fully to vindicate the constitutional rights to the protection of the person and the inviolability of the dwelling.

44. In the light of these conclusions it is not necessary for me to effect a re-shaping of existing common law rules. It follows, therefore, that for all of the above reasons the plaintiff can nevertheless sue and recover damages in respect of the violation of her constitutional rights as guaranteed by Article 40.3.2 and Article 40.5 given the basic ineffectiveness (in the *Hanrahan* sense) of the existing common law rules to protect the important interests relating to the protection of the person and the security of the dwelling which are safeguarded by these constitutional provisions. Even if the common law has not (yet) developed a general principle of tortious liability by reference to which the person is to be protected, that it is irrelevant given that Article 40.3.2 of the Constitution articulates such a general principle in clear and express terms. I am accordingly obliged as a result to fashion remedies which will uphold that constitutional right.

The appropriate level of damages

45. It is not easy to calculate the appropriate level of damages in unusual cases of this kind. In *Raducan v. Minister for Justice* [2011] IEHC 224, [2012] 1 I.L.R.M. 419 I awarded €7,500 to the Moldovian plaintiff who had been falsely detained by immigration officials as a result of a bureaucratic error following her arrival in Dublin airport on a fight from Bucharest. This meant that the plaintiff was unlawfully detained at a detention centre for three days. While the error was *bona fide* and the plaintiff herself very fairly acknowledged the fact that she was well treated while in prison, the sum was designed to compensate her for the loss of liberty for three days.

46. In the present case the interference with the plaintiff's freedom was nothing as far-reaching as in *Raducan.* Nevertheless,

whereas the deprivation of liberty in that case was the result of a *bona fide* mistake contrast, the defendant's conduct here has been outrageous, contumelious and malicious. The offending conduct, moreover, lasted for a three week period as compared with the three days in *Raducan*.

47. In *Herrity v. Associated Newspapers Ltd.* [2008] IEHC 249, [2009] 1 I.R. 326 the defendant newspaper published detailed transcripts of the plaintiff's private telephone conversations which had apparently been obtained by her estranged husband. The transcripts showed that the plaintiff had a romantic relationship with a Roman Catholic priest and the details of these transcripts were then published by the defendant newspaper to the plaintiff's immense distress.

48. Dunne J. held that the defendant had thereby violated the plaintiff's constitutional right to privacy. Addressing herself to the question of damages Dunne J. concluded ([2009] 1 I.R. 326, 347):

> "Bearing in mind the facts and circumstances of this case, I am assessing ordinary and aggravated compensatory damages in the sum of €60,000 for the conscious and deliberate and unjustified breach of the plaintiff's right to privacy and the undoubted and significant distress caused to the plaintiff as a result of that breach. The blatant use of unlawfully obtained transcripts of telephone conversations is such that it seems to me that it could not be condoned in any way whatsoever. The behaviour of the defendant in making use of such material is, in my view, nothing short of outrageous. It will be seldom that a court will award punitive or exemplary damages. However, bearing in mind the comments of Finlay C.J. in [*Conway v. Irish National Teachers' Organisation* [1991] 2 I.R. 305], it seems to me that this is one of the rare occasions when the court's disapproval of the defendant's conduct in all the circumstances of the case should be marked by awarding such damages. In all the circumstances of this case it seems to me that the appropriate sum to award in respect of punitive damages for the conduct of the defendant in making use of transcripts of telephone conversations obtained unlawfully is the sum of €30,000.
>
> Accordingly, there will be a decree in favour of the plaintiff in the sum of €90,000."

49. Of course, the invasion of privacy in *Herrity* was particularly outrageous, not least given that it was committed by a powerful newspaper for commercial gain. This private and intimate information was thereby communicated to a wide audience and, of course, this did not happen in the present case. It must furthermore be acknowledged that Mr. McCartan's conduct stopped following a court order and to that extent Ms. Sullivan's rights have already been vindicated by judicial decision. Yet the outrageous conduct of the defendant cannot be ignored, nor are the grave breaches of the plaintiff's constitutional rights to be lightly overlooked.

50. In the circumstances, I consider that the present case is somewhat closer to *Raducan* in terms of the effects on the plaintiff's life and welfare, even if the breaches of constitutional rights in the present case were more sustained and had a longer duration. In these circumstances I will award the plaintiff the sum of €15,000 by way of general damages.

Whether exemplary damages should be awarded

51. In *Conway v. Irish National Teachers' Organisation* [1991] 2 I.R. 305, 317 Finlay C.J. envisaged that exemplary damages could be awarded in addition to compensatory damages where it was appropriate "to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case." Given all that I have said in both the first judgment and in this judgment regarding the oppressive, arrogant and contumelious behaviour of Mr. McCartan, just as in *Herrity*, it is entirely appropriate that exemplary damages should be awarded. Here I propose to follow the example of Dunne J. in *Herrity* and to award the plaintiff by way of exemplary damages 50% of the sum awarded as compensatory damages, i.e., the sum of €7,500.

Conclusions

52. For the reasons stated, therefore, I propose to award the plaintiff the sum of €15,000 in respect of general damages, with €7,500 by way of exemplary damages. I will thus award her the sum of €22,500 for breaches of her constitutional rights as against the third defendant.