

## THE HIGH COURT

[2011 No. 7391 P]

BETWEEN

SAM MCNULTY

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND  
ATTORNEY GENERAL

DEFENDANTS

**JUDGMENT of Ms. Justice Baker delivered on the 9th day of November, 2016.**

1. The plaintiff seeks damages arising from incidents at his home on two dates, 4th August, 2009 and 19th August, 2009, as a result of which he says he was threatened and intimidated by a member of An Garda Síochána.
2. The claim is pleaded in trespass, negligence, breach of constitutional rights and those under the European Convention on Human Rights. There is also a claim that the plaintiff was injured in his reputation, but this was not further particularised or progressed at trial.
3. In defence, the State entities plead that they acted reasonably, that their behaviour was at all times justified and lawful, and that any anxiety and other conditions of which the plaintiff complains, were pre-existing or related to the difficult circumstances then prevailing in his marriage.
4. The plaintiff was born in 1968 and at the commencement of the proceedings was a student, although he was in full-time employment when the case was heard. At the time of the incidents giving rise to these proceedings he was experiencing grave and irreconcilable difficulties in his marriage. Both the plaintiff and his wife had made complaints to members of An Garda Síochána arising from the behaviour of the other in the period leading up to the incidents the subject matter of these proceedings.
5. The plaintiff was the primary carer of the three children, one of the marriage, and two of a previous relationship of his wife. In the period leading up to the incidents the subject matter of these proceedings, the relationship between the couple was contentious and difficult, and they were attending family counselling. That counselling did not result in the reconciliation of the marital difficulties and the couple eventually separated. An interim order under the Domestic Violence Act 1996, as amended, was obtained by the plaintiff's wife on 25th July, 2009 and immediately thereafter the plaintiff went to the home of his mother and father with the youngest child, a boy, then four years of age. He stayed in his parents' house between the date of the interim order and the return date before the District Court. The plaintiff's wife's application for a barring order was refused at the interlocutory hearing, and the plaintiff returned to the marital home at approximately 3.00 p.m. on 4th August, 2009, accompanied by his father and his young son. There was an argument at the home between the couple, which was described in quite vivid terms as being aggressive and verbally abusive. The plaintiff's wife then left the home taking the young boy with her. The plaintiff called for garda assistance, and he and his father were in the house when the gardaí arrived following his phone call.
6. Two male members of An Garda Síochána attended at the house. The plaintiff says that one garda member, Garda Hartley, took control of the conversation that happened in the family kitchen. The plaintiff described a very unhappy encounter, and described the garda as being immediately confrontational, referring to the plaintiff as the "man who kidnapped his child", a reference explained in the course of trial as a reflection of a complaint made by the plaintiff's wife regarding the whereabouts of the young boy between the date of the interim order and the return date before the District Court. He said the garda asked him if he had been drinking, and opened his fridge, saying he was looking for alcoholic drink. It is alleged that the garda said that as "he was the judge now", he was free to deal with the matter, and that the plaintiff was answerable to him.
7. Mr. McNulty senior attempted to intervene and suggested that the plaintiff would phone his solicitor, which he then did. The garda spoke to the solicitor, but that solicitor gave no evidence as to the purpose or content of the call.
8. The plaintiff says that immediately after that call the garda asked Mr. McNulty senior to leave the house, and no reason was given for this.
9. The plaintiff's wife arrived back at the home with the young boy and the two older children, and she and the gardaí together with the plaintiff, and in the absence of Mr. McNulty senior, agreed arrangements by which it was hoped that the couple could co-exist for a short period, until other more long-term arrangements could be made. That conversation lasted 30 minutes or thereabouts.
10. The interim arrangement between the couple broke down within two days, and a female garda, at their invitation, then negotiated a different arrangement by which the plaintiff's wife left the house and access arrangements were put in place. The plaintiff describes that garda as handling the situation very well, with professionalism and a neutral attitude.
11. The next incident is said to have occurred close to 9 p.m. on 19th August, 2009. The plaintiff was at home watching television with his parents. The young boy was in bed. The plaintiff says that his mother answered a knock on the door and Garda Hartley "barged into" the house, past his mother and went straight to the living room. The plaintiff says he thought Garda Hartley was "coming to apologise", that he had not called for garda assistance and had not spoken to him since 4th August. He said Garda Hartley was extremely aggressive and was shouting at him.
12. He describes an unpleasant incident in his home on that evening, that he was told he would be arrested, that the young boy would be "taken from him", and that he would be charged with assault and kidnapping. He says when asked if he had a warrant, Garda Hartley said that he had been invited to the house by the plaintiff's wife, and an altercation occurred during which the plaintiff said that this could not have happened as his wife had moved to another town, and could not have extended that invitation. The plaintiff says the garda refused to leave the house when he was asked to do so.
13. Mr. McNulty senior attempted to calm the atmosphere and brought the plaintiff into another room.

14. Two other gardaí then arrived. They knocked on the door but did not come in and Garda Hartley left with them. The plaintiff describes the other gardaí as professional and he accepts they attempted to calm what had become quite a heated environment.

15. The plaintiff describes himself as frightened during that incident. He describes the behaviour of Garda Hartley as unprofessional, and that he did not show basic courtesy towards him. He remarked on the fact that he had no notebook, and took no notes whatsoever during the encounter. He attended later that night at Tallaght Garda Station and made a statement about both incidents.

16. In cross examination, he denied that he was a “bully” and offered as an illustration the fact that the children, including the children of his former wife to whom he was in *loco parentis*, had chosen to live with him for much of the time. He did admit that he perpetrated an assault on his former wife’s new partner, but denied that he personally was violent in his marriage.

17. In response to a question from counsel, he denied that Garda Hartley had made it clear to him that it was not his function to be involved in any way in the matrimonial matter, and in response he said “what was he there for then”.

18. He also denies that he was “highly elated” after the interlocutory hearing in the District Court, and said that he was more relieved than anything else. He denies that he had been drinking.

### **Internal investigation**

19. The plaintiff completed a formal complaint to the Garda Síochána Ombudsman Commission (“GSOC”) in regard to both incidents and his complaint was referred to an internal garda investigation on the instructions of GSOC. On 8th April, 2010, Chief Superintendent Lorraine Wheatley who had been appointed pursuant to s. 94 (1) of the Garda Síochána Act 2005 to investigate that complaint found Garda Hartley in breach of discipline, and he was given written advice regarding how he had managed these incidents, and how to deal with disputes of this nature in the future. The provision for dealing with such complaint by “advice” is provided for under Regulation 10 of the Garda Síochána (Discipline) Regulations 2007. The plaintiff is not at all satisfied with this sanction which he described as a mere “slap on the wrist”.

The plaintiff then sought a review by GSOC of the outcome of that enquiry, and GSOC in its decision on 19th October, 2010 found that the investigation had been “both thorough and proportionate”, and that the sanction was appropriate.

### **Personal injuries**

20. The plaintiff claims to have suffered personal injuries as a result of the incidents, giving rise to what was described by his doctor as “chronic anxiety” and a stress-related condition. His evidence is that he suffered insomnia, dizziness, palpitations, blurred vision, faintness, somnolence, and some symptoms described by his doctor as being typical of panic disorder. He was treated with anti-depressants, sleeping tablets for a week, and anti-anxiety medication and undertook a course of counselling therapy. The medical evidence was that the anxiety persisted at an intense level for a short period following the incidents and the plaintiff described flashbacks and strong memories of the incidents. His primary emotional response was one of feeling victimised by what he described as “the legal authorities”, and that he suffered fear and helplessness as a result.

21. The plaintiff’s personal life has now improved significantly and he is in a new relationship and has two small children. He is employed full time. He described himself as a “broken man”, but no longer feels himself to be so.

### **The evidence of Mr Mc Nulty senior**

22. Mr. McNulty senior was an impressive witness. It was he who had suggested to his son that he phone the gardaí on 4th August, 2009, but he thought that Garda Hartley had come to the house with an unhelpful attitude, and that he was overly forceful and insistent in his approach. He too gave evidence of the incident regarding the fridge, and gave somewhat extraordinary evidence that Garda Hartley had “ordered him” to leave the house.

23. Mr. McNulty senior was very clear that the plaintiff had not invited Garda Hartley on the date of the second incident on 19th August, 2009, and that the garda did not mention that he had come regarding a child welfare issue, which could have created a different statutory context. He described Garda Hartley as behaving in a rude and intimidating way both to him, to the plaintiff and to Mrs. McNulty senior.

24. He describes the other gardaí who attended as being excellent.

25. In answer to cross-examination Mr. McNulty senior was calm and helpful in his answers, and when it was put to him that Garda Hartley had been invited into the home on 19th August, he said in the clearest possible terms that the garda had “pushed his way past my wife”. When he was asked whether the garda was really attempting to exclude the plaintiff’s parents to ensure privacy in his conversation with the plaintiff, Mr. McNulty was clear that this was not so, and that his son had asked the garda to leave. He did accept that it was appropriate that the garda did not discuss with him the details of the plaintiff’s marital difficulties. Mr. McNulty senior very fairly admitted that the gardaí have a very difficult job, and that dealing with domestic situations is particularly difficult. He was clear however that Garda Hartley had done nothing to calm the situation, and had instead exacerbated the situation entirely.

### **The evidence of Mrs Mc Nulty senior**

26. Mrs. McNulty senior was a gentle and clear witness. She had not witnessed the incident on 4th August, but was in the house on 19th August, and describes Garda Hartley as “barging past” her. She describes a very unhappy and aggressive exchange between her son and the garda, albeit she was in the adjoining room. She described the garda as physically overbearing, and was quite clear that the plaintiff asked the garda to leave. She very clearly welcomed the other gardaí to the door and told them that Garda Hartley’s response to the situation was aggressive and not at all helpful.

27. A particularly important piece of evidence was that both Mr. and Mrs. McNulty senior said that Garda Hartley had warned the plaintiff that he would have him charged and a summons would issue the following day. Both of them said that Sergeant Philip Rowe had helpfully said that “there will be no summons”.

### **The evidence of Garda Hartley**

28. Garda Hartley described the incident on 4th August, 2009 in broadly uncontroverted terms, but did say that he was concerned with regard to the welfare of the three young children. He describes two contacts between himself and the plaintiff’s wife leading up to the incident on 19th August, 2009. He described a phone call from her on 6th August, 2009 in the afternoon in which she complained that the plaintiff had taken various documents including passports and vehicle registration documents for the family car. He personally took notes after that complaint. He describes the plaintiff’s wife in a phone call on 19th August, 2009 saying that the plaintiff had “taken” the young boy, and that she hadn’t spoken to him for five days. He said it was in that context he attended at the house on that evening. He said he stayed at the door and did not enter without invitation. He said he was invited into the kitchen

and that the plaintiff got irate, aggressive and defensive. He denied that the plaintiff had ever asked him to leave. He said the plaintiff was extremely angry and did ask him to leave later in the conversation, and that it was in that context that a call was made for reinforcements from the garda station.

29. In cross-examination he said he believed that the matrimonial dispute was "beginning to escalate" and that his experience of domestic disputes suggested that it would be difficult to resolve. He denied that he ever used the word "abduction".

30. With regard to the incident regarding the fridge, he admitted to opening the fridge, and explained that in general the consumption of alcohol can exacerbate a tense situation, but he did accept that he did not believe that the plaintiff had consumed alcohol on 4th August.

31. He denied that he, in an aggressive tone, said that he was now the "judge" but that he did try to assess the situation and that he would in those circumstances have to judge the relative risks to all parties concerned including the children.

#### **The evidence of Chief Superintendent Lorraine Wheatley**

32. I heard evidence from Chief Superintendent Lorraine Wheatley, the deciding officer to whom was entrusted the enquiry under garda regulations. She regarded the incident as less serious or "minor", and described Garda Hartley as being a young member whom she thought needed some advice with regard to dealing with sensitive domestic issues. When asked in cross-examination whether Garda Hartley had mentioned in the course of his two interviews with her that his real concern was a child protection issue, she said no, but that it "would have been in his mind". I consider this to be important evidence, as Garda Hartley did not persuade me in his evidence that his real concern was child protection, and had that been the primary focus of his visit on 19th August, 2009, or indeed his primary concern when he attended the call to the house on the 4th August, 2009, it would have been in the forefront of his evidence, as such evidence would have been exculpatory and could perhaps have dealt fully with the claim made against him.

#### **The evidence of Garda Padraig Syron**

33. I heard evidence from Garda Syron with regard to the incident on 4th August and he described the plaintiff as being "celebratory and agitated". He thought Garda Hartley was "calm and professional and reached a compromise". He had no child welfare concerns whatsoever. He accepted in cross-examination that while his statement to the internal garda inquiry described the incident as being one of "domestic violence", he did not believe the matter was properly characterised as such.

34. He said he did not "see" Garda Hartley open the fridge or mention alcohol at all, or that he would be the "judge". He did say that in general, where gardaí are concerned with regard to the welfare of children, they would, in making an assessment of the living arrangements of the children, look to see how they are fed and clothed, and that in those circumstances it would not be unreasonable to see if there was food in the fridge.

#### **The evidence of the former wife of the plaintiff**

35. Michelle McNulty, the former wife of the plaintiff, said that Garda Hartley had been trying to resolve the immediate issue of marital disharmony when he came to the house on 4th August, 2009, and she described him as "calm, relaxed, professional and more like a social worker".

36. She gave evidence that she was the instigator of the visit of Garda Hartley on 19th August, 2009 and that she had asked him to check if the young boy was at home with her former husband. She describes her former husband as "a bully" and she said that between 25th July, 2009, the date she obtained the interim order, and the date when the order was vacated, she did not know where her son was, and that her former husband had taken him without telling her where he was.

37. I do not accept her evidence with regard to the young boy. I believe that she is a loving mother and cares deeply for all of her children with whom she has a very good relationship. I consider it improbable that she did not believe that her young boy was with her husband in the home of his parents during the relevant period. I accept her evidence under cross-examination that she did not believe the young boy was in any danger and her complaint was that she did not know where he was. She accepted there was no child protection issue. It was unclear whether she had in fact made contact with the gardaí between 4th August and 19th August, 2009, and after some pressing with regard to this by counsel for the plaintiff, she said that as she was not Irish and as she had no family in Ireland, she felt isolated and that was the context in which she approached the gardaí. She also said she had no "concern" with regard to the welfare of her young boy but was worried that her former husband would "abduct him". I regard Mrs. McNulty's evidence that her husband had always been tense and stressed and suffered from insomnia as credible and consistent with the medical evidence, and with my observation of him in the course of the hearing.

#### **Medical evidence**

38. The plaintiff had visited his general practitioner Dr. John Twomey in April, 2009 for assistance in dealing with his marital discord and was prescribed anti-anxiety medication. The contemporaneous clinical notes describe the plaintiff as being "very stressed". The plaintiff says that he went to his doctor on the day following the incident on 4th August, 2009 but there is no reference to the incident in the clinical notes.

39. Dr. Twomey prepared a report for the purposes of a PIAB application on 2nd February, 2011 where he recounts details of the two incidents, as a result of which it is said that the plaintiff suffered "acute anxiety, insomnia, agitation and that he was emotionally labile". The symptoms were described as having settled down in that report.

40. In evidence, he said the plaintiff was a rational person and that his anxiety was reactive to the incidents. He prescribed sleeping tablets and advised the plaintiff to attend a counsellor. His view was that the anxiety and stress were under control at the time of the incidents complained of, and that the stress was increased thereby.

41. An attendance on two separate dates in January 2011 suggests that the plaintiff was "terrified and very upset and tearful" on those days. He complained then of being in fear of being "beaten" by the gardaí and it seems an incident had arisen with his new girlfriend giving rise to garda involvement. The plaintiff was advised to continue "his usual" anti-anxiety medication. The plaintiff's mental health was scored as "moderate", midway in the relevant scale. No further investigations were required and a full recovery was expected.

42. Dr. Ian Gargan, psychologist and general medical practitioner, in evidence described the intervention of Garda Hartley as being "an unhelpful" interaction which compounded the psychological and psychiatric difficulties from which the plaintiff suffered. He said that he believed the plaintiff felt "victimised", and that his anxiety was at a level at the time where relatively minor incidents could "jump-start" a heightening of anxiety. He accepts that the plaintiff had a serious and relevant medical history and that the plaintiff had not informed him of this history when he attended for treatment. His diagnosis was that the plaintiff suffered from mild depression

associated with episodes of acute anxiety.

43. Dr. Gargan describes the plaintiff generally as a hardworking, caring, intelligent and resilient man. A theme throughout his evidence and his reports was that the marital difficulties had resulted in significant psychological challenges and had resulted in a moderate depression and a feeling of trauma, fear and helplessness, and that he experienced feelings of harassment, and of being disillusioned and let down by the gardaí. This must be seen in the context of the plaintiff's own evidence that some of the gardaí who came to his assistance were extremely helpful, and he commended them in very positive terms in the course of his evidence.

44. Dr. Gargan's view was that the counselling in which the plaintiff engaged had been helpful, and the plaintiff's own evidence in the course of the trial was that the counselling was "fantastic" and had given him much support and had improved his mood.

#### **Findings on the evidence**

45. The plaintiff came across in evidence as having a strong personality, which at times I considered could be interpreted as overbearing and he displayed a hint of aggression in his response to cross-examination. I accept that he had difficulties in his marriage, and that these have caused him great personal trauma, and he displayed the symptoms of moderate clinical depression as a result.

46. The plaintiff's evidence was put under very rigorous cross-examination, and he did not always respond with clarity or indeed with calm to the questions in cross-examination, but he persisted in his story that the garda had approached the incident with a degree of aggression, or a degree of perhaps negative prejudice towards him which was to say the least unhelpful. I have had the opportunity of observing the demeanour of the plaintiff in court and can understand that his approach might have been seen by Garda Hartley as being aggressive or that he was somewhat elated or celebratory following the lifting of the interim order after the interlocutory hearing. I also consider that the plaintiff was, by early August 2009, in a state of very high anxiety and that his anxiety expressed itself in a degree of unhelpful aggression or anger, some of which presented in the course of the trial before me as still simmering, although the plaintiff has quite clearly, as he put it himself "got on with his life" and has now settled into a happier personal life.

47. I have also had the opportunity of seeing Garda Hartley in court and he too had a forceful personality and was insistent, perhaps overly vigorous, in his personality. I accept the plaintiff's evidence that Garda Hartley did threaten him that he would report his treatment of his child or children to the relevant State body.

48. As to the incident on 19th August, 2009, I consider that Garda Hartley's evidence in cross-examination shows that he did not do a background check to update himself on the situation in the family between the earlier incident on that date, and he did not know that a female garda had very usefully and helpfully brokered an arrangement between the couple. He said that he had been informed there was a theft by the plaintiff of the family car, although he later described the theft as of documents including vehicle registration documents.

49. He said that he had no child concern issues, or no "immediate child care issues" on 4th August, but he did have some concern on 19th August because the plaintiff's wife said she had not seen the young boy for five days. He describes his visit to the house on 19th August as a "caution", and because he was concerned that the plaintiff might leave the country with the children, as he had their passports. He later denied however that the question of abduction was on his mind at all.

50. He accepted in cross-examination that he could not have entered the house on 19th August without invitation, as he had no "sufficient child welfare concerns" to enable him to attend without a warrant.

51. I must conclude in the light of the statement given by Garda Hartley in the internal garda inquiry that he did not have any child protection concerns when he attended the house on either day. In that report, he makes no reference to having child welfare concerns on 19th August, and rather his concern was to seek the return of certain confidential documents belonging to the plaintiff's wife and her passport. I consider that he had no concern with regard to child welfare issues, nor indeed that he believed that he was investigating a theft. While he did intend initially, on 19th August, 2009, to visit the house on a very informal or casual basis, and that he was merely "dropping up" there to see if he could get the documentation sought by the plaintiff's wife, he did not in my view have any cause for his visit, and failed to engage with the circumstances with the required professionalism and detachment.

52. I do not consider that the visit by Garda Hartley on the second occasion was by invitation. Mrs. McNulty senior described the garda "rushing or pushing past her". The evidence of the parties is difficult to reconcile, but I do accept Garda Hartley's general proposition that he attended at the house on a casual basis and because he thought that if he could resolve the issue of her documentation to the satisfaction of the plaintiff's wife, this would calm matters between the couple. However, I regard that belief as not well founded and poorly judged, as he had already had an unpleasant incident in the house two weeks previously. I regard it as foolish at best, and careless of him, to have attended at the house alone and without taking steps to ensure that he would remain calm.

53. I accept the evidence of Mrs. McNulty senior. She came across as a gentle woman who was very understandably not anxious to become involved at all in the matrimonial issues between her son and daughter-in-law, and I also accept that all of the parties involved in this unfortunate situation had a great affection for their children and grandchildren respectively.

54. The evidence seems to me to be quite clear, that the gardaí had no real or perhaps no concern at all regarding the welfare of the children, and there was no suggestion that there was any neglect. This was an unfortunate and very unhappy marital breakdown, the couple had engaged legal remedies and it is quite clear to me having observed the demeanour of both the plaintiff and his former wife, that their relationship was volatile, each of them has a strong personality and neither of them was prepared to yield to good sense or to be civil towards one another in August, 2009. I consider both of them regarded the matrimonial dispute between them as a battleground, and both of them wished to win, and saw winning as a target, rather than conciliation, and that neither of them considered seeking any degree of harmony.

55. I consider that Garda Hartley overstayed his welcome on 19th August, and that once he realised his overture, which I do accept he initially intended to be conciliatory, was not being met or received in that manner, he should immediately have left the house, or sought help from his colleagues. It was not appropriate for Garda Hartley to be in the house on his own, once he realised, as he should have, that the atmosphere was unpleasant and that he was not welcome.

56. I also accept the evidence of the plaintiff, that Garda Hartley used language which was entirely unnecessary and was excessive in all the circumstances. There was no real belief that there had been a "kidnapping" or that there was any risk of an "abduction". I consider that Garda Hartley was intimidating and threatening, not because that was his intention, but because he failed to understand the mood that his presence was creating, and failed to understand that the relationship between the couple was at such

a toxic level that a casual informal approach by a person not skilled in these matters, was likely to exacerbate the situation. Only a person skilled in counselling techniques could have resolved the issue, and Garda Hartley should have realised that after the incident on 4th August, 2009, he personally was not in a position to calm the situation.

57. As to the incident on 4th August, 2009, I accept the evidence of the plaintiff of the unusual incident that Garda Hartley opened his fridge. The plaintiff's description of this was vivid and clear, and his father also gave evidence of it. The incident was strange and unusual to have been imagined by both of them. It is also consistent with the evidence given by the other garda who said that occasionally the gardaí would check a fridge to see if there was sufficient food in a house where there were children with regard to whom there were concerns of neglect. There were no such concerns in this case, and Garda Hartley accepted that he did not believe the plaintiff had been drinking on 4th August. He also accepted, as did the garda who accompanied him, that the plaintiff was in a celebratory mood having succeeded in reversing the barring order on the interlocutory application, and I consider that as a matter of probability, Garda Hartley did open the fridge, did so without cause or reason, and did therefore exceed his authority. I note the fact that the other garda did not "see" the incident. The latter persuades me that it might well have happened, because he is not in a position to say that it did not.

#### **Findings on personal injuries**

58. The plaintiff was to an extent a very poor candidate to experience further psychological trauma. I am satisfied that the primary cause of the plaintiff's depression and anxiety conditions were the marital and family difficulties he was experiencing, and that the plaintiff displayed a considerable degree of confidence in the gardaí in the way in which he sought help through his local garda station over the months preceding the incidents in question. I do accept that the plaintiff became disillusioned, not with An Garda Síochána in general but with the approach of Garda Hartley, whose behaviour on the two days in question he regarded as objectionable, threatening and harassing.

59. I accept also that the plaintiff's anxiety conditions, presenting in bouts of insomnia, anxiety and panic attacks were exacerbated by the fraught atmosphere in his home on the two days in respect of which these proceedings were brought, and that the garda member against whom he makes his complaints did know of the background marital difficulties, and that garda help was being sought in circumstances which in themselves gave rise to a considerable degree of personal anxiety, and that it was precisely at the lowest point in his life that the plaintiff most needed the support of calm professionals. He undoubtedly received this support as he himself has made clear, from other gardaí on whose assistance he called.

60. I have to conclude in the light of the evidence of the plaintiff's general practitioner, that much of his anxiety arose as a result of his very poor relationship with his wife, and his fear that she had sought to have him arrested. It is also clear that the plaintiff had suffered panic attacks in early 2008 and "generalised anxiety".

61. I accept his answer to a proposition put to him by counsel for the defendant that he made no complaint whatsoever to his general practitioner with regard to the incident on 4th until he went to the doctor on 19th. I accept he did attend his general practitioner on 5th August, 2009, the day following the first incident. I note that the general practitioner's contemporaneous notes do not contain any reference to the incident on 4th, but the notes are very short, and I have no doubt that the incident of 4th August, 2009 did happen, that there was a very unhappy altercation between the plaintiff and the relevant member of An Garda Síochána on the day and that the plaintiff was left upset.

62. I do not accept the plaintiff's evidence that the incident in question made him lose confidence in precisely those persons whom he might have turned to for help, as the plaintiff freely accepted that other garda members had been helpful. His response to Garda Hartley was one of anger, and I consider that taking the plaintiff's own description of the response of An Garda Síochána as a whole, the gardaí were more helpful than not in regard to his difficulties. I consider that the plaintiff had a difficulty with one member of An Garda Síochána, and that this was to some extent allayed by a very helpful and calm approach by other members who came to his assistance.

63. The plaintiff is a very poor candidate for the incident in question, and I do consider that Garda Hartley should reasonably have anticipated a degree of upset, anxiety and perhaps even a degree of unpleasantness when he attended at the house on both days. The garda is quite clear that he knew there was some background unhappy matrimonial difficulty in play, and in that context he ought to have concerned himself more to disengage emotionally from the conversation with the plaintiff, which he in my view, failed to do.

64. The plaintiff's complaint of psychiatric injury must also be seen in the context of his failure to give his psychologist details of his prior medical history, and therefore the evidence of Dr. Gargan is to be seen as tempered by that failure.

65. Having observed the plaintiff's demeanour in court, I consider that he was enthusiastic in his criticism of his former wife, and he was somewhat more than reasonably elated as a result of the reversing of the barring order. I believe that the plaintiff's demeanour and his enthusiasm could readily have been seen as a degree of triumphalism or somewhat dangerous elation, and I consider that he could readily have been observed by an outsider as being unreasonably argumentative and to some extent emotionally out of control. The personality of the plaintiff and his behaviour or attitude could be seen as bellicose. That is clear also from the fact that he was convicted of assaulting his former wife's current partner in 2011.

66. I do not take note of the fact that the plaintiff did not make any complaints to his general practitioner with regard to the first incident on 4th August 2009, because I consider that the first incident in itself did not cause him any lasting or unusual response. Almost any person in the circumstances that the plaintiff found himself in would have fluctuating emotions after two weeks living his parents following the granting of the interim barring order.

67. I am, however, not satisfied that Garda Hartley was present in the plaintiff's home lawfully on 19th August, 2009. I am also satisfied that he made unwarranted and unnecessary threats and used language that was inflammatory and could reasonably be seen as intimidating.

68. I am satisfied that the plaintiff had a pre-existing chronic anxiety and depression and was in circumstances of serious marital disharmony. I am satisfied that the approach taken by Garda Hartley exacerbated that condition.

69. As to the medical sequelae I consider that the majority of his symptoms related to his marital circumstances, and these were exacerbated by his own extraverted and insistent personality and his bellicose attitude towards his wife.

#### **Nervous shock?**

70. The defendant defends the action in part in reliance on the principles established in the case law and in particular in *Kelly v. Hennessy* [1995] 3 I.R. 253, which has set out the criteria for a claim in nervous shock. I do not consider this to be a claim of

nervous shock. The plaintiff has made no allegations of having suffered an injury following an apprehended injury to himself or to another. The claim is for damages, for what is said to be a direct sequelae from the negligent behaviour of the defendants and/or the behaviour amounting to a breach of his personal rights by Garda Hartley.

71. I consider that the plaintiff had a pre-existing psychiatric condition and that this was exacerbated by the injury suffered by him. I consider, however, that the exacerbation was minor in its extent. The exacerbation lasted at most for a few weeks.

### **Legal principles**

72. The defendants defend the claim by arguing that the actions of Garda Hartley were not done *mala fides* and that this is required as a matter of law following the judgment of Kearns P. in *Lockwood v. Ireland & Ors.* [2011] 1 I.R. 374. There, the court held that no duty of care in tort arose in the circumstances of that case arising from the manner in which it was alleged the gardaí conducted an investigation, as the claimant would have to show *mala fides* on the part of the gardaí to maintain such a claim. At para. 24, Kearns P. said the following:

"24. Given that it is my view that a claimant must establish *mala fides* to bring her claim within the law of tort within this jurisdiction, I am satisfied to conclude that no duty of care arises in respect of bona fide actions and decisions carried out by An Garda Síochána in the course of a criminal investigation and/or prosecution. Any other view would have quite alarming consequences. One might begin by inquiring where the duty of care would begin or end. Would the victim of a crime, such as that perpetrated on the plaintiff in the present case, be the only person with an entitlement to sue, or would any such entitlement extend to immediate members of her family or perhaps to some person who might have been a witness in the trial or a witness to the event itself? By the same token, the inhibiting nature of any such duty would effectively cripple the capacity of An Garda Síochána, or any other police force for that matter, to carry out its duties effectively and with expedition. It would be unacceptable that those charged with responsibility for the investigation and prosecution of crime should have to take legal advice at every hand's turn in respect of every step in the criminal process. Any such approach would simply render the present system, struggling as it is with the multiple obligations imposed on An Garda Síochána in respect of those suspected of crime, to constraints of unimaginable proportions."

73. The plaintiff in that case alleged negligence and breach of duty by an arresting garda, who had failed to vindicate her constitutional right to bodily integrity, and ensure that justice was achieved in a criminal prosecution for rape, in which she was the complainant. The claim was dismissed on the grounds that the gardaí had not acted *mala fides* in their investigative and prosecutorial functions.

74. I am satisfied on the basis of that judgment, that an element of *mala fides* has to be shown by a plaintiff seeking to establish a claim for breach of duty arising from the conduct of the garda authorities. I consider that *mala fides* was not shown in the present case, and that the behaviour complained of was foolish, but not done with bad or malicious intent. No claim in negligence lies in those circumstances.

### **The claim in trespass and for breach of the human rights of the plaintiff**

75. The claim is made as a claim in trespass at common law and under the Constitution. The claim is actionable without proof of *mala fides* and there was, I consider, a trespass amounting to a breach of the plaintiff's property rights on 19th August, 2009, and a technical trespass on 4th August, in the incident when the fridge in the house was opened without cause.

76. The trespass was to the principal residence or home of the plaintiff. It was short-lived, and was done in the context of what I believe to be an over-zealous approach by the garda.

77. I consider the judgment of O'Malley J. in *Kessopersadh v. Keating & Ors.* [2013] IEHC 317 to assist me in arriving at the correct approach. She found that the plaintiffs had been understandably upset as a result of an unlawful search of their home by gardaí, and also because the gardaí would not accept their word. She did not find any oppressive, arrogant or outrageous behaviour by the gardaí. The circumstances of that case involved a tragic road traffic accident, and the level of upset caused to the plaintiffs as well as the circumstances which O'Malley J. found had amounted to an unlawful arrest of the young son of the plaintiffs, were of note. The gardaí had arrived in the very early hours of the morning, dressed in dark clothing rather than in uniform, and in an unmarked car. The first plaintiff found the manner of the three gardaí intimidating, and the damages awarded recognised the fact that the gardaí knew that they were in the house without the consent of the occupiers from the outset.

78. While I am satisfied that there was a trespass in the home of the plaintiff on 19th August, 2009, I consider that it was short-lived, and that there was no sense in which the plaintiff could be said not to have understood why the gardaí were in attendance in his home. He did not welcome them, but he knew why they were there, albeit I accept that Garda Hartley was not there lawfully.

79. I am persuaded by the judgment of Hogan J. in *Sullivan v Boylan & Ors.* [2013] IEHC 104, [2013] 1 I.R. 510, that damages lie for breach of the plaintiff's personal right to integrity, and his right to enjoy his personal dwelling without interference.

80. Hogan J. also gave judgment in the case of *Ogieriakhi v. Minister for Justice & Ors.* [2014] IEHC 582, in which he considered the nature of the claim for breach of constitutional rights. Hogan J. considered that the judgments of Henchy J. in *Pine Valley Developments Limited & Ors. v. Minister for the Environment & Ors.* [1987] 1 I.R. 23, and in *Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd* [1988] I.L.R.M. 629 suggested that a plaintiff must normally invoke common law or statutory rights in damages claims save where these were "ineffective" to protect constitutional rights.

81. I adopt this approach.

82. I am satisfied that the plaintiff has made out a claim for damages for trespass, and for breach of his personal right to integrity and to the privacy of his dwelling.

### **Measure of damages**

83. The damages must reflect the degree of the trespass and breach of rights.

84. Hogan J. awarded the plaintiff €20,000 for loss of his good name in *Ogieriakhi v. Minister for Justice & Ors.* because he considered that this was the appropriate and singular means by which his constitutional rights to a good name under Article 40.3.2 could be vindicated.

85. O'Malley J. in *Kessopersadh v. Keating & Ors.* assessed compensation for trespass and unlawful entry into the home of the plaintiff in the sum of €50,000. The present circumstances fall short of those in that case. The circumstances of the present case are to be

viewed in the light of the much more serious circumstances with which O'Malley J. was dealing, where the plaintiffs were retired persons living in a quiet neighbourhood, and where the gardaí were searching their dwelling without a warrant.

86. In *Sullivan v. Boylan & Ors.*, Hogan J. awarded Ms Sullivan €22,500 in total, and the circumstances were far more egregious than those in the present case.

### **Conclusion**

87. I conclude that the plaintiff is entitled to some damages for trespass, and breach of his personal rights. The exacerbation of a pre-existing psychiatric condition was short-lived, and I consider that while Garda Hartley exceeded his lawful authority, the plaintiff's own demeanour contributed to the heightened atmosphere in the house.

88. I consider that Garda Hartley acted in breach of his invitation by searching the plaintiff's fridge. This is a technical trespass, and one that was unjustified and unexplained in the circumstances. There were no child protection issues in play.

89. The plaintiff is entitled to damages. I assess the damages at €5,000 for trespass, and €2,500 for personal injuries arising from the breach of personal rights. This results in €7,500 in damages.

90. I am not persuaded that exemplary damages are appropriate in the present case. I consider that the behaviour complained of falls far short of the type of behaviour which Dunne J. in *Herrity v. Associated (Ireland) Newspapers* [2008] IEHC 249, [2009] 1 I.R. 316 described as "outrageous", and which Hogan J. described as "outrageous, contumelious and malicious" in *Sullivan v. Boylan & Ors.*. The award of compensatory damages is appropriate to reflect the loss suffered by the plaintiff and there is no further need to mark the displeasure of the court for the conduct of Garda Hartley.

91. There is to be an award of damages in the sum of €7,500. No proof of any special damages has been established.