

THE HIGH COURT

2007 5734 P

BETWEEN

L.K. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND M.K.)

PLAINTIFF

AND

INDEPENDENT STAR LIMITED, THE DUNDALK DEMOCRAT LIMITED AND INDEPENDENT BROADCASTING CORPORATION LIMITED
T/A LMFM

DEFENDANT

JUDGMENT of Mr Justice Hedigan delivered on the 3rd Day of November 2010.

Introduction

1. The plaintiff's claim is for damages for alleged breaches of the plaintiff's constitutional right to privacy and under ss. 7 and 8 of the Criminal Law (Rape) Act 1981, as amended, arising out of alleged unlawful and unauthorised publications or broadcasts by the defendants respectively in November, 2006.

2. The plaintiff is a minor, suing by her mother and next friend. The plaintiff was born in 1996 and is the youngest of three children. The plaintiff has a moderate learning disability and attends a special needs school.

3. Until recently, the plaintiff and her mother resided in a small village in rural Ireland. The plaintiff lived with her family on an estate therein. D, a neighbour, lived across the road from the plaintiff's house on another adjoining estate.

4. On the 18th April, 2005, the plaintiff, who was eight years old at the time, was raped by her neighbour, D. The plaintiff had been missing on the evening in question and her mother sent her two brothers to look for her. Her brothers called to D's house and were told the plaintiff was not there. It later emerged the plaintiff was in the house and had been locked in a room with D. The child made her own way home in a distressed state. Her mother noticed her clothing was put on back-to-front. The plaintiff's mother contacted the Gardaí who arrived at the house in a squad car. On the same evening, the Gardaí called to D's house. Later that evening the Gardaí returned to the plaintiff's house to make further inquiries. D was arrested that night and brought to the local Garda station. Naturally, these events aroused the curiosity of the plaintiff's neighbours and a number of them saw the Gardaí call to the plaintiff's house and to D's house and saw him being taken away.

5. In the course of interviews with the Gardaí it also emerged that one of the plaintiff's older brothers had four years earlier been sexually assaulted by D.

6. On the 27th November, 2006, D pleaded guilty in the Central Criminal Court to charges of rape of the plaintiff and sexual assault of her brother.

7. The defendants are respectively the publishers and proprietors of the *The Star* and *The Dundalk Democrat*, and the broadcaster and proprietor of LMFM radio.

8. It is alleged that by reason of the defendants' publications and broadcasts the plaintiff herein became identified to persons in her locality and has suffered considerable distress, upset, anxiety and embarrassment as a result. It is stated that since these publications and broadcasts the plaintiff regularly questions her mother about who knows about the case and what happened to her. The plaintiff feels nervous, self conscious and worries about people knowing what happened to her.

9. Following D's conviction in the Central Criminal Court, the following publications or broadcasts were made. On the 27th November, 2006, LMFM radio broadcast on several occasions during the day, the name, age and address of D and the fact he had been convicted of rape of a female and the sexual assault of a male. It is admitted these reports were broadcast, but it is denied that these words led to members of the public identifying the plaintiff or that the defendants could have known or reasonably suspected they might do so.

10. On the 28th November, 2006, *The Star* published the following report:

"D [full name] (31) of [address], pleaded guilty to raping a female on April 18, 2005, and to sexually assaulting a male in July 2001."

It is admitted this report was published, but it is denied that these words led members of the public to identify the plaintiff or that the defendants could have known or reasonably suspected they might do so.

11. On the 29th November, 2006, *The Dundalk Democrat* published the following report:

"31-year-old D [full name] of [address], pleaded guilty to raping a female on April 18, 2005 and sexually assaulting a male on a date unknown between July 1 and July 31 2001."

It is admitted this report was published, but it is denied that these words led to members of the public identifying the plaintiff or that the defendants could have known or reasonably suspected they might do so.

12. It is alleged that after these publications and broadcasts, the plaintiff's neighbours immediately understood the conviction to relate to the events that occurred on the 18th April, 2005. The disclosure of D's address, in particular, allowed the plaintiff's

neighbours to put two and two together and to understand that it was the plaintiff and her brother who were the victims of the crimes of which the defendant was convicted. It is claimed that the matter immediately became a topic of conversation for the people of the village.

13. As a result of the publications and broadcasts, it is claimed that the plaintiff's brother who also was a victim of D refused to leave the house, even to go to school. Similarly, the plaintiff also refused to leave the house. As a result, the plaintiff and her family felt obliged to leave the village and they moved to a different county. The family were unable to obtain public housing in the new location and had to live in rented accommodation.

The Plaintiff's Evidence

14. M was a next-door neighbour of the plaintiff's and gave evidence that she can see D's house from her upstairs window. She gave evidence that she remembered seeing a squad car outside the plaintiff's house on the evening of the 18th April, 2005. She also said she recalled seeing a squad car outside D's house later that evening. She said that on the 27th November, 2006, her partner heard on LMFM radio that D had been convicted of sexual offences. She herself read a report of D's conviction in *The Star* on the 28th November, 2006, and a report in *The Dundalk Democrat* on the 29th November, 2006. She said that on reading these reports she thought that D had assaulted the plaintiff. She said from reading the articles she concluded the articles referred to the plaintiff and her brother.

15. H was also a neighbour of the plaintiff's and lived opposite the plaintiff's house. She also recalled the evening of the 18th April, 2005, the fact that the plaintiff was missing that evening and that the squad car came to the plaintiff's house. She said she thought it "a little bit strange" that the Gardaí were in the house for "a very long time". She also noticed the blinds in the plaintiff's house were pulled, which she thought was "even stranger, because it wasn't dark". She said that on the 27th November, 2006, she heard on the radio in her car that D had pleaded guilty to a number of offences in respect of a male and a female and she said she thought of the plaintiff and when she went home everybody was talking about it. She said she thought back to the night of the 18th April, 2005. Under cross-examination she said she did not tell anyone of her suspicions that the victim might be the plaintiff and she agreed that she did not think the male victim might be her brother. Under cross-examination she said she read a report of D's convictions in *The Dundalk Democrat* the following Wednesday.

16. The plaintiff's mother in her evidence said that on the 27th November, 2006, she heard on the radio that D had pleaded guilty to rape and sexual assault. She was surprised, because she had no notice of the hearing in the Central Criminal Court that day; she had been given notice of previous court appearances. She said she rang the Gardaí and her brother to inform them. She also read a report of the conviction in *The Dundalk Democrat* on the 29th November, 2006, and a report in *The Star* on the 28th November, 2006. She said that when she read the report in *The Democrat* she had no doubt that the convictions referred to her children. She said that over that weekend people were looking at her house and that when her daughter was out she thought it looked like people were talking about her. She said the publicity affected her children: they would not leave the house and they felt people were talking about them. As a result of the publicity the plaintiff's mother decided to leave the village in 2009 and move to a new area with her children where no one would know them. The plaintiff however continued to attend the same school.

17. C, the brother of the plaintiff's mother, also gave evidence in these proceedings. C lives approximately ten miles from the village. He said he has a very close relationship with the plaintiff, her mother and her brother. C recalled the events of the 18th April, 2005. He recalled that on the 27th November, 2006, he got a phone call from his mother who told him that there was something on the news on the radio about D from the village who had pleaded guilty to rape and sexual assault. His mother asked him if this had anything to do with the plaintiff's mother. C told his mother it had not. He explained that he and the plaintiff's mother were trying to keep the matter to themselves and had decided not to tell even their immediate family what had happened to the plaintiff and her brother. C said he heard the broadcast himself on the next news bulletin on LMFM. He also read the report in *The Star* the next day and in *The Dundalk Democrat* the following day. C explained that after he heard the broadcast on the radio, he rang LMFM and asked the person he spoke with to take the story off the news bulletin. The story was broadcast on the next two news bulletins and C rang the station again. The story continued to be broadcast, but was eventually withdrawn.

18. C said that after the report was published in *The Star*, he got a call from some of his friends who asked him if this had anything to do with his sister's children. He recollected that he was asked, "And he actually raped her?" He said he was told the matter was being talked about in the town where he lived.

19. C said, in the aftermath of the publicity, that the plaintiff's brother told his mother he wanted to kill himself and he said this in front of C. C explained that in the aftermath of the events of April 2005, he and his sister tried to support the plaintiff and her brother and they were beginning to get on with their lives. After the publicity surrounding D's conviction, however, C said the plaintiff's brother thought again that he was guilty, that he had done something wrong, that people knew and were watching him.

20. Under cross-examination, C said that although his mother and some family members knew something had happened between D and the plaintiff, they were not told the full story. It was put to C that his mother must have known sufficient information about what had happened to assume that the report on the radio might refer to her daughter and grandchildren. In relation to being asked by his friends in his town, it was put to C that his friends there could not have known about the events of the 18th April, 2005. C explained that some of his friends were with him the night the plaintiff went missing and he told them he had to leave because his niece was missing. On his return, on being asked by his friends what had happened, he told them that she had been found in D's house. He agreed that the defendants would not have known that C would have told his friends this.

21. Under cross-examination, he also said that while people might have known some thing happened between the plaintiff and D, they would not have known it was sexual abuse or rape. He explained a person "could have it in your head that he could have tried something on", but that after the media reports everybody would know what had actually happened, i.e. the plaintiff had been raped by D.

Evidence of the Clinical Psychologist

22. R is a senior clinical psychologist with the Health Service Executive ("the HSE") who compiled a report on the plaintiff and her brother in March 2007 for the purpose of the sentencing hearing in respect of the offences to which D pleaded guilty. Her reports were admitted in evidence. She explained that she interviewed the plaintiff, her mother and her teacher. She explained that the

plaintiff has a moderate learning disability and because of this it was quite difficult for the plaintiff to talk about the effect the sexual abuse by D had on her, and that she had difficulty expressing herself. She said following her interviews and assessment of the plaintiff she formed the view that the plaintiff displayed a lot of the signs of a child who had been significantly traumatically affected by her experience of sexual abuse: for example, bed wetting, displays of some inappropriate sexual behaviour, being quite distressed and helpless. She said her mother noticed the plaintiff was more anxious at home following the sexual abuse.

23. She was asked to interview the plaintiff again for the purpose of these proceedings. She explained from her previous interviews with the plaintiff, that it would be very difficult, upsetting and traumatic for the plaintiff to speak about her experiences again, and for that reason she was against the idea of interviewing the plaintiff again. She also advised against the plaintiff giving evidence in these proceedings. Her view was that the plaintiff would not be in a position to give evidence, that she would not be intellectually capable of doing so and that she would find the experience very distressing and that it would be harmful for her.

24. R also had the opportunity to interview the plaintiff's brother in respect of his sexual abuse by D. R explained that the plaintiff's brother had a mild learning disability, that he found it extremely difficult to talk about his experience of abuse, but that he did his best. He was afraid of being abused again and did not want to go out much as he felt very upset and nervous. He had withdrawn from some activities he had been involved with previously. She said the plaintiff's brother was quite stigmatised by the abuse, he felt helpless and he felt betrayed because he had previously thought D to be a nice person. She explained he did not want anyone to know about the abuse and he had not revealed it to his mother or his family. R also was of the view it would not be helpful to do a second interview with the plaintiff's brother for the purpose of these proceedings.

25. R was asked about the effect of publicity on children. She explained a child who has been abused may feel stigmatised and a sense of being different to other people. For the plaintiff's brother, there was more awareness of other people knowing and what they would think of him. She explained there would be issues around sexual orientation where a boy had been abused by a male, and what other people would think in relation to that. She said the plaintiff's brother was distressed and talked about having thought of harming himself. R was of the view the plaintiff's brother would be better able than his sister to give some evidence, but he would find it difficult. He would, however, be able to answer short, brief questions.

26. Under cross-examination, R explained that it was her understanding that some members of the extended family, although they knew the plaintiff had been abused, did not know she had actually been raped and she understood that this was quite upsetting for the plaintiff and her mother when this was reported.

27. Under cross-examination, she was asked from her experience to describe what it would be like for a child to read the articles published in relation to his or her case. R explained that it is well-known that children who have been abused feel a sense of helplessness, trauma and stigmatisation. She explained that where the abuse is reported and there are concerns that other people know about the abuse, that this repeats some of that sense of stigmatisation. She explained that stigmatisation "is a huge factor in terms of self-esteem and self image ... [which] are very much linked to mood." She explained there are lots of direct and indirect effects for a child where the child feels that other people understand and know about the abuse. She explained that the plaintiff's brother, in particular, felt "very sure that people would know that he had been sexually assaulted by this man in the village" and this was distressing for him.

28. Both parties agreed there was no need for the plaintiff to give evidence in these proceedings.

The Defendants' Evidence

29. Mr. Michael Crawley is the managing director of the radio station LMFM. He had no direct role in authorising the broadcast of the report of D's conviction and he said he had not spoken to the editor, who had day-to-day responsibility for broadcasts, about this matter. He gave evidence in relation to the training and experience of journalists working with the radio station and said some of them would have third-level qualifications and all would be experienced journalists. He explained training is provided in relation to defamation and matters surrounding the reporting of sexual offences and the anonymity of complainants. In relation to giving the address of a convicted person, Mr. Crawley said if one did not give the address of the person one might inadvertently defame another person. Mr. Crawley said he was not aware of any complaint from C, the plaintiff's uncle, in November 2006 until these proceedings were heard in the High Court.

30. Under cross-examination Mr. Crawley said he was aware that it was a legal requirement that victims of sexual offences should not be identified. He was asked if giving information about the perpetrator, his address and the nature of the particular offence could possibly lead to identifying the victim of a sexual offence. He replied that in this instance he did not think the information broadcast could possibly lead any reasonable person to identify the victims. He said the information broadcast was "so cleansed of detail; there was very little detail in it". The report prepared by Mr. MacRuairí, a court reporter, on the conviction of D in the Central Criminal Court was produced in evidence. This report was put to Mr. Crawley and he agreed the report was substantially the same as was broadcast on LMFM. Mr. Crawley said this was the form in which the story came to LMFM, with very little detail and the names of the victims not disclosed.

31. It was put to Mr. Crawley that it would be prudent to inquire as to the identity of the victims to ensure the victim was not identifiable by association with the perpetrator. Mr. Crawley replied that he thought that in a situation like this the court would have said the victims should not be identified.

32. Under re-examination, it was put to Mr. Crawley if he was of the view that the name and address of a convicted person would be of interest to the local community, and Mr. Crawley replied that he felt it was of public interest to the local community.

33. Mr. Joe Flaherty is the managing director of Johnson Press Northern Region Republic of Ireland and he has responsibility for *The Dundalk Democrat* and other local newspapers. He explained the paper would receive court reports by email and fax. He said Mr. MacRuairí was an experienced court reporter who works for the Court Reporting Service and he would be extremely well thought of and an expert in his field. He said he never had a complaint in relation to a similar report and this was a "truly unique case". He said a local newspaper has a responsibility to the community to highlight the conviction of a perpetrator of heinous crimes. He explained this responsibility extends to publishing the names and addresses of convicted persons for two reasons: for the sake of parents in the community who might be concerned for the safety of their children and also for legal reasons *i.e.* to avoid defaming a person with the same name in a small community.

34. The article in *The Dundalk Democrat* was put to Mr. Flaherty and he said that as an editor, as a parent and as someone living in

rural Ireland, he was satisfied there was nothing likely to lead members of the public to identify the victims. He explained the report did not give any information as to the location of the offence or the nature of the offence and did not reveal the ages of the victims or if they had a relationship with the perpetrator and it did not say if the victims were related to each other. He said the report was "vague, but at the same time relevant enough to inform our readers".

35. Mr. Flaherty produced a set of guidelines for use in reporting court cases in *The Dundalk Democrat* which states that, "Once a defendant has been brought before the court and arraigned, we are entitled to publish name and address unless the court directs otherwise". Mr. Flaherty qualified that by saying it should read once a person is convicted. Section 7 of the Criminal Law (Rape) Act 1981 (as amended) was put to Mr Flaherty which provides that "no matter likely to lead members of the public to identify a person as the complainant in relation to that charge shall be published in a written publication available to the public or be broadcast except as authorised by a direction given in pursuance of this section."

36. It was put to Mr. Flaherty that where the name and address of the perpetrator could lead members of the public to identify the victim, a newspaper is not entitled to publish that name and address. Mr. Flaherty agreed with that but said this was not the case here. He also said that he would publish the same information again.

37. Mr. Ger Colleran is the editor of *The Star* newspaper. Mr. Colleran explained that the news desk would receive reports, including court reports and interesting information would be passed on to the back bench presided over by a deputy editor. The back bench decides whether or not a story is to be published. If the story is to be published it is passed on to the subbing department, presided over by a sub-editor who decides if the story complies with the law. There is a system in place where every single item is read by a lawyer on the night of publication or shortly before publication. Finally, there is a checking that takes place by the chief sub-editor or another person. Mr. Colleran explained the deputy editor is an experienced journalist of perhaps 20 or 25 years; the chief sub-editor has ten years experience; and the sub-editors would have responsibility for court reports and would be experienced because of the sometimes problematic nature of court copy. Mr. Colleran explained training is provided on an annual basis by a barrister or solicitor on the legal requirements of defamation and court reporting etc. Mr. Colleran said he is "absolutely confident" about the professionalism and reliability of Mr. McRuairí. Mr. Colleran said that he was aware that a convicted person loses his right to anonymity, that the newspaper had often published the identity of sex offenders and that he had never received a complaint from a victim of a sexual offence like this before. He also said he was aware that a victim of a sexual offence is entitled to anonymity.

38. In relation to the identification of the perpetrator of a sexual offence, Mr. Colleran explained that: "... it serves a very useful public purpose in identifying a person convicted of a very serious criminal offence. The age is very important, because there actually may be more than one D of the same name living at a particular address", for example a father and son of the same name. He explained that it is also important to publish the address of the person as well because there may be two persons in the village with the same name or even of the same age as well.

39. In relation to the article published in *The Star* on the 28th November, 2006, Mr. Colleran said it was clear that the victims were not identified and the ages of the victims were not disclosed, the relationship between the victims and the address of the victims were also not disclosed, and that from the text of the article one could have no idea of the location of the victim.

The Criminal Law (Rape) Act 1981

40. Sections 6-8 of the Criminal Law (Rape) Act 1981 (as amended by the Criminal Law (Rape) (Amendment) Act 1990) as amended, so far as relevant to these proceedings, provide as follows:

"Exclusion of the public

6. (1) Subject to subsections (2) , (3) and (4), in any proceedings for a rape offence ..., the judge, the justice or the court, as the case may be, shall exclude from the court during the hearing all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and such other persons (if any) as the judge, the justice or the court, as the case may be, may in his or its discretion permit to remain.

(2)

(3) Subsections (1) and (2) are without prejudice to the right of a parent, relative or friend of the complainant or, where the accused is not of full age, of the accused to remain in court.

(4) In any proceedings to which subsection (1) applies the verdict or decision and the sentence (if any) shall be announced in public.

Anonymity of complaints

7. (1) Subject to subsection (8) (a), after a person is charged with a sexual assault offence no matter likely to lead members of the public to identify a person as the complainant in relation to that charge shall be published in a written publication available to the public or be broadcast except as authorised by a direction given in pursuance of this section.

(2)

(3)

(4)

(5)

(6) If any matter is published or broadcast in contravention of subsection (1), the following persons, namely—

(a) in the case of a publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,

(b) in the case of any other publication, the person who publishes it, and

(c) in the case of a broadcast, any body corporate which transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of an editor of a newspaper,

shall be guilty of an offence.

(7) In this section—

‘a broadcast’ means a broadcast by wireless telegraphy of sound or visual images intended for general reception, and cognate expressions shall be construed accordingly;

‘written publication’ includes a film, a sound track and any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings.

Anonymity of accused

8. (1) After a person is charged with a rape offence no matter likely to lead members of the public to identify him as the person against whom the charge is made shall be published in a written publication available to the public or be broadcast except—

(a) as authorised by a direction given in pursuance of this section or by virtue of *section 7 (8)(a)* as applied by *subsection (6)* of this section, or

(b) after he has been convicted of the offence.

(2)

(3)

(4)

(5)

(6)

(7)

(8) If, at any time after a person is charged with a rape offence, the Director of Public Prosecutions applies in that behalf to a judge of the High Court, the judge, if he is satisfied that it is in the public interest to do so, shall direct that *subsection (1)* shall not apply to such matter relating to the person charged with the offence as is specified in the direction.”

41. Section 11 of the Act of 1981 provides as follows:

“Penalty for publication of unauthorised matter

11. (1) A person guilty of an offence under *section 7 (6)* (including an offence under that section as applied by *section 8 (6)*) shall be liable on conviction on indictment to a fine not exceeding €12,697.38 or, at the discretion of the court, to imprisonment for a term not exceeding 3 years or to both such fine and such imprisonment.

(2) (a) Where an offence to which *subsection (1)* relates and which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and be liable to be proceeded against and punished accordingly.

(b) Where the affairs of a body corporate are managed by its members, *paragraph (a)* shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(3) Where a person is charged with an offence to which *subsection (1)* relates it shall be a defence to prove that at the time of the alleged offence he was not aware, and neither suspected nor had reason to suspect, that the publication or broadcast in question was of such matter as is mentioned in *section 7 (1)* or *section 8 (1)*, as the case may be.”

The Plaintiff's Submissions

42. Mr. Finlay S.C. on behalf of the plaintiff submitted that the plaintiff was identified to ordinary members of the public as a result of the publication and broadcasting of the address (including the village), name and age of the accused, and this was a breach of the provisions of the Act of 1981 and the plaintiff's constitutional right to privacy. According to Mr. Finlay, on behalf of the plaintiff, it would not be easy to maintain an action for breach of the constitutional right to privacy were it not for the fact that the Act of 1981 gives the plaintiff an important statutory protection. Thus, the action for breach of statute is closely connected to the action for breach of constitutional rights. Section 6 contains a mandatory requirement that proceedings for sexual offences should be heard ‘otherwise than in public’, although *bona fide* members of the press may be present and the verdict and sentence must be pronounced in public. The fact that the verdict and sentence must be announced in public, he argued, does not repeal or diminish the privacy

protection provided by section 6.

43. In relation to s. 7, Mr. Finlay submitted that s. 7 was framed in broad terms so that "no matter likely to lead members of the public to identify" the complainant may be published or broadcast, except in accordance with a direction made under that section. In his submission, not publishing the name of the complainant is not sufficient and a media organisation could be in breach of s. 7 by identifying the convicted person if this in itself would be likely to lead members of the public to identify the complainant. Thus, in the case of inter-familial abuse the name of the perpetrator could not be disclosed if he was the father or brother of the victim, nor could his relationship with the victim be disclosed either.

44. The evidence in this case was that persons who had some knowledge of the accused and the plaintiff were able to "put two and two together" and realize there might have been some connection between the offences to which D pleaded guilty and the plaintiff. These persons included the plaintiff's grandmother; her neighbours M and H and probably other neighbours in the village; perhaps her uncles, aunts and cousins; and friends of C in his town who were aware the plaintiff went missing in April 2005 and knew of D.

45. There was no evidence in these proceedings which indicated that persons with no knowledge of D and the plaintiff were able to connect the two from reading the newspaper reports and listening to the broadcasts on the radio. For example, no evidence was given from a parent of a child attending the plaintiff's school that he or she was able to connect the plaintiff with D on reading the reports in the newspapers or hearing the reports on the radio.

46. In relation to s. 8, Mr. Finlay submitted that while s. 8(1)(b) does not prohibit the perpetrator of a sexual offence being identified after he has been convicted, there may be cases where it would not be lawful to do so having regard to the provisions of section 7.

The Constitutional Right to Privacy

47. Mr. Finlay relied upon the well-known case of *Kennedy v. Ireland* [1987] I.R. 587 which recognised an unenumerated personal constitutional right to privacy and held that where this right is interfered with the person has a cause of action for damages. In that case Hamilton P. said at p. 593 that there had been "a deliberate, conscious and unjustifiable interference by the State through its executive organ with the telephonic communications of the plaintiffs and such interference constitutes an infringement of the constitutional rights to privacy of the three plaintiffs ... Such interference constituted an infringement of the plaintiff's constitutional right to privacy and ... such interference was 'unlawful as constituting a violation of the fundamental law of the State.'"

48. Mr. Finlay further relied upon the more recent case of *Herrity v. Associated Newspapers (Ireland) Ltd.* [2009] 1 I.R. 316 where Dunne J. considered the constitutional right to privacy. In that case the plaintiff was a married woman and had an extra-marital relationship with a priest. Telephone conversations between the plaintiff and the priest were unlawfully tapped and transcripts of those conversations were sent by the plaintiff's husband to the defendant which published them in its publication. The plaintiff claimed the manner in which the transcripts were obtained and subsequently reported by the defendant amounted to a breach of her constitutional right to privacy. Dunne J. expressly found an action for breach of the constitutional right to privacy could be maintained against a private party as well as the State. At p. 337 of her judgment Dunne J. very usefully summarised the relevant principles in relation to the right to privacy as follows:

"(1) there is a constitutional right to privacy;

(2) the right to privacy is not an unqualified right;

(3) the right to privacy may have to be balanced against other competing rights or interests;

(4) the right to privacy may be derived from the nature of the information at issue - that is, matters which are entirely private to an individual and which it may be validly contended that there is no proper basis for the disclosure either to third parties or to the public generally;

(5) there may be circumstances in which an individual may not be able to maintain that the information concerned must always be kept private, having regard to the competing interests which may be involved but may make complaint in relation to the manner in which the information was obtained;

(6) the right to sue for damages for breach of the constitutional right to privacy is not confined to actions against the State or State bodies or institutions."

The Defendants' Submissions

49. Mr Oisín Quinn SC on behalf of the defendants submits that there is no common law action for damages for breach of privacy (*Wainwright v. Home Office* [2003] 4 All E.R. 969).

50. Second, the Criminal Law (Rape) Act 1981 does not introduce a civil cause of action for damages: the Act provides for criminal penalties only. In this regard the defendants rely on the recent judgment of Clarke J. in *Atlantic Marine Supplies Ltd. v. Minister for Transport* [2010] I.E.H.C. 104 where it was stated at para. 6.3 that:

"In relation to statutory duty per se it is clear from cases such as *Moyne v. The Londonderry Port and Harbour Commissioners* [1986] I.R. 299 and *Sweeney v. Duggan* [1991] 2 I.R. 274, that the question of whether a plaintiff is entitled to claim damages for breach of statutory duty must start with the consideration of whether, taking the relevant statutory regime as a whole, it can be said that it was 'intended by the legislature that an aggrieved plaintiff would be entitled to damages'."

51. It was submitted that the Act of 1981 intended to provide for criminal penalties only and no civil cause of action is created or even implied therefrom. Counsel for the defendants contrasted the Act of 1981 with the Data Protection Acts, which create both criminal penalties and a cause of action in damages.

52. While the defendants accept a civil cause of action can be brought for infringement of the constitutional right to privacy, the

defendants submit that there are four essential pre-requisites to that cause of action:

- (i) the information must be private,
- (ii) the violation must be deliberate,
- (iii) the violation must be conscious,
- (iv) the violation must be unjustified.

53. It was submitted, in the first place, that the information published or broadcast by the defendants was accurate, factual information that had been announced in open court, in public, as required by s. 6(4) of the Criminal Law (Rape) Act 1981. The information published was not private. The information concerned D. The fact of D's convictions was pronounced in open court and therefore, this information was not and is not 'private'. His name, age and address were published partly to avoid the risk of defaming a person with the same name. The Act of 1981 distinguishes between the trial of a sexual offence, which is usually heard *in camera*, and the pronouncement of the verdict and the sentence, which must be heard in public.

54. Secondly, it was submitted that the material published was not likely to lead members of the public to identify the victims. It was submitted that a significant amount of supposition, guess work and additional information would be required for anyone to make a connection between D and the victims. Thirdly, the defendants were not aware or suspected and had no reason to suspect that the publication or broadcast of the information concerned would be likely to lead members of the public to identify the victims. Therefore the defendants did not consciously or deliberately violate the plaintiff's right to privacy. Finally, it is submitted that the publications and broadcasts were justified: the information was published in pursuance of the defendants' legitimate entitlements to freedom of expression and to report on matters announced in public in court including having regard to the public interest in having a convicted rapist identified.

55. Mr. Quinn emphasized that, in fact, the material published did not name the victims, did not indicate the relationship between the victims, did not indicate if the victims were children and did not indicate their ages. It did not indicate the location where the offences were committed nor did it refer to any relationship the victims had with the perpetrator nor refer in any way to the circumstances or context of the crimes.

Decision of the court

Does a breach of s. 7 of the Act of 1981 give rise to a cause of action in damages?

56. The plenary summons herein indicates this action is brought for damages for breach of s. 7 of the Act of 1981. In his submissions to the court, however, counsel for the plaintiff clarified that the essential basis for this claim for damages was a breach of the plaintiff's constitutional right to privacy. In that respect, it was submitted that because the Act of 1981 made it unlawful to publish or broadcast information likely to lead to members of the public identifying the complainant, the Oireachtas was legislating to protect the right to privacy of complainants in sexual assault cases. Therefore, the claim for breach of s. 7 was ancillary, but closely connected, to the claim for breach of the constitutional right to privacy.

57. Counsel for the defendants argued that unless provided for specifically in the relevant statute, no cause for damages arose where some action was made unlawful. Counsel referred to the Data Protection Acts as an example of where a statute expressly created a cause of action for breach of a statutory duty created by that Act. Section 7 of the Data Protection Act 1988 provides that:-

"For the purposes of the law of torts and to the extent that that law does not so provide, a person, being a data controller or a data processor, shall, so far as regards the collection by him of personal data or information intended for inclusion in such data or his dealing with such data, owe a duty of care to the data subject concerned"

58. It is therefore significant that the Act of 1981 does not provide a cause of action for damages in respect of a breach of s. 7 nor otherwise indicates that the media owes a complainant a duty of care. I gratefully adopt what Clarke J. said in *Atlantic Marine Supplies Limited. v. Minister for Transport* [2010] I.E.H.C. 104 that "the question of whether a plaintiff is entitled to claim damages for breach of a statutory duty must start with the consideration of whether, taking the relevant statutory regime as a whole, it can be said that it was 'intended by the legislature that an aggrieved plaintiff would be entitled to damages'." In my view, reading the Act of 1981 as a whole no such intention can be found and consequently I find that a breach of s. 7 does not give rise to a cause of action in damages for complainants in sexual assault cases where the media, in breach of that section publish information likely to lead to their identification.

59. In my view however, the fact that publication of such information is prohibited is a matter that can properly be taken into account in determining if the plaintiff can maintain an action for damages for breach of her constitutional right to privacy.

Was the information published or broadcast in breach of the Act of 1981?

61. In *Herrity v. Associated Newspapers (Ireland) Ltd.* [2009] 1 I.R. 316 Dunne J. at p. 340 said that where the Oireachtas has expressly prohibited something, in that case the interception of telephone communications, a person cannot assert freedom of expression in the thing prohibited as "the State has seen fit to lay down by statute an exception to the right to freedom of expression". She further stated that:

"I think, that cases in which the right to privacy will prevail over the right to freedom of expression may well be far and few between. However, this may not always be the case and there are circumstances where it seems to me the right to privacy could be such that it would prevail over the right to freedom of expression. One of those circumstances arises on the facts of this case where the freedom of expression asserted is the publication of material obtained unlawfully."

62. Applying that principle to this case, if the court were to find that the information published herein was in breach of s. 7 of the Act of 1981, then it would be unlawful to publish it and the defendants could not maintain a right to freedom of expression in the

publication of such information. That would be an important matter to take into consideration when determining whether the plaintiff's right to privacy was violated in this case.

63. Sections 6, 7 and 8 of the Criminal Law Rape Act 1981 (as amended) represent an attempt by the Oireachtas to balance the constitutional requirement that justice should be administered in public with the very understandable desire to encourage and facilitate victims of sexual offences to come forward and to assist in the prosecution of persons who are alleged to have committed sexual offences and to protect complainants, as much as possible, from unnecessary publicity and distress occasioned thereby.

64. Section 6(1) creates a mandatory requirement for the court to exclude the public from the courtroom in any proceedings for a rape offence. The reason for this provision is to facilitate complainants in rape cases to give their evidence in court free from the embarrassment of publicity. Section 6(1), however, expressly permits *bona fide* representatives of the press to be present in court. Clearly, the Oireachtas intended that the press could report on the trial of a rape offence. The details of a complainant's evidence are often reported in the media, although the complainant may not be identified. Section 6(4) provides that the verdict of the jury must be pronounced in public and the sentence imposed by the judge must also be announced in public. This is to ensure that justice is not only done, but is seen to be done.

65. Section 7 is headed "anonymity of complainants". Section 7 does not provide an absolute right of the complainant not to be identified. The general principle is that "no matter likely to lead members of the public to identify a person as the complainant" shall be published or broadcast. In certain limited circumstances however, the trial judge may give a direction under s. 7(2) to permit a publication or broadcast of such matter to be made. No direction was given in this case. Section 7(6) creates a criminal offence if information is published or broadcast in contravention of section 7.

66. Section 8 gives an accused a right to anonymity after he is charged with a rape offence. A trial judge may give a direction during the course of the trial that would permit an accused to be identified; however, the trial judge must consider in accordance with s. 8(2) whether the making of a direction to authorise the publication or broadcast of the accused's identity "might enable members of the public" to identify the complainant.

67. The accused's right to anonymity ceases on his conviction as provided for in section 8(1)(b). Section 8(8), in my view, is an important proviso and allows the Director of Public Prosecutions to apply to the High Court, at any time after a person is charged with a rape offence, for directions that s. 8(1) shall not apply "to such matter relating to the person charged with the offence as is specified in the direction". Where the section refers to s. 8(1), I think it also refers to section 8(1)(b). Section 8(8) does not expressly refer to the period after the accused has been convicted, however, it seems to me that the Director of Public Prosecutions could apply to the High Court pursuant to that subsection for directions that the accused not be identified after his conviction or that his address not be published *etc.* on the basis that this could, indirectly, identify the complainant. This course was not followed in this case, and I also note that the plaintiff and her family, apparently inadvertently, were not notified of the hearing in the Central Criminal Court on the 27th November, 2006, although it seems that the family had been notified of previous court hearings.

68. The fact that s. 8(1)(b) permits the identity of the defendant to be disclosed after conviction, in my view, does not detract in any way from the complainant's right to anonymity provided for in section 7(1). I accept there is a public interest in identifying and naming convicted sex offenders. In *Herrity v. Associated Newspapers* [2009] 1 I.R. 316 Dunne J. at p. 341-342 drew a proper distinction between the public interest in knowing of the behaviour of the priest with whom the plaintiff was having an affair, and the plaintiff's right to privacy in her telephone conversations as provided for by legislation, and she held that the public interest could not set at naught the restrictions provided by the Postal and Telecommunications Services Act 1983. The same consideration applies here: the public have an interest in knowing the names and identities of convicted sex offenders, but not at the expense of a complainant's right to privacy and anonymity as provided for in s. 7 of the Act of 1981. The complainant's right to anonymity continues after the accused has been convicted, and no information likely to lead to her identification may be published, "except as authorised by a direction given in pursuance of [s. 7 of the Act of 1981]". It is common case that no direction was given in this case. The issue, therefore, is whether the name, age and address of D published and broadcast in this case were "likely" to lead members of the public to identify the plaintiff as the complainant.

69. It seems to me that even if I am wrong in relation to the construction of s. 8(8), a court also has jurisdiction to restrict the publication of the identity of an accused or convicted person if this would indirectly identify the complainant in the case. This is because a complainant enjoys a constitutional right to privacy to which s. 7 of the Act of 1981 gives expression and her right to anonymity provided for in that section continues after the trial of the offence and the conviction of the accused. It seems to me that in an appropriate case the constitutional requirement that justice be administered in public and the constitutional protection of freedom of expression may need to be balanced with a complainant's right to privacy, particularly where she is a minor and the victim of a sexual offence. In such a case, a court could lawfully restrict the publication of the identity of a convicted person in order to prevent her being inadvertently identified. Of course if the complainant chooses to waive her right to privacy and have the assailant identified as in *Independent Star Ltd. v. O'Connor* [2002] 4 I.R. 166, there would be no justification for any restriction on the requirement that justice be administered in public or the right to freedom of expression. That however was not the case herein.

Likely to Lead to the Complainant Being Identified

70. What does "likely" mean in section 7(1)? Is it to be determined objectively or subjectively? Counsel for the defendant opened the decision of the High Court of England and Wales in *O'Riordan v. D.P.P.* [2005] E.W.H.C. 1240 (Admin.) where Rose L.J. (with whom Crane J. agreed) at para. 29 cited with approval the decision of Butler-Sloss P. in *Attorney General v. Greater Manchester Newspapers Limited* [2001] E.W.H.C. Q.B. 451. In that case the President of the Family Division had granted an injunction to restrain the publication of the identity of Jon Venables and Robert Thompson who had been convicted of the murder of Jamie Bolger. The order made in that case restrained the defendant newspapers and any person with notice of the order from publishing or causing to be published, *inter alia*, "any information likely to lead to the identification of the past, present or future whereabouts" of Thompson and Venables. The Attorney General instituted proceedings against the defendant for contempt for alleged breaches of this order. Butler-Sloss P. at para. 20 of her judgment stated as follows:

"Collins Dictionary of the English Language gives a number of definitions of the word 'likely'. They include: tending or inclined, apt; probable; having good possibilities of success. I have also had my attention drawn to reported decisions on the use of the words 'likely' and 'probable'. Those decisions and others point to the fact that the word 'likely' may be used in different contexts in different ways. There will undoubtedly be cases in which the use of the word 'likely' will be properly equated with 'probable'. In other cases it has been used to mean something which could or might well happen. The words have to be seen in the context of the sentence and in the context of the situation in which they are used. In my judgment a detailed consideration of the decisions cited to me does not help me to come to a conclusion in the present case. The purpose of the injunction is to protect the lives and personal safety of these boys. In the passage from my judgment of the 8 January above, I used the phrase 'real possibility that their lives would be at risk.' The use of the

word 'likely' in the order is not to be equated with statistical probability that it will lead to the identification of the boys or their whereabouts but to the real risk, the real danger, the real chance that it may lead to that dangerous situation. The background to the injunction is the recognition of the rights of each boy to the protection of arts. 2 and 3 (*sic*) of the Convention from which there is no derogation and the court as a public authority has a duty to act positively to try to ensure those rights."

71. The decision of Butler-Sloss P. is helpful, and in my view the use of the term "likely to lead" in s. 7(1) of the Act of 1981 means a real risk that the complainant would be identified in the minds of the public if the information is published. Whether there is a real risk depends upon the circumstances of each case.

72. The Act of 1981 is a criminal statute and s. 7(6) creates a criminal offence if information is published in breach of section 7(1). Furthermore, s. 7 is clearly an interference with the constitutional right to freedom of expression. Section 11(1) provides for the penalties for a breach of s. 7: a fine not exceeding €12,697.38 and/or up to three years imprisonment. Section 7 must, therefore, be construed strictly. Section 11(3) provides a defence where a person is charged with an offence under s. 7, whereby the defendant can prove that "he was not aware, and neither suspected nor had reason to suspect, that the publication or broadcast in question was of such matter as is mentioned in *section 7(1)...*". It is a defence to show that the person did not know or suspect or have reason to suspect that the information published was a "matter likely to lead members of the public to identify a person as the complainant".

73. In this case all the defendants took their information from a report prepared by Mr. MacRuairí, an experienced court reporter. The report of Mr. MacRuairí was produced in evidence. The report does not identify the victims by name, does not indicate their address or their ages or their relationship with the perpetrator. As far as the defendants were concerned the victims could have been adults, could have been unrelated to each other and the offences could have been committed anywhere. In my view, the defendants did not know or suspect or have reason to suspect that the information published was likely to lead to the victims in this case being identified. If the report stated that the victims of the crimes also lived in the same village as the perpetrator and that the offences were committed in the village that would, perhaps, be a different matter. It did not however do so.

74. Mr. MacRuairí was not called to give evidence by either the plaintiff or the defendant. The transcript of the hearing in the Central Criminal Court on the 27th November, 2006, was produced in evidence. The transcript simply reads: "the accused was arraigned on Counts 1 and 3 and pleaded guilty". The learned trial judge set a date for the sentencing hearing in March. It appears from the transcript that the plaintiff and her brother were identified by name in court that day. The indictment was not produced. Usually an indictment will state the name of the accused and the particulars of the offence, such as the name of the alleged victims and where the offence is alleged to have been committed, e.g. "in the county of ...". The address of the victim is usually not stated in the indictment.

75. In Charleton, McDermott and Bolger, *Criminal Law*, (Tottel Publishing, 1999) at p. 415, the following example of an indictment for the crime of rape is given:

"You, AB, a male person on the (date) at (place) in the (District), had unlawful sexual intercourse with CD, a woman"

The rules for the drafting of an indictment are contained in the schedule to the Criminal Justice (Administration) Act 1924. Rule 7 relates to the description of a person and provides there is no necessity to state the "abode, style, degree or occupation" of any person named in the indictment, whether it be the accused or the alleged victim.

76. The address of the plaintiff is not disclosed in the transcript of the hearing in the Central Criminal Court on the 27th November, 2006; neither is the fact that the victims were children. In my view, the court must assume that Mr. MacRuairí had very limited information about the context of the offences in this case, whether or not the perpetrator and the victims were related or neighbours or the fact the victims were children. It seems to me that a person sitting in court that day would know that the offence was committed in a particular village, but not necessarily that the victims also lived in that village, or indeed that the victims were children. It cannot be assumed that Mr. MacRuairí knew any more than that. It may well be that he spoke to barristers and solicitors in court that day and did obtain additional information concerning the case. However, in the absence of evidence from Mr. MacRuairí, it would not be appropriate for the Court to speculate as to his knowledge of the context of the offences to which D pleaded guilty. Mr. MacRuairí quite properly did not identify the victims by name in the report he compiled on the case and sent to the defendants. There was nothing in the report of Mr. MacRuairí which, from his subjective point of view and that of the defendants, would be likely to identify the victims in this case.

77. I am satisfied the information published and broadcast in this case, viewed subjectively from the point of view of the defendants, did not seem "likely" to identify the plaintiff. Therefore, the publications and broadcasts made by the defendants were not unlawful pursuant to s. 7.

Was the information published in breach of the plaintiff's right to privacy

78. The fact the information published was not in breach of s. 7 of the Act of 1981, does not determine whether the information was published in breach of the plaintiff's constitutional right to privacy. In the well-known case of *Kennedy v. Ireland* [1987] 1 I.R. 587, the phones of the plaintiffs were tapped, but this was not in breach of any Act of the Oireachtas; nevertheless the High Court found this was in breach of the plaintiffs' right to privacy.

79. In that case Hamilton P. (as he then was) said at p. 592 that:

"Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality."

80. Hamilton P. also noted that "[t]here are many aspects to the right to privacy", and he referred to the judgment of McCarthy J. in *Norris v. The Attorney General* [1984] I.R. 36. In *Norris v. The Attorney General* McCarthy J. stated at p. 100 that there is "a limited right of privacy given to certain litigants under laws made under Article 34". The Act of 1981 is one such law made under Article 34, which provides that "save in such special and limited cases as may be prescribed by law" justice shall be administered in public. The trial of a sexual offence is a "special and limited case" prescribed by law to be held otherwise than in public and the Act of 1981 takes

steps to protect the anonymity of the complainant. The Act of 1981 does not grant an absolute right to anonymity however. There are exceptions; Section 8 specifically provides that the accused may be identified after his conviction. In my view, the defendants were entitled to publish the name and address of D provided they did not know and did not suspect or have reason to suspect that by so doing they might indirectly identify the plaintiff. From the report of the case provided to them by Mr. MacRuairí, it seems to me that the defendants did not know, did not suspect and had no reason to suspect that to publish this information would be “likely” to identify the plaintiff and would be in breach of the plaintiff’s right to privacy in this case. Whilst identification of the complainant might have been possible, it was far removed from being likely to do so.

81. In *Kennedy v. Ireland* Hamilton P. noted at p. 593 that “[t]he nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society”. In my view, the Act of 1981 gives expression to a complainant’s constitutional right to privacy and dignity in a trial of a sexual offence, and if the media published the name of the complainant in a rape trial in breach of s. 7, in my view, that complainant would have a cause of action for damages against that newspaper or radio station for breach of her right to privacy. If a complainant is indirectly identified, for example by association with the defendant in the case of inter-familial abuse, e.g. where a report states that Mr A.B. of a particular address was convicted of the rape of his daughter, this could also amount to a breach of s. 7 and the plaintiff could similarly have an action for damages. Where, however, the publication is found not to be in breach of s. 7, e.g. pursuant to a direction of the court under that section or where, as in this case, the information did not seem “likely” to identify the complainant, in my view, a right to damages for breach of the constitutional right to privacy does not arise.

82. There are many reasons why this should be so. First, Article 34 provides that justice shall be administered in public, “save in such special and limited cases as may be prescribed by law”; therefore, any exception to the principle that justice should be administered in public must be construed strictly. As Denham J. noted at p. 398 in *Irish Times Limited v. Ireland* [1998] 1 I.R. 359, any curtailment on the right of the media to report on court proceedings must be considered to be “a curtailment of the access of the people to the administration of justice and should be analysed accordingly”. The Act of 1981 allows the press to attend the hearing of a rape trial and to report on the details of a complainant’s evidence, subject to the requirement that it may not identify the complainant or publish any matter “likely” to lead to her identification.

83. Second, Article 40.6.1.i provides for “the right of the citizens to express freely their convictions and opinions.” This right includes the right to receive information. This right is not absolute and the Article provides that:

“The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.”

84. Article 10 of the European Convention on Human Rights also protects freedom of expression and provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

85. Where freedom of expression is to be limited, it must be done in a proportionate manner, for a legitimate purpose and must be necessary. The protection of the privacy of a complainant in the trial of a sexual offence is, in my view, a legitimate purpose and a restriction on the media identifying, directly or indirectly, a complainant in such a case is a proportionate restriction on freedom of expression. It is also necessary because of the need to protect the right to privacy of complainants in sexual offence cases. However, there is also a public interest in convicted sex offenders being named and identified to the public. Where the identification of a person convicted of such an offence might indirectly identify the complainant, in my view, that would be a legitimate reason to restrict the identification of the convicted person in the media.

86. In this case, counsel for the prosecution could have legitimately applied to the trial judge for a direction under s. 8(8), or the court itself could have lawfully directed that the name and address of D would not be published or broadcast in this case. Had that been done (and perhaps it would have been done if the plaintiff and her family had been notified of and attended the arraignment) the trial judge could have made a direction in accordance with that subsection, that direction would have been in accordance with law, and would have been necessary in a democratic society to protect the privacy and dignity of the plaintiff, and would have been proportionate to the aim to be achieved. Had that been done and had the media published the information in breach of that direction, this would have been unlawful and the plaintiff could, in my view, have successfully maintained a cause of action for damages for breach of her constitutional right to privacy. That was not done in this case and the defendants identified D by name and revealed his address in circumstances where they did not know or did not suspect or could not have suspected that by doing so they would indirectly identify the complainant. The publications and broadcasts in this case were not unlawful and were not in breach of the plaintiff’s right to privacy.

Summary

87. The factual background of this case is a very sad one. It involves the most serious sexual abuse of an eight year old child who is the main victim in a family traumatised by this terrible event. Her mother, who brings this action on behalf of the infant plaintiff, had first to deal with this terrible assault on her child and then with the consequences of the publication in the local media of the fact of this assault. This publication recreated the original nightmare for the family and especially for the child victim herself. She felt unable to venture out of the house and suffered greatly from the sense that everyone knew what had happened. The fact she has a moderate learning disability makes it even harder for her to cope with a situation that would tax even the strongest of children. The family, under the pressure of these events, were obliged to leave their village and move somewhere else in the hope that they could find some anonymity. The plaintiff seeks damages on either one or both of two headings. Firstly, under the relevant statute, i.e. ss. 7 and 8 of the Criminal Law (Rape) Act 1984 and, secondly, for breach of her constitutional right to privacy. The Act provides for the anonymity of complainants in sexual assault cases. It provides that it is a criminal offence to publish or broadcast information likely to

lead to members of the public identifying such a complainant. The action in respect of her constitutional right to privacy is based upon legal recognition in the above Act of her right to anonymity and upon constitutional principles set out in *Kennedy v. Ireland* [1987] I.R. 587. In that case Hamilton P. (as he then was) stated that although not specifically guaranteed by the Constitution, the right to privacy is one of the fundamental personal rights of the citizen. He further stated that this was not an unqualified right. It may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality.

88. The claim arises from the publication of the bare facts of the assaults which on their own could not possibly identify the plaintiff. However, the publication of the name of the perpetrator together with his age and address identified the victim in the minds of the other villagers and some acquaintances of her uncle who had been broadly aware that something had happened without knowing the details. This situation arose in circumstances where the perpetrator pleaded guilty at one of his court appearances preliminary to his trial. The plaintiff's mother, who had been notified of his previous appearances, had not been notified of this one through inadvertence. She was not therefore present. A court reporter prepared a report stating the perpetrator had pleaded guilty to charges of rape of a female on a particular date and the sexual assault of a male some years earlier. The report named the perpetrator and gave his age and address. The report was then sent to the media in the locality as was normal in such cases since they were located and published in the area where most interest in the case would exist. They published these very bare details. One was broadcast in a radio news bulletin repeated throughout the day, the other two in their newspapers. Locals hearing and reading the reports immediately associated the details with the events of the night of the offence when they had noted the Gardaí presence at both the plaintiff's and the perpetrator's house. This was an event that had attracted some attention at the time. The plaintiff's mother and her uncle had kept secret the details of the offence committed that night. By virtue of the details published and the connections made in the minds of a number of villagers, it became widely known that the plaintiff had been raped that night.

89. The statutory framework applicable was designed to prevent this happening. While the name of the perpetrator could be published once he had been convicted, nothing likely to identify the plaintiff could be. It was stated in evidence by the defendants and I accept that in order to prevent defaming a person of the same name, the address and age of the perpetrator would also need to be published. Failure to do this might result in a person of the same name in the village or even in the house in question being defamed. The legislation as noted above whilst providing anonymity for a complainant also provides for naming a perpetrator after his conviction. There are obvious reasons for this, i.e. protection of the public by informing them of a potential risk to their children. I accept that this is not just a right of the media in the exercise of press freedom but it is, as was stated by the defendants in evidence, a public duty as well. So two important rights conflict. Resolution of this conflict is the task faced by the Court in these proceedings.

90. It is clear from the Act of 1981 that the media may publish the name and to avoid defaming the innocent, the address within the village and the age of the perpetrator. They are however precluded by the Act of 1981 from publishing any matter likely to lead members of the public to identify a person as the complainant. The complainant's right to anonymity exists alongside the media's right and/or duty to identify the perpetrator. I have concluded in this judgment that the Director of Public Prosecutions has a right under s. 8(8) of the Act of 1981 to apply to the trial Court to prevent the publication of the perpetrator's name where doing so might identify the complainant. This is because of her constitutional right to privacy to which statutory expression has been given in s. 7 of the Act of 1981. No such application was made in this case. It might well have been successfully made had the plaintiff's mother or uncle been present. It is a case where on its particular facts, the Court might have felt no publication at all was possible since any details would likely have identified the complainant.

91. It was suggested during the hearing of these proceedings that the media should have investigated to ascertain whether the victims were children and whether it was likely they would be identified by publication of the details of name, age and address. I am satisfied that this would not be a reasonable or proper course to follow as it would constitute in itself an invasion of privacy of at least equal gravity to that which actually occurred.

92. Did the defendants know or should they have known that publication of the name, age and address was likely to result in the identification of the complainant? In my view the answer is no. The details published were the barest minimum. They did not know the victim was a child or that she lived in the same village as the perpetrator or that she was related to the male victim. In the result I find the defendants did not breach s. 7 of the 1981 Act. In any event, for the reasons set out above I hold that that section does not give rise to an action for damages.

93. Did the defendants breach the plaintiff's constitutional right to privacy? I think it quite clear that such a right was engaged and that an action for damages can be brought in respect of such a right. However I accept there are four prerequisites to success in such an action;

- (a) the information must be private;
- (b) the violation must be deliberate;
- (c) the violation must be conscious;
- (d) the violation must be justified.

In this case it is clear the information published was not private. Whilst the publication was a deliberate act, it was done, as I have already held, without knowledge it would identify the plaintiff and therefore without any intention to violate her privacy. It was therefore not a deliberate violation. For the same reason the publication cannot be held to be a conscious violation. The fourth prerequisite does not arise but I would think it hard to find that a publication made *bona fide* in pursuit of a public duty could be considered unjustified. For these reasons I conclude that the defendants did not violate the plaintiff's constitutional right to privacy in the circumstances of this case and that in consequence I am obliged to dismiss the plaintiff's action.