

THE HIGH COURT

2003 No. 15507 P

BETWEEN

MICHELLE HERRITY

PLAINTIFF

AND

ASSOCIATED NEWSPAPERS (IRELAND) LIMITED

DEFENDANT

Judgment delivered by Ms. Justice Dunne on the 18th day of July 2008

1. The plaintiff in this case seeks damages for wrongful invasion and breaches by the defendant of the rights enjoyed by the plaintiff under the provisions of Bunreacht na hÉireann. Other relief arising from the same circumstances is also claimed.

2. The plaintiff is a married woman who was residing in Lucan in 2003. A number of articles appeared in a newspapers owned by the defendant over a three week period concerning the plaintiff. The first of the articles appeared in the edition of the 2nd November, 2003, under the headline "Husband accuses priest of dirty dealing ... with his wife". The second article appeared on the 9th November, 2003, under the headline "Wife's nights on the town with her OTHER 'wild' priest". The third article appeared on the 16th of November, 2003, under the headline "Phone lover priest quits". A fourth article was subsequently published in 2004. It is not the subject of complaint in the pleadings herein although reference was made to it during the course of the hearing.

3. The articles concerned the relationship between the plaintiff and Fr. Heber McMahon, then a parish priest in Brackenstown, Swords, Co. Dublin. The first of the articles set out an account of the plaintiff's background and a history of the marriage of the plaintiff and her husband. It described how the plaintiff and her husband came to develop a friendship with Fr. McMahon over the years. It also set out some detail as to the breakdown of the marriage between the plaintiff and the plaintiff's husband. The subheading for this article was as follows:-

"The extraordinary tapes which revealed to parishioner that 'all priest' star was a little too close for comfort".

4. This article was accompanied by three photographs of the plaintiff, one in which she is seen with her husband and another in which she is seen with Fr. Heber McMahon. There is also a photograph of Fr. McMahon. The article was also accompanied by a transcript of a telephone conversation that took place between the plaintiff and Fr. McMahon. That transcript was introduced as follows:-

"Michelle Herrity and Fr. Heber McMahon shared intimate and frequent telephone conversations which were intercepted by a private eye working for her husband, Liam. In the first extract, the couple have a lover's tiff, ironically sparked because the unsuspecting pair cannot work out why the phone line is bad. Bizarrely, both frequently refer to themselves in the third person as 'your wife' and 'your husband'."

5. The main body of the article referred to the extract from the transcript as follows:-

"Now Michelle's furious husband has reported Fr. McMahon to the Diocese after commissioning a private eye to spy on the couple and tape their intimate telephone conversations. For weeks the private eye tailed Fr. McMahon and Michelle and caught them going on holiday to Italy together and having dinner in a plush restaurant. But the clinching evidence that their relationship was far closer than appropriate for priest and parishioner came when the investigator taped a series of conversations between the two. The extraordinary tapes which have been listened to by Ireland on Sunday, contain lurid conversations between the pair in which they talk with baby voices and call each other 'husband' and 'wife'. In all, there are thirteen hours of cassettes which captured the nightly chats between the pair in which they regularly spoke of their love for each other."

6. The second article referred to was published on the 9th November, 2003, and contained transcripts of parts of two conversations that the plaintiff had with a Fr. Eddie Cleary and three telephone calls she had with Fr. McMahon and a transcript of part of a telephone conversation with a female friend. The main body of the article contained references to the transcripts which were published on that date as follows:-

"Mrs. Herrity's socialising and questionable friendship with thirty four year old Fr. Cleary is revealed in thirteen hours worth of detailed phone conversations which were taped by a private detective hired by her suspicious husband, Liam. Although the bulk of the conversations are between Mrs. Herrity and Fr. McMahon, there are references made to Fr. Cleary and chats involving the young priest and Mrs. Herrity. In one conversation, Mrs. Herrity tells a female friend how she spent more than four hours one night drinking in Bewleys Cafe on Grafton St. with a priest, who was originally from Co. Tipperary. She said: 'I sat there and I didn't go home until about 1.00 in the morning. I sat there and I had three glasses of wine and had a ball with him, now I really did'. Mrs. Herrity also told her shocked friend that the easy going cleric knocked back the vodka. She said: 'I mean, he drinks vodka, he is a good drinker, you know. But I went up there and here is me thinking I am going to tell him my problems and he starts telling me all his problems. Oh I tell you, the laugh I had'."

7. The final article to which reference is made in the pleadings was that headed "Phone lover priest quits". That article did not publish any further transcripts of the plaintiff's telephone conversations but made the following comment:-

"Mr. Herrity, who is estranged from his wife, had become so suspicious of the relationship that he hired a private detective to monitor the couple's activities and to tape their telephone conversation. What he discovered was that Fr. McMahon and Michelle Herrity, a petite blonde, had enjoyed romantic dinners, beach strolls and even a holiday together in Italy. However, their intimate conversations provided a greater insight into just how close the couple had become. They affectionately referred to each other as 'husband' and 'wife' and repeatedly said to one another, 'I love you'."

The evidence of the plaintiff.

8. The plaintiff in the course of her evidence described her family background, education and her training to become a hairdresser. She married Liam Herrity at the age of twenty two, having known him since she was fifteen to sixteen. Originally they lived with his father in his father's home and subsequently bought their first house in Clondalkin. They met Fr. McMahon there through a residents committee and became friendly with him. Her husband was active in local affairs. They subsequently moved to Lucan.

9. There were no children of the marriage. The plaintiff described her husband's attitude to having children - apparently, he did not want to have children unless they were adopted.

10. The plaintiff then went on to outline her concerns as to her husband's friendship with a young man who was employed by her husband when he was seventeen. This young man accompanied Mr. Herrity on holidays and on other activities such as golf and horse riding. The plaintiff was concerned with the amount of time her husband spent with this young man and she also had some other concerns about their relationship. She confronted him at this time and asked her husband to leave the house. Court proceedings followed and on the 8th August, 2003, a Civil Bill was issued.

11. The plaintiff indicated that at that point in time the relationship with Fr. McMahon was one of friendship only. Following the departure of the plaintiff's husband from the family home her relationship with Fr. McMahon became more intimate and developed into a sexual relationship.

12. She gave evidence to the effect that she was the subscriber to the telephone which was in her name only. She did not give anyone permission to interfere with her telephone line. The first intimation that the plaintiff had, that her phone conversations had been taped came from a telephone call made by her husband to the plaintiff's sister-in-law. He stated that he was going to have transcripts of phone conversations published, if she did not sign over the family home to him for a sum of €20,000. She did not believe that he had any transcripts. Subsequently, the day before the first article was published, she received a phone on her mobile phone at work. She was told that a story was about to be published about her relationship with Fr. McMahon and she was asked for a comment. She described how she dropped the phone and became hysterical. Because of her reaction to the phone call, she lost her job. She was unable to drive herself home and her brother had to collect her. She described her reaction to the publication of the article the following day and commented that the article was based on her husband's account of the marriage breakdown. She said that it was untrue to suggest that the marriage broke down because of her involvement with Fr. McMahon and she was critical of the fact that the defendant's newspaper made no effort to find out her side of the story apart from the brief phone call at her place of work. She outlined her reaction to the subsequent articles, she accepted that the transcript as set out were accurate but commented that they were transcripts of private conversations which were meant to be private.

13. She explained that she is now living with Fr. McMahon who has applied to be laicised. She said that the publication of the material knocked her confidence completely. She said she suffered from nightmares and panic attacks subsequently. In the course of cross examination she was adamant that her relationship with Fr. McMahon developed after her marriage was over and she conceded that her marriage was over before her husband moved out of the family home. She accepted that the conversations which were recorded took place in 2003 by which time she was involved with Fr. McMahon. She accepted that insofar as the newspaper article published on the 2nd November, 2003, was concerned that it was true to say that she was in a relationship with a man who was a priest.

The evidence of Fr. Heber McMahon.

14. Fr. McMahon in the course of his evidence said that he was still a priest in the Roman Catholic Church. He has resigned all his duties and is waiting for laicisation. He described how he came to know both of the Herrity's. Subsequently he was transferred to Brackenstown, in Swords and the plaintiff and her husband continued as friends. Subsequently he discovered that the marriage of the plaintiff and her husband was unhappy. He suggested counselling and was anxious to help. He accepted that his concern for her ultimately led him to become unprofessional in his relationship with her. However, he stated that this post dated the break up of the marriage.

15. Finally he described how he became aware of the imminent publication of the first article. He was stopped at traffic lights in town when a person who identified himself as a journalist from "Ireland on Sunday" tapped on his window. There was a brief conversation during which Fr. McMahon confirmed that Mr. Herrity had made a complaint to his archbishop. There was no further contact beyond that. He then described the adverse effect of the publication on the plaintiff. He reiterated that the break up of the marriage predated his relationship with the plaintiff.

16. In cross examination, he accepted that a complaint had been made by Mr. Herrity to the Church authorities in 2002. By November, 2003, he was engaged in an emotional and sexual relationship with the plaintiff. At that time he was still a serving parish priest and was reasonably well known. He accepted that he was in breach of his ethical code and that people would be disappointed by a priest not living up to his vows. He accepted that people would have an interest in the story. He accepted that the discussion he had with the journalist on the Saturday prior to the publication of the article was accurately reported, but he described it as a discussion and not an interview. He tendered his resignation after the article appeared.

Evidence of Raymond Casey

17. Mr. Casey gave evidence that he was a former member of the Gardai. He is now employed in the security business and in that capacity he was asked to visit the former family home of the plaintiff and her husband. He found evidence that a device had been placed at some stage at the point at which telephone lines entered the house. He noted that the connector attached to the phone wire could have been used to connect to a tape recorder. His conclusion was that it was clear that a device was connected to the phone line.

Evidence of Patrick Ryan

18. The plaintiff's solicitor Patrick Ryan gave short evidence as to the activity of a photographer in the precincts of the court building. He saw the photographer on a number of occasions and subsequently saw the same photographer with the defendant's team.

19. No evidence was tendered on behalf of the defendant.

Findings on the evidence

20. So far as the evidence in this case is concerned, I accept that the relationship between the plaintiff, her husband and Fr. McMahon was at the outset one of mutual friendship. Over a period of time, difficulties arose in the marriage of the plaintiff and her husband. An attempt was made to deal with these difficulties through counselling, on the recommendation of Fr. McMahon, but to no avail. It seems to me from the evidence that I heard, that the plaintiff at this time had legitimate concerns as to the nature of the relationship between her husband and the young man who was his employee and with whom he now lives.

21. I accept that the relationship between Fr. McMahon and the plaintiff became intimate after the marriage of the plaintiff and her husband had come to an end, although I am somewhat unclear as to whether this was before or after Mr. Herrity left the family home. I am also unclear as to precisely when Mr. Herrity did in fact leave the family home. It is clear the Circuit Court proceedings commenced in August, 2003, but as I have indicated it is not clear whether Mr. Herrity had left the family home prior to that date or not.

22. I also accept and there can be no doubt about this that the telephone line of the plaintiff was interfered with and that a recording device had been attached to the telephone lines. Her telephone calls were recorded without her permission. There can also be no doubt that this was done at the instigation of Mr. Herrity, apparently by a private detective employed by Mr. Herrity.

23. The newspaper articles of which complaint is made in these proceedings were clearly facilitated by Mr. Herrity in that he provided the transcripts and a number of photographs. The newspaper articles presented a one sided account of the break up of the marriage. It could be said that the evidence I have heard is also one-sided given that no evidence was led by the defendant but nonetheless, I am satisfied that the account given in the newspaper article was significantly less than the full story.

24. I accept that the plaintiff was deeply upset as a result of the publication of these articles and particularly, the publication of her private telephone conversations.

25. As mentioned at the outset, the plaintiff in these proceedings claims damages for breaches by the defendant of the right to privacy enjoyed by the plaintiff under the provisions of Bunreacht na hÉireann. In addition she claims damages for the wrongful infliction of mental distress, for breach of confidence, for breach of statutory duty and for conspiracy. The core of the complaints made by the plaintiff herein is an alleged breach of the provisions of s. 98 of the Postal and Telecommunications Services Act 1983, which provides:-

"(1) A person who

(a) intercepts or attempts to intercept, or

(b) authorises, suffers or permits another person to intercept, or

(c) does anything that will enable him or another person to intercept,

telecommunications messages being transmitted by the company or who discloses the existence, substance or purport of any such message which has been intercepted or uses for any purpose any information obtained from any such message shall be guilty of an offence. ..."

26. Section 98(5) of the Postal and Telecommunications Act 1983 as amended by s. 13(3) of the Interception of Postal Packets and Telecommunications Messages Act 1993, provides as follows:-

"In this section 'intercept' means listen to, or record by any means, in the course of its transmission, a telecommunications message but does not include such listening or recording where either the person on whose behalf the message is transmitted or the person intended to receive the message has consented to the listening or recording, and cognate words shall be construed accordingly."

27. The amended defence filed herein included a plea that if, which was denied, the articles complained of included content that was acknowledged in the articles to include extracts from recordings made of private telephone conversations held by the plaintiff with third a party, it was denied that such conversations were held by the plaintiff on her private telephone line as alleged. It was also further denied that the material had been obtained by a third party by means of unlawful surveillance and recording of private conversations held by the plaintiff on her telephone line. Notwithstanding these pleas, I am satisfied that there is no doubt whatsoever that the articles complained of contained material which was obtained by means of the recording of telephone conversations of the plaintiff with third parties without her knowledge or permission. To that extent it appears that there has been a breach of s. 98 of the Postal and Telecommunications Act 1983.

The Issues

28. The key point in this case made by the plaintiff is that the publication of the transcripts amounts to a breach of the right to privacy enjoyed by the plaintiff. It was conceded that the right to privacy is not an unqualified right and that there may be exceptional circumstances in which it is possible to justify the breach of privacy of an individual. However, it was submitted that the defendant could not attempt to claim that their actions were lawful in circumstances where the material published was obtained as a result of the commission of a serious criminal offence.

29. In the defence filed herein, the defendant pleaded that it acted in accordance with the right to freedom of expression, in particular in publishing material in the public interest. However, it was submitted that the articles in this case went much further than could be justified by reference to any public interest. In replies to particulars, the public interest identified by the defendant, *inter alia*, was that served by exposing "the conduct of members of the clergy, who hold positions of public trust". However, it was submitted on behalf of the plaintiff that this did not justify details relating to her private life being publicised and that this went far beyond any need to publicise the conduct of Fr. McMahon. In support of this contention, particular reliance was placed on the second article published by the defendant on the 9th November, 2003, which contained transcripts of further telephone conversations of the plaintiff. In those conversations reference was made to Fr. Eddie Cleary. It was submitted that there was no justification whatsoever for publishing that material. It was submitted that the defendant did not set out to inform their reader that Fr. McMahon was having an affair with a married woman but rather they set out to use the material given by her husband to violate her privacy.

30. The response of the defendant to the arguments of the plaintiff in respect of the plaintiff's claim for damages for breach of the right to privacy is to say that the authorities do not support the contention that there is a cause of action for damages for breach of privacy against a defendant other than the State. In other words damages cannot be recovered for breach of privacy against a private person or entity. Reference was made to the decision in the leading case of *Kennedy v. Ireland* [1987] 1 I.R. 587. It was submitted that that decision appears to refer only to State liability. It was pointed out that there is no decided case in this jurisdiction where damages have been given for breach of a right to privacy against a private person or entity. It was further pointed out that the only cases within this jurisdiction that have gone to full trial and in which the right to claim damages for breach of privacy have been recognised have been claims against the State, namely, *Kennedy* referred to above, *Hanahoe v. Hussey* [1998] 3 I.R. 69 and *Gray v. Minister for Justice* [2007] IEHC 52.

31. It was accepted that there have been decisions given in this jurisdiction at an interlocutory stage which have assumed that there is a cause of action in privacy against a private individual, namely, *X. v. Flynn* (Unreported, Costello J. 19th May, 1994), *M. v. Drury* [1994] 2 I.R. 8 and *Cogley v. R.T.E.* [2005] 2 I.L.R.M. 529.

32. Reference was also made to the English authority in the case of *Wainwright v. Home Office* [2004] 2 A.C. 406, in which it has been

specifically decided that there is no general common law tort of invasion of privacy.

33. The second point made on behalf of the defendant was that if there is a right to claim damages for breach of privacy against private persons and entities then following the reasoning of the Supreme Court in *Kennedy*, it can be concluded that the publication of transcripts of telephone conversations is a *prima facie* breach of the right to privacy if the publication was deliberate, conscious and unjustified. Therefore the question to be considered in this case is whether the *prima facie* breach was "unjustified". The first point relied on in this regard is that the defendant in this case, a newspaper, was exercising its right to freedom of expression. Such a consideration was absent from the *Kennedy* case. It was pointed out that there is a conflict between the right of privacy on the one hand and the freedom of expression on the other hand. Reference was made in that context to the decision in Supreme Court in the case of *Mahon v. Post Publications Limited* [2007] 2 I.L.R.M. 1. Thus counsel argued that the defendant was entitled to publish the material concerned not simply by relying on the public interest but also having regard to the defendant's right to freedom of expression. In other words it is not necessary to justify the publication by reference to the public interest. It was pointed out that in this regard there is no conflict between the Constitution and the European Convention on Human Rights. Although the 2003 Act, was not in force at the time of publication, it was suggested that the approach taken in the case of *Mahon v. Post Publications Limited* should be adopted in this case. Freedom of expression is not dependant upon being able to establish that there is any public interest in a story.

34. The second point made on behalf of the defendant is that the central allegation in the articles complained of is true. There is no challenge to the accuracy of the material published. It was submitted that this was a decisive factor in an analogous case namely, *Maguire v. Drury* [1995] 1 I.L.R.M. 108.

35. The next point relied on by the defendant was the public interest. It was pointed out that Fr. McMahon was a Catholic priest and as such required to be celibate. It was also submitted that a Catholic priest, particularly one who serves as a parish priest, is a public figure. It was argued that if such a priest is not celibate or if his private behaviour is not in accordance with the norms advocated by the Church, then that is a matter of public interest. Reliance was placed on the decision of the Court of Appeal in the United Kingdom in the case of *A. v. B. Plc* [2003] Q.B. 195.

36. The final matter relied on by the defendant was the fact that the information published came from the plaintiffs husband and it was submitted that his rights to freedom of expression had to taken into consideration. In support of this contention reliance was placed on the decision in *A. v. B. Plc* referred to above and on a passage at para. I l(xi) where it was stated:-

"More difficult is the situation where the alleged intrusion into privacy is as a result of the reporting of the information to a third party by a party to the relationship which creates the privacy. This is a material factor in situations where two people have shared a sexual relationship outside marriage. If one wishes to exercise his or her article 10 rights that must impact on the other's right to maintain confidentiality. For example the information may relate, as in this case, to a situation where there is a sexual relationship between two parties and one of the parties informs the media about the relationship without the consent of the other party. ... While recognising the special status of a lawful marriage under our law, the courts, for present purposes, have to recognise and give appropriate weight to the extensive range of relationships which now exist. Obviously, the more stable the relationship the greater will be the significance which is attached to it."

37. On the basis of that decision it was contended that if it was relevant in that case to consider that one of the parties to a non-marital relationship wished to give information to the newspapers it was all the more so a consideration where the information came from a party to a marriage.

38. Relying on those considerations, it was submitted that the publication was justified.

The Right to Privacy

39. The right to privacy is an unenumerated right under the Constitution which has its genesis in a short series of cases commencing with the decision in *McGee v. Attorney General* [1974] I.R. 284. That well known case concerned the provisions of s. 17 of the Criminal Law (Amendment) Act 1935, which restricted the availability of contraceptives. Section 17(3) was struck down as being inconsistent with the Constitution as it was an unjustified invasion of the plaintiffs personal right to privacy in her marital affairs. At p. 313 of his judgment, Walsh J. commented:-

"In my view, Article 41 of the Constitution guarantees the husband and wife against any such invasion of their privacy by the State. It follows that the use of contraceptives by them within that marital privacy is equally guaranteed against such invasion and, as such, assumes the status of a right so guaranteed by the Constitution. If this right cannot be directly invaded by the State it follows that it cannot be frustrated by the State taking measures to ensure that the exercise of that right is rendered impossible."

40. Henchy J. at p. 308 in the same judgment said:-

"In my opinion, s. 17 of the Act of 1935 violates the guarantee in s. 3(1) of Article 40 by the State to protect the plaintiff's personal rights by its laws; it does so not only by violating her personal right to privacy in regard to her marital relations but, in a wider way, by frustrating and making criminal any efforts by her to effectuate the decision of her husband and herself, made responsibly, conscientiously and on medical advice, to avail themselves of a particular contraceptive method so as to ensure her life and health as well as the integrity, security and well-being of her marriage and her family. Because of the clear unconstitutionality of the section in this respect, I do not find it necessary to deal with the submissions made in support of the claim that the section violates other provisions of the Constitution."

41. Griffin J. also referred to the concept of marital privacy as one of the personal rights guaranteed by s. 3(1) of Article 40 at p. 333 of the judgment.

42. Thus it was for the first time that the right to privacy in any context was recognised as one of the unenumerated rights under the Constitution.

43. The next case to consider the right of privacy in this extent was the case of *Norris v. Attorney General* [1984] I.R. 36. That case considered the constitutionality of laws criminalising homosexual acts between males. In that case the question of the right to privacy was considered, but the majority of the Supreme Court took a restrictive view of the extent of the right of privacy. In the course of his judgment in that case, O'Higgins C.J. noted at p. 64 a right of privacy or, as it has been put, a right "to be let alone", can never be absolute.

44. The genesis of the right to privacy culminated in the case of *Kennedy v. Ireland* [1987] 1 I.R. 587. The decision of the High Court in that case expressly recognised that there is a constitutional right to privacy. That case involved unlawful tapping of the plaintiff's telephone lines. The plaintiff claimed that this was a breach of their personal right to privacy and freedom from unlawful and unwarranted intrusion, guaranteed by Article 40 of the Constitution. In the course of his judgment, Hamilton P. stated at p.590:-

"The personal right to privacy is one of such rights. In the course of his judgment in *Norris v. The Attorney General* [1984] I.R. 36 at pp. 100 and 101 of the report, Mr. Justice McCarthy stated: -

'The Constitution does not guarantee or, in any way, expressly refer to a right of privacy - no more, indeed than does the United States Constitution, with which our Constitution bears so many apparent similarities. In the United States Constitution the right to privacy in one form or another has been founded upon the First Amendment (*Stanley v. Georgia* (1969) 394 U.S. 557); the Fourth and Fifth Amendments (*Terry v. Ohio* (1968) 392 U.S. 1); in the penumbra of the Bill of Rights (*Griswold v. Connecticut* (1965) 381 U.S. 479) - the contraceptives case; in the Ninth Amendment (*Griswold v. Connecticut*); and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment (*Meyer v. Nebraska* (1923) 262 U.S. 390).

In our Constitution a right of privacy is not spelt out. As stated by Mr. Justice Henchy in his judgment, there is a guarantee of privacy in voting under Article 16, s. 1(4) - the secret ballot; a limited right of privacy given to certain litigants under laws made under Article 34; the limited freedom from arrest and detention under Article 40, s. 4; the inviolability of the dwelling of every citizen under Article 40, s. 5; the rights of the citizens to express freely their convictions and opinions, to assemble peaceably and without arms, and to form associations and unions - all conferred by Article 40, s. 6(1); the rights of the family under Article 41; the rights of the family with regard to education under Article 42; the right of private property under Article 43; freedom of conscience and the free profession and practise of religion under Article 44. All these may properly be described as different facets of the right of privacy, but they are general in nature (as necessarily they must be in a Constitution) and do not set bounds to the enumeration of the details of such a right of privacy when the occasion arises. In our jurisdiction this is best exemplified in the *McGee Case* [1974] I.R. 284 where, whilst Mr. Justice Walsh rested his judgment upon the provisions of Article 41, Mr. Justice Budd, Mr. Justice Henchy and Mr. Justice Walsh relied upon the guarantees of Article 40, s. 3. I would respectfully share the latter view of the true foundation for what the *McGee Case* upheld - the right of privacy in marriage.

Whilst the Constitution of the Irish Free State (Saorstát Éireann) 1922, did not, as it were, isolate the fundamental rights of citizens in a manner in which the present Constitution of 1937 has done, articles 6, 7, 8, 9 and 10 of that Constitution indicate the manner in which certain rights were spelt out but, to a degree, highlight the absence of such guarantees as are contained in Article 40, s. 3, and Article 41 of the Constitution. There may well be historical reasons for these differences - a greater awareness of the need for the enunciation of fundamental rights was present during the 1930s than at the time of the negotiations for the Treaty that led to the enactment of the Constitution of the Irish Free State. At all events, the concept of judicial dynamism in constitutional law has grown, thereby identifying more readily the role of the Courts; and in particular, this Court as the judicial organ of government, not merely by way of a supervisory jurisdiction on the actions of the legislative and executive branches of government but by way of legal interpretation - thus playing its part in 'seeking to promote the common good, with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured . . .' as most strikingly evidenced by the decision in the *McGee Case*.

How then, to identify the nature of the personal right of privacy? The right to privacy has been called by Brandeis J. of the United States Federal Supreme Court 'the right to be let alone' - a quotation cited by the Chief Justice in this case and by Mr. Justice Walsh in his dissenting judgment as a member of the Court of Human Rights in *Dudgeon v. United Kingdom* (1981) 4 E.H.R.R. 149. By way of definition it has brevity and clarity and I would respectfully adopt it as accurate and adequate for my purpose but, to a degree, the very definition begs the question. The right to privacy is not in issue, the issue is the extent of that right or the extent of the right to be let alone."

45. Having quoted at length the passage from the judgement of McCarthy J. in *Norris*, Hamilton J. at p. 592 then continued:-

"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.

There are many aspects to the right to privacy, some of which have been dealt with in the cases referred to by Mr. Justice McCarthy in the passage which I have just quoted from his judgment in *Norris's Case* [1984] I.R. 36 and the remaining aspects remain to be dealt with when suitable cases come before the courts for determination. The question to be determined in this case is whether the right to privacy includes the right to privacy in respect of telephonic conversations and the right to hold such conversations without deliberate, conscious and unjustified interference therewith and intrusion thereon by servants of the State, who listen to such conversation, record them, transcribe them and make the transcriptions thereof available to other persons.

I have no doubt but that it does."

46. Mr. McCullagh, S.C. on behalf of the defendant did not dispute the existence of a right to privacy but contended that there was no right to sue a private entity or person for damages for such a breach. He relied on the language of Hamilton P. and in particular the last paragraph of the passage just quoted above to suggest that the liability in respect of damages is limited to the State. He accepted that the right to sue an individual or entity had been assumed in a number of cases but added that such assumption had been made in cases involving interlocutory applications only and not in cases that had gone to full trial. Any case in which the matter was raised and in which the right to claim damages for breach of privacy have been recognised were actions against the State.

47. During the course of legal argument herein, reference was made to the case of *Meskeil v. C.I.E.* [1973] I.R. 121 by Mr. McDowell, S.C. in support of the plaintiffs contention that a claim for damages for breach of a constitutional right was not limited to actions against the State. The case of *Conway v. I.N.T.O.* [1991] 2 I.R. 305 was also referred to in this context.

48. It is interesting to note that in the *Kennedy* case referred to above, Hamilton P. expressly referred to the decision in *Meskeil* at p.593 of his judgement. He quoted from the words of Walsh J. during the course of his judgment in that case where he stated at pp.

"A right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it."

49. Hamilton P. in the course of the *Kennedy* judgment having referred to the passage referred to above from *Meskill*, went on to say as follows:-

"In this case the plaintiffs and each of them claim damages for breach of constitutional rights, abuse of power and breach of contract. In the events which have happened, the only remedy which the plaintiffs can obtain in this court, which, as one of the organs of the State is obliged to respect, defend and vindicate the personal rights of the citizens, lies in damages. Damages may be compensatory, aggravated, exemplary or punitive."

50. I should refer briefly to the decisions referred to by Mr. McCullough, in support of his argument that there is no single decision arising out of the hearing at full trial of a claim for damages for breach of privacy against a private person or entity. The two cases relied on in particular in this regard are the decisions in *M. v. Drury* [1994] 2 I.R. 8 and *Cogley v. R.T.E.* [2005] 2 I.L.R.M. 529.

51. The facts of *M. v. Drury* referred to above are strikingly familiar to the facts of the present case. The plaintiff wife and the husband had been involved in family law litigation which resulted in an order for judicial separation being made on the 26th July, 1993. A number of articles appeared in different newspapers published by the defendants reporting the husband's view that the marriage had broken down by reason of an alleged adulterous relationship between his wife and a Roman Catholic priest, and his intention to bring proceedings against the Roman Catholic Church seeking compensation for the breakdown of his marriage. The plaintiff applied to the High Court for *inter alia*, an interlocutory injunction restraining the defendants from publishing or communicating to any person any matter or fact, pertaining to her family life. It was submitted on behalf of the plaintiff that since the proposed publications would disclose matters relating to the intimate family relationship of the plaintiff and the defendant, they constituted an invasion of the plaintiff's right to privacy which right was an unspecified right deriving from the Constitution of Ireland, 1937, and in particular, Article 41 thereof. It was held, by O'Hanlon J. that the proposed publications complained of did not concern the intimacies of married life or marital communications between husband and wife but, allegations of adultery made by a husband against a wife. Accordingly, having regard to the provisions of Article 40 and Article 41 of the Constitution, there was no fair case to be tried as to whether some right of the plaintiff derived from those Articles would be breached by publication of the proposed material. It was also noted by the Court that had the truth of the allegations been contested by the plaintiff, the injunction could have been granted and the law of defamation could have been invoked in aid of the plaintiff's claim. The court went on to hold that whilst in certain cases the right to privacy, which right was an unspecified right deriving from the Constitution, demanded an intervention of the courts, in general it was desirable that the legislature and not the courts should prescribe the exceptions to the right of freedom of speech. It was also held that having regard to the fact that the husband's allegations had already been widely aired in the press and to the general undesirability of delaying the publication of material in circumstances where it was likely that the courts would determine that such publication was lawful at the trial of the action, the balance of convenience was against granting the reliefs sought. It is interesting to look at precisely what was said by O'Hanlon J. in the course of his judgment. At p. 14, he commented:-

"It appears to me, however, that what is involved in this case is not a matter concerning the intimacies of married life, or marital communication between husband and wife but rather a matter of allegations made by a husband of an extra-marital liaison entered into by his wife which he was anxious to publicise for the purpose of giving vent to his anger against the third party involved and possibly to reap some financial reward for himself in the process.

If the truth of the allegations were seriously challenged, the courts would certainly intervene in an appropriate case to prevent publication pending trial and the law of libel could be invoked in aid of the plaintiff's claim. Similarly, in case of a breach of the in-camera rule, as happened in *Re Kennedy & McCann* [1976] I.R. 382, injunctive relief could be obtained under various statutes dealing with family law matters.

I cannot derive from the provisions of Article 40 or Article 41 of the Constitution any grounds which lead me to believe that there is a fair case to be tried as to whether some right of the plaintiff under those Articles would be breached if further revelations of the kind which have already appeared in print are repeated in the future in the publications of the various defendants or for which they are responsible as distributors or correspondents or otherwise."

52. He went on to say at p. 17:-

"There are extreme cases where the right to privacy (which is recognised as one of the personal rights, though unspecified, guaranteed protection by the Constitution - see judgment of Budd J. in *McGee v. Attorney General* [1974] I.R. 284 at p. 322) may demand the intervention of the courts. An example might be the circumstances illustrated in *Argyle v. Argyle* [1967] Ch. 302, where confidential communications between husband and wife during their married life together, were protected against disclosure. Generally speaking, however, it seems desirable that it should be left to the legislature and not to the courts to 'stake out the exceptions to freedom of speech' (in the words of Lord Denning).

In the present case, the Court is asked to intervene to restrain the publication of material, the truth of which has not as yet been disputed, in order to save from the distress that such publications is sure to cause, the children of the marriage were all minors. This would represent a new departure in our law, for which, in my opinion, no precedent has been shown, and for which I can find no basis in the Irish Constitution, having regard, in particular to the strongly expressed guarantees in favour of freedom of expression in that document."

53. He went on to deal with the balance of convenience, if it arose, in that case and he noted that there seemed to be little to be gained by granting an interlocutory injunction as maximum publicity had already been given to the husband's version of events. It seems to me that that case is important for a number of reasons. First of all, it recognises the existence of a right to privacy as one of the personal rights guaranteed protection by the Constitution. Secondly, it does recognise the importance of protecting confidential communications between a husband and wife during their married life together. (Despite the fact that the articles concerned in this case deal with the marital circumstances of the husband and wife, it is clearly not a case in which confidential communications between a husband and wife during their married life together have been disclosed.) The third point that is important to note is the comment of O'Hanlon J. to the effect that it was desirable that it should be left to the legislature and not to the courts to "stake out the exceptions to freedom of speech". I will return to this point later.

54. The other case I wish to refer to in this context is the judgment in the case of *Cogley v. R.T.E.* [2005] 2 I.L.R.M. 529. That case

concerned an intended broadcast of a programme in relation to the operation of a nursing home known as Leas Cross Nursing Home. Two sets of proceedings were brought against RTE seeking to prevent the broadcast of the programme. The plaintiff in the first set of proceedings was a Director of Nursing at the nursing home and the plaintiffs in the second set of proceedings were the owners and occupiers of the nursing home. Using a concealed camera, a worker filmed the operation of the nursing home over a two week period. The plaintiffs in the second proceedings based their application primarily on the allegation that the use of a secret camera was a breach of the right to privacy of the plaintiffs and the patients at the nursing home and constituted trespass. In considering the extent of the constitutional right to privacy as set out in *Kennedy v. Ireland*, Clarke J. noted at p. 90:-

"However, it is also clear from *Kennedy v. Ireland* [1987] I.R. 587 that the right to privacy is not an unqualified right but is subject to the constitutional rights of others and to the requirements of public order, public morality and the common good. It should also be noted that the express recognition of an obligation to respect the privacy of others contained in the Broadcasting Acts 1960 to 1976 referred to above is also not unqualified in that it places an obligation on the Broadcasting authority not to 'unreasonably encroach' on the privacy of an individual. Thus it is clear that while persons such as the plaintiffs have a constitutional right to privacy and an arguable entitlement to ensure that the Broadcasting Authority does not unreasonably interfere with their privacy in the course of making and broadcasting programmes, those rights are not unqualified. It is, therefore, necessary to address how the right of privacy may be balanced against other competing rights and, in particular, how an assessment of the situation in respect of such competing rights should be made at an interlocutory stage such as this."

55. Clarke J. went on to comment as follows:

"A useful starting point for the purposes of this case seems to me to be to distinguish between a right of privacy in the underlying information whose disclosure it is sought to prevent, on the one hand, and, on the other hand, the situation where a right to privacy which does not extend to that underlying information but it is contended that the methods by which the information has been obtained amount to a breach of privacy."

There are certain matters which are entirely private to an individual and where it may validly be contended that no proper basis for their disclosure either to third parties or to the public generally exists. There may be other circumstances where the individual concerned might not, having regard to competing factors which may be involved, such as the public interest, be able to maintain that the information must always be kept private but may make a complaint in relation to the manner in which the information was obtained.

It seems to me the different considerations apply most particularly at an interlocutory stage, dependant on which of the above elements of the right to privacy is involved."

56. Ultimately in that case the court went on to refuse the interlocutory relief sought. Clarke J. did comment (at p. 93) that the plaintiffs had at least made out an arguable case to the effect that the circumstances in which the filming occurred may amount, *prima facie*, to a trespass and breach of privacy. However, he went on to hold that the mere fact that information may arguably have been obtained in breach of an individual's rights is not of itself necessarily decisive. He pointed out the importance of weighing in the balance any public interest issues which arise and given that he was dealing with an interlocutory application, the extent to which damages may be an adequate remedy. I find it difficult to draw the conclusion from the decision in that case or indeed from the decision in *M. v. Drury* referred to above that because the plaintiffs in those cases failed to obtain the interlocutory relief sought, and bearing in mind that there has not been a decision arising out of a full trial of a claim for damages for breach of privacy against a private person or entity, that no such right exists. What does emerge from the decisions to which I have referred and in particular from the decision in the case of *Cogley v. R.T.E.* are the following principles:-

- (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.

Application of the principles to the facts of this case

57. Given that I have reached the conclusion that a breach of the constitutional right to privacy is actionable against a private person or entity, it is now necessary to consider in the context of this case whether the matters published by the defendant herein amount to a breach of privacy and the extent to which the right to privacy asserted by the plaintiff herein may be qualified. It was accepted in this case on behalf of the defendant that if there is a right to claim damages for breach of privacy against private individuals, then that right must follow the reasoning of the Supreme Court in *Kennedy*. On that basis it was accepted that the publication of transcripts of telephone conversations is a *prima facie* breach of that right if it was deliberate, conscious and unjustified. On that basis it was submitted that the question to be determined is whether the *prima facie* breach of the right to privacy was "unjustified".

58. The defendant relied on a number of matters to justify the publication of the articles complained of herein. Those can be summarised as follows:-

- (1) The newspapers' right to freedom of expression.
- (2) The accuracy of the information involved.

(3) The public interest in the information.

(4) The freedom of expression of the plaintiff's husband.

59. In support of those matters, the defendant relied on a number of authorities. Dealing with those issues as they arose, counsel on behalf of the defendant noted that the question of freedom of expression was not something that arose in the *Kennedy* case. Reference was made to the judgment of the Supreme Court in *Mahon v. Post Publication Limited* [2007] 2 I.L.R.M. 1 in which Fennelly J. considered the nature of freedom of expression at page 13 and 14 of the judgment:-

"It is no function of the Court to adjudicate on the dispute agitated in the affidavits as to whether future publication by the media of material regarded as confidential by the Tribunal would be in the public interest, as the defendant claims, or would be aimed at boosting circulation, as Ms Gribbin has stated on behalf of the Tribunal. The courts do not pass judgment on whether any particular exercise of the right of freedom of expression is in the public interest. The media are not required to justify publication by reference to any public interest other than that of freedom of expression itself. They are free to publish material which is not in the public interest. I have no doubt that much of the material which appears in the news media serves no public interest whatever. I have equally no doubt that much of it is motivated, and perfectly permissibly so, by the pursuit of profit. Publication may indeed be prompted by less noble motives. So far as the facts of the present case are concerned, the decision of Mr O'Kelly to publish the names of three TD's in direct defiance of the wishes of the Tribunal was disgraceful and served no identifiable public interest. On the other hand, that does not mean that it was unlawful.

The right of freedom of expression extends the same protection to worthless, prurient and meretricious publication as it does to worthy, serious and socially valuable works. The undoubted fact that news media frequently and implausibly invoke the public interest to cloak worthless and even offensive material does not affect the principle. Like Kelly J, I cite the following passage from the judgment of Hoffmann L.J., as he then was, in *R. v Central Independent Television Plc* [1994] 3 WLR 20:

'Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.'

60. That is a powerful expression of the right to freedom of expression. It is not authority however for saying that the right to freedom of expression is more significant than the right to privacy. As Hoffmann L.J. noted, the freedom is subject to clearly defined exceptions laid down by common law or statute. It is in that context that the constitutional right to privacy comes into the equation. Accordingly it seems to me that there is a balancing exercise engaged in circumstances where the right to freedom of expression conflicts with the right to privacy. It is clear that newspapers are free to publish all sorts of matters regardless of public interest and questions of good taste but, as is the case with the right to privacy, the right to freedom of expression is not an unqualified right. Lord Hoffmann in the passage just quoted above and approved by Fennelly J. noted:-

"This freedom is subject only to clearly defined exceptions laid down by common law or statute.

61. O'Hanlon J. in the case of *M. v. Drury* referred to above, quoted the same passage from the judgment of Hoffmann L.J. and he added at page 17 of his judgment:-

"Generally speaking, however, it seems desirable that it should be left to the legislature, and not to the courts to 'stake out the exceptions to freedom of speech' (in the words of Lord Denning)."

62. Clarke J. in his judgment in *Cogley* referred to the fact that:

"There may be other circumstances where the individual concerned might not, having regard to competing factors, such as the public interest, which may be involved, be able to maintain that the information concerned must always be kept private but may make complaint in relation to the manner in which the information was obtained."

63. It seems to me that those passages have a particular bearing in the context of this case. The publication of the telephone transcripts in this case were obtained in breach of the provisions of s. 98 of the Postal and Telecommunications Services Act, 1983. As previously indicated, s. 98(1) applies to a person who not only intercepts or attempts to intercept or authorises someone else to intercept telecommunications messages but also applies to those who disclose the existence, substance or purport of any such message which has been intercepted or uses for any purpose any information obtained from any such message and such person is also guilty of an offence. I cannot see how anyone can assert a right to freedom of expression to publish transcripts of private telephone conversations where the legislature has expressly prohibited the interception of telecommunications messages. This is precisely a situation in which the State has seen fit to lay down by statute an exception to the right to freedom of expression. There is a hierarchy of constitutional rights and as a general proposition, 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. One must bear in mind that the provisions of s. 98 of the Act are there to protect the privacy of an individual's telephone conversations. No one expects to see their private telephone conversations printed in a newspaper to excite the prurient curiosity or to provide amusement for the paper's readers.

64. There may be other circumstances where the right to privacy prevails. For example, could a newspaper be entitled to publish details of a diagnosis of serious illness in respect of an individual bearing in mind the nature of the confidential doctor-patient relationships? What if the individual was a well-known public figure? Would it make a difference if the individual was a celebrity or, say, a senior politician? I would have thought that the circumstances which could justify a publication of such private information would seldom arise and only if there was some clear, demonstrable public interest.

65. The second aspect of the matter relied on by the defendant herein related to the accuracy of the information. Undoubtedly that

was a factor in the case of *M. v. Drury* referred to above. The facts of that case are, as mentioned previously, very similar to the facts of this case. In that context, O'Hanlon J. stated at page 17:-

"In the present case, the court is asked to intervene to restrain the publication of material, the truth of which has not as yet been disputed, in order to save from the distress that such publication is sure to cause the children of the marriage who are all minors. This would represent a new departure in our law, from which, in my opinion, no precedent has been shown, and for which I can find no basis in the Irish Constitution, having regard, in particular, to the strongly-expressed guarantees in favour of freedom of expression in that document.

I therefore do not find that it has been shown that there is a fair case to argue when the case comes on for full trial, and on this ground I refuse the application for interlocutory relief."

66. The fact that the material is accurate does not of itself give rise to a right to publish the material. As I have noted above the right to freedom of expression is subject to exceptions at common law and subject to statutory restriction. The fact that the material is accurate would not in my view avail the defendant in this case where the material at issue is disclosed contrary to a statutory exception to the right to freedom of expression.

67. The third point relied on by the defendant is the public interest. In essence the submission of the defendant was that the information that appeared in the articles complained of concerned a Catholic priest. It was submitted that the Catholic Church demands celibacy of its priests and that a Catholic priest and in particular a parish priest is a public figure. On that basis it was contended that there was a legitimate public interest in whether a parish priest is having an affair with a married woman. In this context reference was made to the decision in the case of *A. v. B. Plc* [2003] Q.B. 195 where the Court of Appeal noted:-

"Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion that follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls. The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest."

68. I would make a number of observations about this line of argument. First of all the public interest in this particular case, such as it may be, is asserted to be a public interest in the behaviour of Fr. McMahon, who is of course, not the plaintiff herein. Much of the material that appeared in the course of these three articles concerned the plaintiff. Given the nature of the role of a Catholic priest in Irish society, Fr. McMahon could well be said to be a person whose conduct may be subject to public scrutiny as outlined in the case of *A. v. B.* referred to above. It is inevitable that if information is disclosed about a public figure such as a priest, that could expose others in the position of the plaintiff herein to unwelcome intrusion into their lives. In such circumstances I think that as a general proposition the right to freedom of expression would outweigh the right to privacy of the individual in the position of the plaintiff herein. However, in considering that aspect of the matter one would also have to have regard to the extent of the information in relation to the individual concerned and once again, one would have to have regard to the means by which the information was obtained and the type of disclosure that occurred. Accepting as I do that there is such a public interest of the kind contended for by the defendant, nonetheless, that public interest remains subject to the caveat that the limits on the right to freedom of expression cannot be ignored simply by recourse to the public interest. In other words, the right to freedom of expression is as stated before, not an unqualified right. It is subject to exceptions at common law, for example, by means of defamation law (if the publication is not accurate) and by legislation. I can see no basis for saying that the public interest arising on the facts of this case could be such as to set at nought the restriction on the disclosure of telecommunications messages prohibited by s. 98 of the Postal and Telecommunications Services Act 1983. It simply cannot be so.

69. The final point raised relates to the right to freedom of expression of the plaintiff's husband. In the case of *A. v. B. Plc.* referred to above, it was noted by the court as follows:-

"More difficult is the situation where the alleged intrusion into privacy is as a result of the reporting of the information to a third party by a party to the relationship which creates the privacy. This is a material factor in situations where two people have shared a sexual relationship outside marriage. If one wishes to exercise his or her article 10 rights that must impact on the other's right to maintain confidentiality. For example the information may relate, as in this case, to a situation where there is a sexual relationship between two parties and one of the parties informs the media about the relationship without the consent of the other party. ... While recognising the special status of a lawful marriage under our law, the courts, for present purposes, have to recognise and give appropriate weight to the extensive range of relationships which now exist. Obviously, the more stable the relationship the greater will be the significance which is attached to it."

70. Thus it was submitted that where the information comes from a party to a marriage this is a relevant fact to consider in circumstances where one of the parties to the marriage wishes to give information to newspapers. That passage recognises the difficulty that is to some extent at the heart of this case, namely that one person's right to privacy or as stated in that case to maintain confidentiality, must impact on the other's right to freedom of expression. In such situations one has to weigh up the conflicting interests and find where the balance lies. However, for the reasons I have already outlined, such considerations do not arise where the material comes from a source which is prohibited by law as in this case, namely, telephone tapping.

71. Accordingly, I am satisfied that the publication of the transcripts of telephone conversations in this particular case by the defendant in breach of s. 98 of the 1983 Act, can only be described as a deliberate, conscious and unjustified breach of the plaintiff's right to privacy.

Other issues

72. During the course of submissions in this case, Mr. McDowell, S.C. on behalf of the plaintiff in the course of submissions made the comment that there was no real significant or weighty public interest involved in these proceedings in the publication of private information pertaining to the plaintiff's private life. It was stated that the argument of the defendant could have carried some weight had the defendant limited its publication to details about Fr. McMahon and Fr. Cleary. He went on to say that the exposure of the

plaintiff's private life without any basis in public interest and was designed purely to create a salacious and prurient article. As I have already indicated, I can see some basis for the identification of the plaintiff as a person involved in a relationship with Fr. McMahon. However, much of the material published in the articles and concerning the plaintiff could not have any bearing on the public interest asserted by the defendant. In any event much of the material published consisted of the contents of transcripts of private telephone conversations of the plaintiff. For the reasons outlined above there could be no basis for the publication of that material.

73. Submissions were made to me in relation to the right to privacy as protected under the European Convention of Human Rights. The publication in this case occurred before the European Convention on Human Rights Act 2003, came into effect on the 31st December, 2003. It was noted in the course of submissions that the right to freedom of expression under the Constitution were in accordance with the provisions of the European Convention on Human Rights, and it does not seem to me to be necessary to make any observation on the provisions of the Convention.

74. Submissions were also made in relation to a contention that the publication of the material in this case amounted to a breach of confidence. It does not seem to me to be necessary to deal with this issue in the light of the findings expressed above.

75. Further it was contended that the publication by the defendant of the telephone conversations amounted to a breach of statutory duty giving rise to a claim for damages. Again I do not think it is necessary to consider this aspect of the matter.

76. The final matter raised by way of argument was that there was a conspiracy on the part of the defendant and others in relation to the publication of the transcripts of the plaintiff's private telephone conversations for the purpose of injuring the plaintiff. Again I do not think it is necessary to consider this aspect of the case in the light of the views expressed in relation to the plaintiff's claim for damages for breach of her right to privacy.

Damages

77. The final issue to be considered in this case is the issue of damages. The first comment I want to make in relation to the question of damages is that I accept the evidence given by the plaintiff in this case. In that regard I accept that the marriage of the plaintiff and her husband had broken up before her relationship with Fr. McMahon commenced. I accept that there was no real effort made by the defendant to get the plaintiff's side of the story in relation to the breakdown of the marriage. I accept that what appeared in the newspaper articles complained of was an account based solely on her husband's version of events. There was a phone call made to the plaintiff on the day before the publication of the first of the articles complained of, but I cannot accept that it was a genuine attempt to obtain her side of the story. In any event, that would not justify a breach of a right to privacy. I accept that while she was asked about her relationship with Fr. McMahon in the phone call that took place, she was never asked anything about her friendship with Fr. Eddie Cleary or the circumstances in which that friendship came about. Finally I accept that the plaintiff was very distressed as a result of the publication of these articles exposing, as they did, to public scrutiny transcripts of her private telephone conversations.

78. Counsel on behalf of the plaintiff in the submissions in respect of damages referred to the decision of the Supreme Court in the case of *Shortt v. Commissioner of An Garda Síochána* [2007] I.E.S.C. 9, in which the law in respect of damages in tort or for breach of a constitutional right were considered. It was stated by Murray C.J. as follows:-

"In these circumstances I am quite satisfied that the principles relating to the award of damages in tort or for breach of a constitutional right as set out by Finlay C.J. in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305 at 317 are applicable to the assessment of damages in this case ...

79. In *Conway v. I.N.T.O.* Finlay C. J. stated:-

'In respect of damages in tort or for breach of a constitutional right, three headings of damages in Irish law are, in my view, potentially relevant to any particular case. They are:-

1. Ordinary compensatory damages being sums calculated to recompense a wronged plaintiff for physical injury, mental distress, anxiety, deprivation of convenience, or other harmful effects of a wrongful act and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.

2. Aggravated damages, being compensatory damages increased by reason of

(a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or

(b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

(c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action.

Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant.

3. Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation, where it may exist in the same case, to compensate the plaintiff for the damage which he or she has suffered. I have purposely used the above phrase 'punitive or exemplary damages' because I am forced to the conclusion that, notwithstanding relatively cogent reasons to the contrary, in our law punitive and exemplary damages must be recognised as constituting the same element."

80. Bearing in mind those principles, it seems to me that the plaintiff herein is entitled to compensatory damages and I am also satisfied that she is entitled to aggravated damages. I am also satisfied that this is a case in which punitive damages should be

awarded. I propose to deal with the issue of ordinary compensatory damages and aggravated damages together. In this regard I accept the evidence of the plaintiff that she was very distressed as a result of the flagrant and unwarranted breach by the defendant of the plaintiff's right to privacy. The publications at the heart of this case took place over a three week period designed to extract the maximum value out of the telephone transcripts of the plaintiff's conversations. Use was made of family photographs and information as to the plaintiff's family circumstances, history and background which could have had no bearing whatsoever on the public interest asserted by the defendant herein. However, the most serious aspect of this case was the use by the defendant of material obtained unlawfully as a result of an illegal phone tap, which was in turn, obtained by the defendant from a husband motivated by revenge. Balanced against that must be the fact that it seems to me that some limited information as to the plaintiff could have been legitimately brought into the public domain had the defendant chosen to write about the conduct of Fr. McMahon, in embarking on a relationship with the plaintiff. Unfortunately for the defendant, it chose to go beyond what would have been permissible in the exercise of its right to freedom of expression by making use of material obtained unlawfully. In this context, the passage from the judgement of Clarke J. in his judgement in *Cogley* at p. 539 is particularly apposite to the facts of this case:-

"In my view a useful starting point for the purposes of this case seems to me to be to distinguish between a right to privacy in the underlying information whose disclosure it is sought to prevent on the one hand and a right to privacy which does not extend to that underlying information but where it is contended that the methods by which the information has been obtained amount to a breach of privacy on the other hand.

81. There are certain matters which are entirely private to an individual and where it may validly be contended that no proper basis for their disclosure either to third parties or to the public generally exists. There may be other circumstances where the individual concerned might not, having regard to competing factors, such as the public interest, which may be involved, be able to maintain that the information concerned must always be kept private but may make complaint in relation to the manner in which the information was obtained."

82. I should briefly add that complaint was made during the course of this case about the conduct of the defendant in the course of the trial of this action. Complaint was made as to the presence of a photographer and the conduct of the same photographer during the course of this trial. It appears that the photographer was seen in the company of the defendant's representatives during the course of the trial. While that matter was ventilated in court, it does seem to me that one of the consequences of engaging in litigation is that parties will necessarily be subjected to the sometimes unwelcome attention of photographers. This is one of the modern day incidents of litigation and does not in my view amount to an element which could or should result in aggravated damages in the circumstances of this case.

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

84. Accordingly, there will be a decree in favour of the plaintiff in the sum of €90,000.