

## CHAPTER TWO SCOPE OF PROTECTION

### 2.2. PROTECTION OF PERSONALITY RIGHTS AND PRIVACY

#### 2.2.4. IRISH AND PORTUGUESE LAW

##### *Introductory Note*

a) As stated above,<sup>1</sup> in the absence of a limitative enumeration of protected rights in the general provision of Art. 483(1) of the *Código civil*, the **Portuguese** courts have included personality and privacy rights in the scope of protection of tortious liability rules. Thus the Suprema Tribunal de Justiça has held that culpable interference with the right to health and rest gives rise to tortious liability. Such a right is included in the right of personality enshrined at Art. 70 of the *Código civil*. That article must indeed be read in conjunction with Art. 64 and 66 of the *Constituição Política* (Portuguese Constitution), which guarantee respectively the protection of health and the right to an ecologically balanced human environment.<sup>2</sup>

b) In Ireland, as stated before,<sup>3</sup> because of the written Constitution, the common law diverges from English common law in matters where infringement of constitutional rights are at issue. According to Art. 40(3)(1) of the Irish Constitution, the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizens.<sup>4</sup> As a consequence, unlawful interferences with one of the rights mentioned in Art. 40(3)(2) (“life, person, good name and property rights”) may also, under certain circumstances, be regarded to constitute a civil wrong when they are committed by individuals.<sup>5</sup> One such case is reprinted below.<sup>6</sup>

c) The recognition of wrongful interference with constitutional rights as a tort is a symptom of what is usually called the constitutionalization of private law. Such constitutionalization also occurs as a result of the impact of the ECHR (and of the EC

<sup>1</sup> *Supra*, General Introduction.

<sup>2</sup> See *infra*, **2.P.34**.

<sup>3</sup> *Supra*, General Introduction.

<sup>4</sup> Von Bar I at 317, para. 296.

<sup>5</sup> *Ibid.* at 317-8, para. 297, with reference to case-law and to J.M. Kelly, G. Hogan and G. Whyte, *The Irish Constitution*, 3rd ed. (Dublin: Butterworths, 1994) at 707-708 and B.M.E. Mc Mahon and W. Binchy, *Irish Law of Torts*, 2nd ed. (Dublin: Butterworths, 1990) at 6-16.

<sup>6</sup> *Infra*, **2.IRL.33**.

## 2.IRL.33.

## SCOPE OF PROTECTION

Treaty) on national private laws.<sup>7</sup> The impact of the ECHR on the domestic laws of countries which have adhered to the ECHR is most discernible in the area of personality rights. That is why reference is made here already to ECHR case law.

In a case coming from England, the ECtHR has made it clear that causing nuisance, noise, the emission of toxic fumes, etc. can be considered as an interference with the “right to respect for one’s private and family life, and one’s home...” within the meaning of Art. 8 ECHR.<sup>8</sup> That case concerned the noise generated by aircraft using Heathrow Airport and therefore affecting large numbers of persons. The Court considered that the U.K. authorities had not “exceeded the margin of appreciation afforded to them or upset the fair balance required to be struck under Art. 8 (between the conflicting interests of the individual and the society as a whole)”. Obviously, the importance of Heathrow Airport for England and the measures taken by the public authorities to reduce noise were taken into account to reach that conclusion.

In a subsequent case from Spain, where not a large number of persons, but rather an individual plaintiff was affected, the applicant complained that a waste-treatment plant had been built next to her apartment, and that the relevant authorities had failed to act to correct the noxious effects on her health and housing conditions. The ECtHR held that the State had failed to strike a fair balance between the economic well-being of the town — fostered by the waste-treatment plant — and the applicant’s effective enjoyment of her right to respect for her home and her private and family life, and that the failure constituted a violation of Art. 8 ECHR.<sup>9</sup>

*High Court*<sup>10</sup>  
*Murtagh Properties Ltd. v. Cleary*

**2.IRL.33.**

### CONSTITUTIONAL RIGHT TO EARN A LIVELIHOOD

#### **No waitresses wanted**

*A trade dispute intended to deprive a person of his/her constitutional right to earn a livelihood is unlawful. Injunction granted to the plaintiffs restraining the defendant from authorizing persons to enter the vicinity of the plaintiff’s premises for the purpose of picketing them.*

<sup>7</sup> See *infra*, Chapter IX, 9.1. and 9.2.

<sup>8</sup> ECtHR, Judgment of 21 February 1990, *Powell v. United Kingdom*, Ser. A No. 172 at para. 40.

<sup>9</sup> ECtHR, Judgment of 9 December 1994, *López-Ostra v. Spain*, Ser. A No. 303-C. That case was similar to the Portuguese case reproduced *infra*, **2.P.34**. See also A.W. Heringa, “Private Life and the Protection of the Environment” (1995) 2 MJ 196. As to the possibility of obtaining compensation under the ECHR, see *infra* 9.3.

<sup>10</sup> [1972] IR 330, with thanks to L. Flyn for selecting an appropriate case and further advising on processing it and commenting upon it.

*Facts:* The plaintiffs who are licensed vintners employed part-time bar waitresses to serve customers at tables in the lounges on the public's side of the bar counter. The trade union objected to the employment of the waitresses contending that the employment was in breach of an agreement it had concluded with the employers' association of which two of the plaintiffs were members. The defendant secretary of the union authorized members of the union to picket the plaintiffs' public house in furtherance of the trade dispute. Plaintiffs applied to the High Court for an interlocutory injunction.

*Held:* Kenny J. granted an interlocutory injunction restraining the defendant from authorizing further picketing.

*Judgment:* KENNY J: "The plaintiffs' first contention was that the objection by the Union to the employment of bar waitresses was based not on any suggestion that they were unsuitable for the work but solely on the ground that they were female, that this was a breach of the constitutional right of equality before the law (Art. 40(1)) and that the picket was designed to compel the plaintiffs to infringe this right of the bar waitresses. The next contention was that each of the bar waitresses had a constitutional right to earn her livelihood without discrimination on the ground of sex. The plaintiffs conceded that the National Parliament may validly rule that men or women shall not engage in certain types of work, but the plaintiffs said that it had not done so and that the threat of a picket was therefore an attempt by the Union and the defendant to compel each of the plaintiffs to infringe this right. It followed therefore that the picketing was not protected by the Trade Disputes Act 1906. The defendant's principal submissions were that the employment of bar waitresses was a breach of the agreement of 1968, that the right of equality before the law had not been infringed, and that the Constitution did not create a right to earn a livelihood without distinction on the ground on the ground of sex..."

The part of Art. 45 on which the plaintiff's rely is the passage in s. 2 which reads: 'The State shall, in particular, direct its policy towards securing (i) That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.' The parenthesis recognises the right to an adequate means of livelihood and, while this is not enforceable against the State, its existence logically involves that each citizen has the right to earn a livelihood. The phrase 'all of whom, men and women equally' shows that the right is one conferred equally on men and women...

It follows that a policy or general rule under which anyone seeks to prevent an employer from employing men or women on the ground of sex only is prohibited by the Constitution. It was strenuously contended... that the consequence of this was that there could be no differences in salary on the ground of sex, and that the remuneration structure of the public service was therefore an infringement of this right. I do not think that this result follows. What is or is not an adequate means of livelihood is a matter for decision by the Oireachtas, but a demand backed by a threat of a picket that women should not be employed at all in any activity solely because they are women (and not because the work is unsuitable for them or too difficult or too dangerous) is a breach of this right...

If this constitutional right [to earn a livelihood] exists, as I believe it does, the analogy with the law declared by the Supreme Court in *Educational Company of Ireland Ltd. v. Fitzpatrick (No. 2)* is compelling in this case. In that case picketing was held to be contrary to the law when its purpose was to compel employers to dismiss those in their employment who were not members of a union. The basis of the decision was that the State had guaranteed liberty for the exercise of the right of its citizens to form associations and unions, which necessarily involved a right not to join one. When giving the judgment of

## 2.IRL.33.

## SCOPE OF PROTECTION

the High Court, Mr. Justice Budd said at p. 369 of the report: ‘Therefore, if and so far as the Trade Disputes Act 1906 may purport to authorise picketing in the circumstances existing and with the object of forcing the non-union men to join a particular union against their wishes and constitutional rights, such alleged effect of the act is inconsistent with the provisions of the Constitution and any construction of the Act permitting picketing to achieve the unconstitutional purpose aimed at cannot be permitted to prevail. That is because that Act, under the terms of Art. 50 of the Constitution, is only effective in so far as it is not inconsistent with the Constitution. To say otherwise would amount to admitting that a constitutional right could be flouted with impunity and to render the provisions of the Constitution nugatory.’ These words have great cogency in their application to the circumstances of this case. The purpose of the threat of the picket is to compel the employers to dismiss the bar waitresses solely because they are women, and this is a breach of their constitutional rights...”

### Notes

(1) The annotated judgment of the High Court, like the judgment of the Supreme Court in *Educational Company of Ireland Ltd. v. Fitzpatrick (No. 2)*<sup>11</sup> to which it refers, relates to the plaintiffs’ entitlement to an injunction for infringement of a constitutional right — here the right to earn a livelihood — which is not mentioned explicitly in Art. 40(3)(2) of the Irish Constitution.<sup>12</sup> It does not relate to a claim for compensation in tort, which is not unexceptional however, as is evident in the German, French and English cases reproduced above. The judgment reproduced above has been chosen because it is a clear example of how constitutional provisions are relied on by the courts to grant relief to individuals for infringement of their constitutional rights by other individuals.

(2) The role of the law of tort itself in the protection of constitutional rights should not be overestimated. As G. Hogan and G. Whyte point out, after Walsh J’s remark in *Meskell v. C.I.É*<sup>13</sup> according to which constitutional rights can be protected 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”, it was speculated that nominate torts such as assault, battery, libel and false imprisonment might disappear and be replaced by an innominate tort of infringement of personal rights.<sup>14</sup> Instead, they continue, the courts “have tended to take the view that the law of tort generally provides adequate protection for personal rights and that it is only in those cases where common law remedies are inadequate or non-existent that an action based directly on the Constitution would arise”.<sup>15</sup>

A case in point was decided by the Supreme Court in *Hanrahan v. Merck Sharp*

<sup>11</sup> [1961] IR 345.

<sup>12</sup> See *supra*, 2.2.4., Introductory Note under b).

<sup>13</sup> [1973] IR 121.

<sup>14</sup> J.M. Kelly, G. Hogan and G. Whyte, *The Irish Constitution*, 3rd ed. (Dublin: Butterworths, 1994) at 707.

<sup>15</sup> *Ibid.*

& *Dohme (Ireland) Ltd*, where the plaintiffs sought damages for injuries and loss suffered as a result of emissions from the defendant's factory.<sup>16</sup> The plaintiffs argued that, since the State was obliged to protect and vindicate their constitutional rights to property and bodily integrity (Art. 40(3)(2) of the Irish Constitution), the State, through the courts, should assist them by shifting the burden of proof on the causation issue, in relation to the tort of nuisance, onto the defendants. Henchy J speaking for the court said:

"So far as I am aware, [Art. 40(3)(1) and (2)] have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question... A person may of course, in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right [here he cites *Meskeil v. C.I.É.*, mentioned above]; but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional rights."

(3) The general view, taking into account the case-law referred to in the preceding note is therefore that, where an existing tort is ineffective to protect constitutional rights, the courts may *either* modify the definition of the tort *or* permit the plaintiff to sue directly for infringement of constitutional rights.<sup>17</sup> It would seem, however, that "courts too readily assume that constitutional rights may be adequately vindicated" through the use of the law of tort.<sup>18</sup>

<sup>16</sup> [1988] ILRM 629.

<sup>17</sup> J.M. Kelly, G. Hogan and G. Whyte, *The Irish Constitution*, 3rd ed. (Dublin: Butterworths, 1994) at 708. The authors add that the only instance where the former action was taken is *McKinley v. Minister for Defence* [1992] 2 IR 333. In that decision a majority of the Supreme Court extended the action for loss of consortium to the plaintiff wives "in order to avoid difficulties with the constitutional guaranties of equality. In that case the plaintiff's husband who was the victim of a serious accident became impotent as a result. Although at common law only claims of husbands, not of wives could be granted under that tort, the claim of the wife was admitted."

<sup>18</sup> Kelly et al., *ibid.* at 708.

*Suprema Tribunal de Justiça, 28 April 1977*<sup>19</sup>

**2.P.34.**

CONSTITUTIONAL RIGHT TO HEALTH AND REST

**Noise from tunnel construction**

*The municipality of Lisboa is held liable for unbearable noise due to the way in which a tunnel was positioned, causing injury to the plaintiff's health.*

*Facts:* The defendant municipality of Lisboa built a train tunnel too close to the surface. The resulting vibrations and noise affected the plaintiff, who sued for damages.

*Held:* Defendant was ordered to pay PTE 250,000 as compensation for material and non-material damages.

*Judgment:* "...The degree of rest allowed to the [plaintiff] ... did not allow her to enjoy the right to health and thus detracted from her right to life, a personal right protected by law, over and above the material interests of society...

It is legitimate for the Court to calculate fair and appropriate compensation, since fault on the part of the [defendant] has been proved...

The tunnel was built close to ground level, so that passing trains caused vibration affecting the floors, walls and ceilings of the [plaintiff]'s apartment.

Her mother, the second [plaintiff], is of advanced age.

Lack of rest and emotional strain aggravated the suffering associated with a long-standing condition of discopathy, latent rheumatic problems, and arthritis.

By virtue of Art. 70 and 483(1) of the *Código civil*, civil liability arises as a result of the [defendant]'s fault, in that [the defendant] encroached upon the [plaintiff]'s entitlement to health and rest. Fair assessment: material damage (costs of transport and carriage) and non-material damage (nuisance in the form of noise and the disagreeable effects of vibrations).

Unlawful infringement of the right to health and rest, which is essential for a balanced physical existence, inherent in the [plaintiff]'s personal rights under Art. 70 of the *Código civil*.

The Constitution itself guarantees that 'everyone shall be entitled to a healthy and ecologically balanced environment for human life', the disturbance of which shall give rise to entitlement to compensation (Art. 66).

The defendant's fault derived from the fact that it built the tunnel too close to the surface, thereby failing to guarantee due insulation against noise and vibration...

The appellant suffered considerable non-material damage, and the amount of compensation awarded by the lower courts seems to this Court to be very small. The amount of compensation awarded to the appellant is adjusted — for all material and non-material damage suffered — to the sum of PTE 250,000.

<sup>19</sup> Boletim do Ministeria da Justiça, May 1977, No. 266 at 165, cited in von Bar I at 36, para. 23. Translation by N. Sims.

Costs to be apportioned.”

*Note*

The above case shows how in Portugal case-law lends substance to the protection which the general provision of tort law, Art. 483(1) of the *Código civil*, gives to “the rights of another” and “the interests of others”. Those two concepts are not otherwise defined in the provision of the *Código civil* relating to tort law. As is apparent here, the other provisions of the *Código civil* (here Art. 70 which guarantees a general protection to the person and to personality) and the Constitution provide guidance to the courts as to which interests are considered to be worthy of protection under tort law.