AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:000059

O'Donnell C.J.

Dunne J.

Charleton J.

O'Malley J.

Woulfe J.

Hogan J.

Collins J.

Between/

CHRISTOPHER MCGEE

Appellant

-and-

GOVERNOR OF PORTLAOISE PRISON, THE MINISTER FOR JUSTICE AND EQUALITY AND IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 25th day of May, 2023.

I BACKGROUND

Introduction

1. It is possible to conceive of a legal code which seeks to set out detailed rules and where individual court decisions merely seek to develop the doctrines contained in the code in a logical fashion, and where even then the room for development is necessarily limited by the detail already contained in the code. A constitution in a common law system, however, is not such a code. While it will often contain some detailed provisions in relation to the structure of the State, it also contains guarantees of rights that, as described by Justice Robert H. Jackson, speak in "majestic generalities". The development of constitutional law in a common law system owes more to chance, therefore, than to systematic deduction from accepted principle. It is dependent on the happenstance of litigation raising an issue that is recognised as such by the lawyers and judges involved, and then the manner in which it is analysed. Development is at best incremental, random, and unpredictable. But if, however, the drafters of the 1922 or 1937 Constitutions had intended to produce a comprehensive code, then the question of when the rights protected by the Constitution would give rise to a successful claim for damages in a civil action is undoubtedly one that would have demanded particular attention and careful analysis.

2. In the first place, the drafters would have had to consider if the Constitution created a right between citizens (or other rights holders) and the State alone, or if it could affect the relations between private parties; in modern parlance, whether the Constitution created rights having vertical effect only, or whether they also had horizontal effect, and, if so, in all cases, or only in certain circumstances. Assuming the Constitution could come into play in any way in

the relations between private parties, it would also be necessary to distinguish between a number of different circumstances.

3. First, and perhaps the easiest, is when it is contended by other parties to private litigation that the Constitution invalidates a statutory provision or common law rule with the effect of altering the outcome of proceedings from what would otherwise have been the case, in the absence of a Constitutional claim. A simple example would be those cases in which it is alleged that the provisions of the Statute of Limitations which would otherwise bar a plaintiff's claim against a defendant are invalid having regard to the Constitution (*O'Brien v. Keogh* [1972] I.R. 144; *O'Brien v. Manufacturing Engineering* [1973] I.R. 344; *Moynihan v. Greensmith* [1977] I.R. 55 *Cahill v. Sutton* [1980] I.R. 269*; Tuohy v. Courtney* [1994] 3 I.R. 1). On the other side of the equation, a constitutional right might be called in aid to defeat a claim which would otherwise be permitted within the statute law but which it is contended cannot properly or fairly be prosecuted (*O Domhnaill v. Merrick* [1984] I.R. 151). These are cases in which the Constitution can be seen to have an indirect, but nevertheless sometimes decisive, effect on private law litigation between individual parties. But the field of application of constitutional law is still public law. In theory, the two claims could be separated and the question of the constitutionality of a provision established in one set of proceedings against the State and Attorney General to which the private law defendant was not a party, and where the outcome would be of general application, and a subsequent, or parallel proceeding to which the Attorney General was not a party, and where the only issue is whether the plaintiff is entitled to damages or other relief against the individual defendant.

4. At the other extreme are claims in public law, where a plaintiff who can establish sufficient standing to do so, may succeed in the claim that either an Act of the Oireachtas, or indeed, the conduct of the Executive branch is invalid having regard to the Constitution. Does that *by itself* give rise to any claim for damages against the State? So far, the High Court has given contrasting answers to this question (*Redmond v. Minister for Environment (No. 2)* [2004] IEHC 24, [2006] 3 I.R. 1, *An Blascaod Mór Teoranta and ors v. Commissioner of Public Works in Ireland and ors* [2000] IEHC 130, [2000] 3 I.R. 565) and this Court has yet to definitively address this issue. However, this issue has been discussed in the case law of other jurisdictions, such as in the Supreme Court of Canada in *Mackin v New Brunswick (Minister for Finance)* [2002] 1 SCR 405, where the court decided that normally a declaration of invalidity was a sufficient remedy but that an award damages was available, but not merely on proof of loss or damage consequent on the invalid legislation: it was necessary to prove something more, such as bad faith, akin to the principles applied in this jurisdiction in *Pine Valley Developments v. Minister for Environment* [1987] I.R. 23.

5. A refinement in this category of claim is where the ground in which the invalidity is established, is that the legislation or act of the Executive is found to breach one of the personal rights of the citizen guaranteed by the Constitution – as opposed to the claim that the legislation or act of the Executive is inconsistent with some provision of the Constitution of general application but which itself does not create an individual or personal right, such as breach of the non-delegation doctrine which might invalidate the Act but could not be said to breach a personal right of the plaintiff.

6. In these latter cases, the claim is one not in private law but rather in public law, and the appropriate respondent is one or more of the organs of the State. If such a cause of action is maintainable, it would be a vertical claim, i.e., one in which a claim for damages or other relief is made by a person or individual against the State in respect of a breach of a right which under the Constitution the State is obliged to respect, defend, and vindicate. A further distinct subheading of claim is where a claim is made against the State in respect of the conduct of its servants or agents alleging that their conduct infringed constitutional rights, but not necessarily constituting a recognised tort. Again, this has been discussed in Canada in cases such as *Vancouver (City) v. Ward* [2010] SCR 28, and *Henry v British Columbia (Attorney General)* [2015] SCR 214. As will be seen, this is one such case.

7. Finally, in this regard, there is a class of claim which may be described as a "pure" horizontal claim. That arises where it is contended that the obligation which the Constitution places upon the State to defend and vindicate the personal right of the citizen, and in particular, by its laws to protect from unjust attack, and in the case of injustice done, vindicate the life, person, good name, and proper rights of every citizen has the effect that where those rights are said to be infringed by another private party, the law of the State must give an entitlement to seek some remedy against the other party including and, if necessary, damages. If the private law of the State, contained in the form of either statute or common law, does not itself recognise a cause of action in such circumstances, then the Constitution, nevertheless, requires a remedy be provided to the individual against the person or entity alleged to have wrongfully injured their life, person, good name, or property rights. This type

of horizontal claim has been called a "pure *Meskell* claim" in reference to the case in which it was first recognised by this Court; *Meskell v. Córas Iompair Éireann* [1973] I.R. 121 ("*Meskell*").

8. If these issues were not already enough, a drafter of a comprehensive constitutional code, particularly if approaching this matter by reference to recognisable features of the legal system in 1922 or 1937, would also have had to address a related issue relating to the liability of the State, or, as it was then considered, the immunity of the State, in tort. This is once again, a separate category. It does not concern a novel claim against the State in public law or give rise to any new cause of action. Rather, it concerns the question of whether the conduct of the State itself, or more commonly its servants or agents, could give rise to a liability in circumstances where the same conduct would give rise to a cause of action against an individual citizen. That is to say, whether the State can be liable for an existing tort recognised by the law and applied in private law.

9. This issue was resolved in *Byrne v. Ireland* [1972] I.R. 241 ("*Byrne*") in favour of the proposition that the State was not entitled to any immunity in tort. Thereafter, the State could be sued in the same circumstances as an individual citizen might, most obviously and commonly, for the negligence of its servants or agents in the driving of motor cars. However, this also meant that the State could be liable for wrongs that only a public authority could commit, such as misfeasance of public office, and moreover, in circumstances where the effective monopoly of the State over certain matters such as arrest and detention

might give rise to claims of wrongdoing, which only the State (through its servants or agents) could in practice commit.

10. The above categories are not necessarily exhaustive, but they have in common the fact that they are all examples of cases in which the Constitution gives rise to the possibility of a successful claim for damages or other relief in circumstances where such a claim would not have been maintainable if considered by reference to the common law or statute law alone. However, the distinctions made above are important because it does not follow that the Constitution gives the same answer to each question, so that for example, *Byrne* does not answer the question posed as to the possible liability of the State for damages arising out of the passage of legislation found to be unconstitutional. The fact that this area of the law gave rise to a number of related but discrete issues was addressed in an insightful article, "Constitutional Remedies in the Law of Torts", by Professor William Binchy in *Human Rights and Constitutional Law Essays in Honour of Brian Walsh* (Round Hall: J. O'Reilly, 1992), where he wrote at p. 202:

> "*The threshold question that arises here concerns the nature of a right. Budd J's remarks suggest a reciprocity of relationship as between citizens which is, in fact, far from inevitable. In cases where a right is one defined exclusively in terms of the relationship between a citizen and the State then, of course, it will simply not be possible for another citizen's conduct to interfere with that right, save tangentially.*
>
> *One must therefore, enquire, in respect of every constitutionally – protected right, whether it is one defining exclusively the relationship*

between the citizen and the State or whether it is a right enforceable, not only against the State, but also against other citizens. Only in the latter case will a plaintiff be able to invoke Meskell to obtain compensation from a citizen as well as the State.

It should also be noted that the mere fact that a constitutional right is enforceable both against the State and another citizen does not necessarily mean that the conditions for eligibility for an award of compensation are identical. There is no logical reason why this should be so and it is easy to conceive of considerations of principle and of policy which would warrant the making of distinctions. The nature of the relationship between a citizen and the State is not the same as the relationship between citizens. The State, through its organs or servants, engages in activities (such as legislating, policing, imprisoning, and censoring, for example) which may bear no direct parallel to the activities of citizens. Moreover, the political ties between citizen and State are based on normative premises which again differ from the ties between citizens as members of society".

11. Furthermore, it is clear that Irish law did not develop by reference to these distinct categories but rather, haphazardly and in response to individual cases. The categories are not in any event mutually exclusive. In the simple case of a private law claim which is claimed to be statute barred, and it is asserted that the provision of the Statute of Limitations is invalid having regard to the Constitution, then it is possible to conceive of a claim either as one between the private parties, in which it is contended that the statute cannot be effectively

raised, or alternatively, one in which the operation of the statutory bar is accepted, but a claim made against the State for damages alleged to flow from the effect of an unconstitutional statute. Nevertheless, it is important to recognise the differences between the classes of cases, because as already observed, they do not raise precisely the same issues, and are not necessarily susceptible to the same analysis.

The appellant's claim

12. The appellant in these proceedings was imprisoned in Portlaoise Prison between 2000 and 2004. During this time, he alleges he was required to engage in "slopping out" as a result of the lack of in-cell sanitation. That is a practice which was held by the European Court of Human Rights to be a breach of Article 3 of the European Convention on Human Rights guaranteeing against inhuman or degrading treatment. This Court held in *Simpson v. The Governor of Mountjoy Prison* [2019] IESC 81, [2020] 3 I.R. 113, ("*Simpson*") that this practice, amongst others, infringed the personal rights of the citizen guaranteed by Article 40.3 of the Constitution. Prior to the *Simpson* decision, and on 22 December, 2014, ten years after his release from prison, the appellant in this case commenced proceedings claiming that the conditions of his detention were in breach of his constitutional rights. On 10 August, 2020, (and after the delivery of the judgment in *Simpson*) the appellant delivered a statement of claim in which he elaborated upon his claim and sought damages for this breach. It is a reasonable inference that the statement of claim was framed in the light of the judgment in *Simpson*. On 19 March, 2021, the respondents delivered a full defence and raised a preliminary objection that the appellant's action was statute barred pursuant to s. 11(2) of the Statute of Limitations Act, 1957 ("the 1957

Act"). The question of whether or not the claim was statute barred was then the subject of a preliminary hearing and determination in the High Court. Barr J. held that the appellant's claim was barred by s.11(2) of the 1957 Act ([2022] IEHC 210). Leave to appeal to this Court was granted on 8 November, 2022 ([2022] IESCDET 123).

13. S. 11(2) of the 1957 Act, as amended provides as follows:-

> *"Subject to paragraph (c) of this subsection and to section 3 (1) of the Statute of Limitations (Amendment) Act, 1991, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued*".

In its original form in 1957 and prior to the amendment effected by the Statute of Limitations (Amendment) Act, 1991 (the "1991 Act"), s. 11(2)(b) made provision for claims for personal injury in respect of actions claiming damages for negligence, nuisance, or breach of duty broadly defined as extending to any case whether the duty existed by virtue of contract, or a provision made under statute, or independently of any contract or any such provision. It is clear from the structure of the Act that any such cause of action was included in the claims founded on tort referred to in what was then s. 11(2)(a).

14. For present purposes, it is not suggested that the present claim falls within the provisions of the 1991 Act and is not to be considered a claim for damages for personal injuries. It is clear, moreover, that any cause of action accrued at the latest, ten years before the commencement of the proceedings, immediately prior to the release of the appellant from prison in 2004. Accordingly, if s. 11(2) of the 1957 Act as amended, is applicable to this case, the action is statute

barred. The net issue in this case is, therefore, whether the so-called pure *Meskell* claim is one which is "founded on tort" so that the provisions of s. 11(2) apply.

15. At first sight, most lawyers might have thought that this issue had long since been resolved, and that it had been established that a claim for damages for breach of a constitutional right was to be considered to be founded on tort for the purposes of the Statute of Limitations, and also for the purposes of the Courts (Supplemental Provisions) Act, 1961, reference 6 of the Third Schedule of which provides for the jurisdiction of the Circuit Court in cases which are "founded on tort" and other similar provisions. In consequence, the Circuit Court would have jurisdiction to hear and determine "pure *Meskell*" claims on this basis but by the same token would be subject to the provisions of s. 11(2) of the 1957 Act, as amended. However, in a carefully constructed argument counsel for the appellant has argued that while that interpretation is certainly the approach taken by at least two of the judgments of this Court in *McDonnell v. Ireland* [1998] 1 I.R. 134 ("*McDonnell*"), and to have been the conclusion reached by the High Court and Court of Appeal on the same or similar issues. The observations in *McDonnell* on close analysis, cannot be said to have commanded the agreement of a majority of the Court, although the Court in that case was unanimous as to the result. On this basis, the appellant contends that it remains open to this Court to address the matter, and the appellant seeks to argue therefore, that pure *Meskell* type claims must be regarded as *sui generis* constitutional claims, which cannot be considered to be torts or founded upon tort. Indeed, it is argued that a condition of the existence of pure *Meskell* causes of action is the very fact that the case does not fall within the heading of any

existing tort claim and it follows, it is argued, that the claim cannot fall within s. 11(2) of the 1957 Act.

16. It is not argued, however, that this analysis should mean that a pure *Meskell* claim can be brought and maintained without any consideration of the lapse of time. Instead, counsel for the appellant acknowledged that even if the Statute of Limitations did not apply in terms, some principle akin to the equitable doctrine of laches must necessarily apply. Just as the Constitution provided the cause of action, it would also protect the rights of defendants from being subjected to stale claims, which could not be properly or fairly defended. This acknowledgement might appear fatal to the prospects of the claim. It is generally accepted that the equitable principle of laches will tend to follow the common law provisions of an applicable Statute of Limitations. Thus, where a claim is brought both in equity and in contract, a claim for equitable relief will often be found to be precluded by laches at the same point at which a contractual claim is barred by a Statute of Limitations. If so, it might appear that the argument would only escape the frying pan of the Statute of Limitations, at the expense of landing in the fire of laches. This risk is frankly acknowledged by counsel, who points out however, that such a conclusion could not be reached on this application or any similar preliminary application. It would necessitate a full trial; a consideration of all the evidence, which might raise the possibility of facts and evidence which may persuade a judge to permit the claim to proceed; and more realistically, might in any event give rise to the possibility that the defendant might see merit in avoiding the possibility and risk of trial and agree to compromise the claim. In any case, if the plaintiff could defeat the preliminary application, the claim would live to fight another day. In this way,

the pragmatism of routine litigation leads to a consideration of sometimes complex constitutional principles.

II DISCUSSION OF THE CASE LAW

Simpson v. The Governor of Mountjoy Prison

17. *Simpson* was treated as a lead case in circumstances where there was a large number of similar "slopping out" claims brought before the courts. That was inevitable given the fact that the prison conditions, the subject of the proceedings, had been in place for a considerable time within the State, and thus a large number of individuals had been subjected to them and, of those, many had commenced proceedings. It should be noted that the facts in *Simpson* were more severe than those of which the appellant in this case complains. The plaintiff in *Simpson* was, at his own request, treated as a protection prisoner, requiring his detention in a dedicated landing in the prison which also had the consequence however, that he was not at liberty for 23 of every 24 hour period, partly because of difficulties in arranging exercise periods that did not put him at risk from other prisoners. He was obliged to share an overcrowded cell with other prisoners, and there was no arrangement for privacy in relation to bodily functions. In *Simpson* moreover, it appeared that incorrect assurances had been provided to the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, that camping style toilets had been introduced on a roll-out basis in the prison. However, it is clear that the practice of slopping out was a significant element of the *Simpson* claim, and for present purposes this appeal can proceed on the basis that the appellant's claim as advanced herein is capable of stating a cause of action, indeed, the same cause

of action as that in *Simpson*. It is, accordingly, necessary to consider what the Court decided in that case.

18. The plaintiff's claim in *Simpson* relied initially on Article 3 of the European Convention on Human Rights and the Constitution. The reason for relying on the ECHR was clear: there is a clear line of Strasbourg case law on the circumstances in which prison conditions could be held to amount to a breach of the Article 3 guarantee of protection against inhuman or degrading treatment. That case law had reached the point where the Court applied a presumption of breach based on the measurement of cell space available to individual prisoners, and of course, Article 3 had, from a claimant's perspective, the benefit of being absolute protection unqualified by any countervailing considerations.

19. The High Court in *Simpson* discounted the claim under the ECHR, however, for a number of reasons. The provisions of the Convention are incorporated in Irish law by the provisions of the European Convention on Human Rights Act, 2003 (the "2003 Act") which operates prospectively from the date of the coming into force of the 2003 Act. Furthermore, while the 2003 Act provides for a remedy in damages for a breach of the rights protected under the Convention under s. 3(5), such a claim was required to be brought within one year of the breach. Accordingly, the High Court found that the bulk of the plaintiff's complaints fell outside a period in which it would be possible to advance a claim for damages under the ECHR. Similar considerations apply in this case.

20. Both judgments delivered in this Court in *Simpson* rejected the argument advanced by the plaintiff that the case law of the European Court of Human Rights on prison conditions under Article 3 of the ECHR could be simply

repackaged as a breach of a constitutional right and blended with the jurisprudence of this Court on the circumstances in which a breach of a constitutional right could give rise to a claim for damages, described in the case law as a constitutional tort. Both judgments found, however, that the plaintiff *was* entitled to recover damages for a breach of his constitutional rights. Although not said explicitly in either judgment, it was clear that this was considered to be a "pure *Meskell* claim", albeit one which arose particularly and peculiarly against the State, because it was the body responsible for the detention of persons in prisons following a lawful conviction, and accordingly, responsible for the conditions in which they were held. It was clearly a private law claim seeking damages against a defendant, which in this case happened to be a representative of the State. The other members of the Court (Clarke C.J., McKechnie and O'Malley JJ.) agreed with both judgments.

21. In my judgment, I considered that the protection of the person set out in Article 40.3 also protected the personal space of an individual and their consequential psychological wellbeing. Furthermore, in considering the extent of the right of protection of the person, it was appropriate and useful to have regard to the right of privacy, which had elements of both physical privacy and of autonomy. These fundamental rights were, moreover, adopted under the Constitution so that the dignity and freedom of the individual might be assured. Accordingly, I found that the constitutional right of the plaintiff, and in particular his right to protection of the person under Article 40.3.2° had been breached, and that he was entitled to damages.

22. Much of the argument in the appeal in this case has focused, properly, on the lead judgment delivered by MacMenamin J. who also found that the plaintiff was entitled to recover damages for breach of his constitutional rights.

23. It is clear that MacMenamin J. did not consider that the claim could be brought within the headings of the existing law of torts and that the claim arose under the Constitution. At paragraph 107 of his judgment, he stated: -

> "*None of the nominate torts fully describe the nature of the infringement. In truth, what is at issue in this case lies at a point where the right of privacy and the value dignity could be seen as lying at the base points of a pyramid which has at its apex the respect due to any person. These are attributes of personhood, and, along with other values such as autonomy, are aspects of the protection of the person afforded by Article 40.3 of the Constitution. By contrast to any other approach, this identification of the right as being one under the Constitution forms a firm, yet flexible, starting point for consideration of vindication within the contours of established law. The conditions to which the appellant was exposed diminished the right of privacy and the value of dignity due to him as a person, even seen within the limitations which necessarily arose from the fact of his detention. His rights under Article 40.3 of the Constitution were thereby violated*". (Emphasis added)

24. At paragraph 128, MacMenamin J. acknowledged that a substantial part of the evidence gave rise to a constitutional infringement which in turn gave rise to a requirement for vindication and damages, but he added "*[b]ut this is in*

circumstances which do not conveniently lend themselves to an easy characterisation or measurement by reference to any one tort".

25. At paragraph 135 of his judgment MacMenamin J. returned to the question of the characterisation of the claim and restated the position accepted since *Hanrahan and ors v. Merck Sharp and Dohme (Ireland) Limited* [1988] I.L.R.M. 629 ("*Hanrahan*"), that while the Constitution protects personal rights, and where violated might give rise to a claim for damages, where such a claim was capable of being vindicated by the general law (normally of tort) there was no need to devise a separate remedy: -

> "*It will be borne in mind that the courts have repeatedly emphasised that resort to constitutional remedies should take place only where strictly necessary. As Barrington J. pointed out in McDonnell v. Ireland [1998] 1 I.R. 134, at pp. 147-148, only if necessary will the courts define a right and fashion a remedy for a breach of the Constitution. There may be cases where the fact that a tort is also the violation of a constitutional right may give rise to an award for exemplary or punitive damages. But, as Barrington J. warned at p. 148, constitutional rights should not be seen as "wild cards" to be played at any time to defeat all existing rules. If the general law provides an adequate cause of action to vindicate a constitutional right, an injured party cannot ask a court to devise a new and different cause of action. So, too, with remedy. I believe there is much substance in Keane J.'s observations in McDonnell v. Ireland at pp. 157-159 that, insofar as practicable, constitutional remedies are to be seen as the vindication of a wrong and therefore subject to the*

> *necessary limitations which apply within the constraints of tort law and civil liability.*"

In other words, the existing civil law, whether through statute or by common law developed by the courts, was the primary method by which the State discharged its duty to defend and vindicate the personal rights of the citizen. The civil law might permit of a number of defences and might not provide a remedy in every case, either because of the constraints of the law or the possibility that the defendant might not be able to meet any award of damages, but the existence of the civil law in general was sufficient to discharge the duty on the State under the Constitution *by its laws* to defend and vindicate the personal rights of the citizen.

26. Later, at paragraph 139, he considered how damages should be measured in such a claim: -

> "*In considering the question of damages, it seems to me that a court may apply the following basic principles. First, there must be a restitutionary element, seeking to put a claimant in the same position as if his or her constitutional rights had not been infringed. Second, it is necessary to ask whether what arose in a particular case was not simply some procedural error. Third, a court's approach should be an equitable one, having regard to the particular facts of an individual case and the seriousness of the violation. Fourth, if and where necessary, a court awards damages under the various headings of the common law, such as non-pecuniary loss including pain, suffering, psychological harm, distress, frustration, inconvenience, humiliation, anxiety and loss of*

> *reputation. Fifth, punitive damages will not generally be awarded save in very grave cases, such as where there was a direct intent or purpose in bringing about a significant consequence or detriment".*

27. Finally, at paragraph 141, MacMenamin J. concluded: -

> *"Ultimately, all these considerations place the question of remedy within the category of compensatory damages. An award of compensatory damages can serve a vindicatory purpose. It will recognise that what happened was wrong and did have an effect upon the plaintiff over and beyond other constitutional infringements where a declaration would be adequate. To mark the wrong in this case, therefore, the vindication must go further than a mere declaration and contain a just financial redress*".

28. At paragraph 143, MacMenamin J. expressed his conclusion that the conditions of the plaintiff's detention infringed his personal rights under Article 40.3 of the Constitution including those of privacy and the values of dignity and autonomy. That infringement was not susceptible to identification as any one nominate tort: -

> "*But, as the Constitution itself provides, this fact will not prevent a court from granting a suitable remedy where the evidence shows there was a violation of the plaintiff's rights under, and values contained in, or derived from, Article 40.3 of the Constitution*".

29. It will be observed from the foregoing, that the judgments were broadly in agreement, and there is little, if any, difference of emphasis between them. It

may be said that the judgment I delivered located the right infringed more firmly in the protection of the person under Article 40.3, but both judgments were in agreement in finding that the claim was one of breach of constitutional rights; that the general law of tort did not provide a specific remedy; but a claim could be maintained and that damages were recoverable.

30. The question remains however, whether the cause of action identified in *Simpson* and invoked here, is one which can be said to be "founded on tort" so that the provisions of s. 11(2) of the 1957 Act, as amended, applies? In this regard, the argument of the appellant in this case has the merit of simplicity. The entire basis upon which the claim for damages in *Simpson* arises is (as derived from *Meskell*) that the cause of action is not an existing tort. Furthermore, while the reasoning in *Meskell* and subsequent cases including *Simpson* found that the circumstances of the case reviewed in the light of the Constitution, required the Court to fashion a remedy, that remedy had not taken the form of the adaptation of any existing tort, or even the creation of a new tort. Furthermore, the claim had also given rise to what appeared to be separate principles for the assessment of damages, albeit closely related to recognisable principles governing recovery of damages at common law. It followed, it was argued, that the claim identified in *Simpson* was a novel claim, and was *sui generis* which was moreover, not within the contemplation of the 1957 Act and could not and did not come within the term "*founded on tort*" as it was necessarily understood at that time or indeed today. Counsel for the appellant contended that while in principle there was no reason why the statute could not provide for a separate limitation period for such novel claims, that had not been

done and the logical conclusion was that s. 11(2) of the 1957 Act, as amended simply did not apply on its face to this claim.

31. This argument was one that had some support in the period between *Meskell* and *Hanrahan*, but it was frankly acknowledged that the trend of case law subsequent to *Hanrahan* had been to contrary effect. Nevertheless, it was argued that the position had never been established definitively by a conclusive decision of this Court, and the opportunity should be taken to restore what was seen as the logical analysis of the *Meskell*-type claim. It follows that it is necessary to consider what was involved in that case, and how the reasoning has evolved since then.

The Pure Meskell-type Claim

32. The starting point is, however, not *Meskell* itself, but rather *Educational Company v. Fitzpatrick (No. 2)* [1961] I.R. 345 ("*Educational Company*"). In that case, employees of the company had gone on strike and were picketing the company in support of that strike. The reason for the industrial action was that the company had nine employees who were refusing to become members of the trade union of which the first named defendant was the General Secretary. In the rather tortured law of industrial disputes which then applied (and still to some extent applies), the conduct of workers in going on strike by withdrawing their labour and the conduct of a trade union, and its officials in organising and supporting such a strike, may constitute civil wrongs in the nature of a breach of contract on the part of the employees; inducing breach of contract on the part of the union and union officials; an unlawful means conspiracy; and perhaps more. Picketing of premises may constitute watching and besetting, which has

been treated as a tort. However, if such conduct and actions were carried out in furtherance of a trade dispute, then the provisions of the then applicable Trade Disputes Act, 1906 (the "1906 Act") provided for an immunity from any such action.

33. In the High Court in *Educational Company*, it had been held by Budd J. that the freedom of association protected by Article 40.6 of the Constitution necessarily implied a co-relative right of freedom to dissociate, and that if the 1906 Act was to be interpreted as protecting conduct in furtherance of a trade dispute by seeking to compel individuals to join a union and thus to refrain or abstain from exercising their constitutional right to dissociate, then such a statutory provision would be invalid having regard to the Constitution. Accordingly, the 1906 Act could not be interpreted (as indeed it had been until then) as covering a trade dispute having such an objective. By a majority of three to two (Kingsmill Moore, Ó Dálaigh, and Haugh JJ.; Maguire C.J. and Lavery J. dissenting) the Supreme Court agreed.

34. Looked at through modern eyes, the case is somewhat unusual in that the company was permitted to assert the rights of a third party, in this case its employees, and the question of the constitutionality of the 1906 Act, or its interpretation having regard to the Constitution, was determined without the presence of the Attorney General, as would now be required under Order 60 of the Rules of the Superior Courts. Furthermore, whether the right of dissociation could be said to follow as a matter of irrefutable logic from the freedom of association protected by the Constitution, has been the subject of some

penetrating analysis; see for example, T. Kerr and G. Whyte, *Irish Trade Union Law* (Abingdon Professional, 1985).

35. However, a similar conclusion was reached somewhat later by the European Court of Human Rights, *Young, James and Webster v. UK* (1982) 4 E.H.R.R. 38, and under the Canadian Charter of Rights and Freedoms; *Lavigne v. Ontario Public Services Employees Union and Ontario Council of Regents for Colleges of Applied Arts and Technology* [1991] 2 SCR 211. The right to dissociate is now well established. In any event, the decision in *Educational Company* is important in establishing the general principle that the 1906 Act cannot be interpreted to protect a trade dispute directed towards compelling persons not to exercise their constitutional rights.

36. Viewed through the lens of the categories discussed at the outset of this judgment, *Educational Company* is a clear-cut example of the first category of cases identified in this judgment; i.e., a claim between private individuals in which the Constitution is invoked to disapply a prevailing interpretation of a statutory provision which might otherwise be decisive in favour of the defendants. In another case, a relevant provision may be found to be invalid as infringing the Constitution. In each case, the constitutional claim operates in the realm of public law but its conclusion in disapplying a legislative provision or requiring a particular interpretation to be applied has a decisive effect in a private law claim.

Meskell v. CIE

37. The claim in *Meskell* also arose in the context of industrial relations, in this case an agreement between unions and employers to provide for a form of closed

shop, or at least to expand union membership and ensure that existing members continued to pay their dues. It may be inferred that the claim was itself prompted by the *Educational Company* decision. The right of dissociation identified in *Educational Company* precluded a direct route to the objective of creating a closed shop, but that case also established that an employer could lawfully make it a condition of employment that the prospective employee become, and remain, a member of a recognised trade union. The four unions organised within CIE agreed with the company that the company would terminate the contracts of employment of all employees, but with an offer of immediate reemployment on the same terms with one additional term, that being that the employee would become and remain a member of one of the recognised trade unions.

38. Mr Meskell had been employed by the defendant company and its statutory predecessor for a period of 15 years when he was dismissed pursuant to this arrangement. Although during his employment he had been a paid-up member of a union, it appears he took exception to being effectively compelled to become a member of the union and he refused to accept reemployment on the terms offered. Instead, he commenced proceedings. The High Court dismissed the claimed in an *ex tempore* judgment. On appeal, the Supreme Court (Walsh J., Ó Dálaigh C.J. and Budd J. concurring) in a landmark judgment reversed the decision of the High Court, and held that an individual could bring a claim for breach of constitutional rights and recover damages against another person whether natural or legal. The judgment of the Supreme Court has been widely cited, essentially because it is one of the most expansive examples of a horizontal claim for breach of a constitutional right, and is stated in apparently general terms and without qualification.

39. It is not clear, however, that the decision was understood in those terms at the time. Certainly, if a major issue of constitutional law was understood to be involved, it might have been expected that it would have been heard by a panel of five members of the Court rather than three.

40. With the benefit of hindsight, it is apparent that, although occurring in a very similar factual scenario, the legal issues raised were, on analysis much different to those which arose in *Educational Company*.

41. It is worth considering why the action was framed in the novel way it was, as a claim for damages for breach of a constitutional right, and why, for example, it was not merely contended by broad analogy with *Educational Company* that the termination and dismissal was wrongful because it was effected in order to force the abandonment of the constitutional right first identified in *Educational Company* itself. At the time the claim was commenced, there was no statutory protection from unfair dismissal. The only protection was that accorded by the contract itself which often provided for termination on relatively short periods of notice and, even where it was established that the dismissal was wrongful, the measure for damages would have only been the wages payable in lieu of notice. This was explained by counsel for Mr Meskell at p. 125 of the report: -

> "*The gist of this action is the infringement of a constitutional right, and the measure of the plaintiff's damages is the actual financial loss which he sustained in consequence. In The State (Quinn) v. Ryan, Ó Dálaigh C.J. expressed the intention of the Constitution, in guaranteeing the fundamental rights of the citizen, as being "that rights of substance were being assured to the individual and that the Courts were the custodians*

> *of these rights." This involves the assessment of damages for breach of constitutional right at the very least on the basis of damages for tort, if not on a higher basis. If the plaintiff's damages are assessed on the basis of tort, they must represent the entire difference between what the plaintiff earned during the period when he was wholly or partially unemployed and what he would have earned if he had advanced normally in the employment of which he ought not to have been deprived*".

42. What was at issue in the case emerged clearly in the argument of counsel for the defendant, at pp. 125-126 of the report. He distinguished *Educational Company*, observing that the essential decision in that case was that "*the legislature could not be allowed to intervene by statute so as to legalise interference with a constitutional right.*" Furthermore, counsel contended that *Educational Company* "*did not decide that a citizen necessarily had a right of action simply because pressure had been put on him to exercise that right in a particular way*". Later he said bluntly, "*[t]here is no reported decision where an infringement of constitutional rights has, of itself, been held to afford a cause of action*".

43. In the event, the Court accepted that a person could bring a claim against another for breach of rights guaranteed by the Constitution. In doing so, the Court based itself on dicta from the decisions in two cases only – *Educational Company* and *Byrne*. Viewed in the light of hindsight, neither case provided clear support for the significant step that was being taken. In the style of the times, however, the judgment is in broad terms, and the issue is formulated as one of principle and

answered in general and unqualified terms. At pp. 132-133 of the report, Walsh J. referred to *Byrne*, and the proposition that: -

> "*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. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right. As was pointed out by Mr. Justice Budd in Educational Company of Ireland Ltd. v. Fitzpatrick (No. 2) it follows that "if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it." He went on to say that the Courts would act so as not to permit a person to be deprived of his constitutional rights and would see to it that those rights were protected.*"

Later, at p. 135 of the report he said: -

> "*If the Oireachtas cannot validly seek to compel a person to forego a constitutional right, can such a power be effectively exercised by some lesser body or by an individual employer? To exercise what may be loosely called a common-law right of dismissal as a method of compelling a person to abandon a constitutional right, or as a penalty for his not doing so, must necessarily be regarded as an abuse of the*

> *common-law right because it is an infringement, and an abuse, of the Constitution which is superior to the common law and which must prevail if there is a conflict between the two. The same considerations apply to cases where a person is dismissed or penalised because of his insistence upon, or his refusal to waive, his right to dissociate. In each of these cases the injured party is entitled, in my view, to recover damages for any damage he may have suffered by reason of the dismissal or penalty resulting from his insistence upon exercising his constitutional right, or his refusal to abandon it or waive it*".

44. Walsh J. concluded at p. 136 that:

> "*In my view, upon the facts proved in this case the plaintiff is entitled to a declaration that his dismissal was a denial and a violation of and an unlawful interference with his constitutional rights, and that the agreement between the trade unions concerned and the defendants to procure or cause that dismissal was an actionable conspiracy because the means employed constituted a breach or infringement of the plaintiff's constitutional rights. In my view, the plaintiff is entitled to such damages as may, upon inquiry, be proved to have been sustained by him*".

45. As is apparent from the passage just quoted, *Meskell* could have been decided in favour of the plaintiff without necessarily going so far as finding a right of action by one individual against another for damages for breach of a constitutional right. It is conceivable that the particular claim could have been decided on the narrower basis that the agreement between the unions and the

employers constituted an actionable conspiracy by unlawful means, viz the interference with the constitutionally protected rights of the citizen. This, on the appellant's argument, highlights the breadth of what was being decided in *Meskell*. The solution was not found, or at least not just found, within the existing law of torts, or some incremental development thereof. Instead, it stated that the Constitution could itself provide a sufficient basis for a claim for damages made by one person against another. It is not necessary here to consider whether the conclusion that the constitutional obligation on the State to defend and vindicate the personal rights of the citizen of necessity required the existence of a law of torts (*inter alia*). Nor is it necessary in this case to decide that even if the existing law does not provide a remedy, and that one may be provided pursuant to the Constitution, that necessarily leads to the conclusion that the Constitution is equally enforceable in every case against other individuals, and in the same way as it may be enforceable against the State. It is sufficient that *Meskell* undoubtedly decides that a claim may be made for relief, including damages, by one individual against another for breach of personal rights protected by the Constitution. That is what occurred in this case, albeit that the defendant is the State.

46. In the immediate aftermath of *Meskell,* a number of developments were possible. In *Meskell,* a claim was upheld which could not be accommodated, at least without adjustment, within the existing law of torts. What implications did this have for the existing law of torts? If that law was to be seen as the purported performance of the State's obligations to defend and vindicate the personal rights of the citizen, then was it open to adaptation and amendment in the light of what was determined to be the requirements of the Constitution, and was it

therefore, at best, only a provisional version of what the Constitution was to be interpreted as requiring, and subject in any case to an appeal to a broader conception of constitutional rights? Could it be replaced altogether, and claims reformulated, advanced, and defended solely by reference to the Constitution? An answer to these questions was provided in the course of a short passage in the judgment in *Hanrahan.*

Hanrahan v. Merck Sharpe and Dohme (Ireland) Limited

47. *Hanrahan* was a major claim in nuisance brought by a farmer against a large industrial plant alleging catastrophic damage to his cattle herd as a result of emissions from the defendant's factory. Much of the claim in the High Court concerned a detailed assessment of factual and expert evidence. The legal issue of the impact of the Constitution on the law of torts was not by any means central to the claim. However, the issue did arise because of a difficulty the plaintiff encountered in making their case. It was clearly established that the plaintiff's cattle herd had suffered serious damage to its health, and it was also established that there were emissions from the defendant's chemical plant. However, the defendant strenuously denied that there was any provable causal connection between the emissions from the plant and the injuries which the plaintiff alleged, and called expert evidence to that effect. The plaintiff sought to argue that they should not have to carry the burden of establishing a causal connection between these two matters. Rather, they contended that the tort of negligence was "*but a reflection of the duty imposed on the State by Article 40.3 of the Constitution in regard to their personal rights and property rights*". It was argued that the vindication of those rights would be ineffective if the plaintiff had to carry the burden of positively establishing a causal pathway linking the plant emissions

to the plaintiff's injury. Rather, the plaintiffs contended, the proper vindication of the constitutional rights required that once the emissions and injury have been proved, the burden should shift to the defendants to show that the emissions were not the cause. If this approach was taken, the plaintiff necessarily succeeded because the defendant's expert evidence could not point on the balance of probabilities to any other cause. The appeal succeeded, essentially on the basis that what was described as the primary evidence of fact, should not be overridden, or displaced by subsequent expert evidence based necessarily on hypothesis or theory. However, the Court rejected the contention that the Constitution required that the onus of proof should shift.

48. In one of his last judgments in this Court, Henchy J. addressed this issue in a relatively short passage in his judgment. He accepted that the tort of nuisance was an implementation of the State's duties under Article 40.3 to protect the personal and property rights of the plaintiffs as citizens. However, in an important passage, he continued: -

> "*So far as I am aware, the constitutional provisions relied on 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. In many torts – for example, negligence, defamation, trespass to person or property – a plaintiff may give evidence of what he claims to be a breach of a constitutional right,*

but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. 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 (see Meskell v C.I.E. [1973] I.R. 121); 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 right. But that is not alleged here. What is said is that he may not succeed in having his constitutional rights vindicated if he is required to carry the normal onus of proof. However, the same may be said about many other causes of action. Lack of knowledge as to the true nature of the defendants' conduct or course of conduct may cause the plaintiff difficulty, but it does not change the onus of proof.

It is also to be noted that the guarantee to respect and defend personal rights given in Article 40.3.1º applies only 'as far as practicable' and the guarantee to vindicate property rights given in Article 40.3.2° refers only to cases of 'injustice done'. The guarantees, therefore, are not unqualified or absolute. I find it impossible to hold that Article 40.3.1° means that a plaintiff in an action in nuisance is to be relieved of the onus of proving the necessary ingredients of that tort. Neither, in my view, does Article 40.3.2° warrant such a dispensation, for the guarantee of vindication there given arises only 'in the case of injustice done', so it is for the plaintiff to prove that the injustice relied on was actually suffered by him and that it was caused by the defendant."

49. As was observed by Binchy *op. cit*, this passage marked a significant development that showed, as the author put it, "*a striking reluctance to involve the courts in the role of refashioning tort law, root and branch, in the light of the Constitution*". Whatever the theoretical attractions of such an expansive approach, the judgment sits easily with a more modest understanding of the Constitution which recognises and continues in force the existing law of torts, rather than mandating a complete reimagination of the area of civil wrongs working only from the limited references of the constitutional text. Certainly, the approach in *Hanrahan* has held sway ever since. But in this case, the *Hanrahan* analysis provides the launch pad for the plaintiff's challenge. Here, the appellant, relying on *Simpson*, contends that the existing law of torts was basically ineffective to protect his constitutional rights, and the Constitution must provide a remedy which it has done through the mechanism of the judgment in *Simpson*, creating a binding precedent, and an entitlement to recover damages. The appellant asserts that the cause of action in this case is, in the language of the case law, a "pure *Meskell* claim", and he contends that this *by definition* cannot be a tort because such a claim only arises if the law of torts is ineffective, and accordingly cannot be "*founded upon tort*" for the purposes of s. 11(2) of the Act of 1957.

McDonnell v. Ireland

50. That specific issue arose in *McDonnell*. The plaintiff was employed in the postal service, which at that time meant that he was an established civil servant employed by the Department of Post & Telegraphs, a statutory predecessor to An Post, which was itself established by statute in 1983. In 1974, the plaintiff

was convicted in the Special Criminal Court of the offence of membership of an illegal organisation contrary to the Offences Against the State Act, 1939 (the "1939 Act"). Under s. 34 of the 1939 Act, it was provided that, on conviction by the Special Criminal Court, a defendant automatically forfeited any office or employment remunerated from State funds and was furthermore disqualified from holding such office for a period of 7 years post-conviction.

51. Seventeen years later, the Supreme Court, in *Cox v. Ireland* [1992] 2 I.R. 503 ("*Cox*"), held that the provisions of s. 34 of the 1939 Act were inconsistent with the Constitution, and, it followed, invalid. That same year, the plaintiff in *McDonnell*, relying on the removal by *Cox* of s. 34 of the 1939 Act, commenced proceedings seeking damages calculated by reference to his loss of earnings and superannuation, amounting at the time, it was claimed, to almost £200,000. The plaintiff accepted that the Statute of Limitations might apply to a claim to recover salary whether as money due under statute, or as damages, for breach of constitutional rights, but maintained that this claim arose *ex debito justitiae*.

52. In the High Court in *McDonnell*, Carroll J. applied dicta from a previous judgment she had delivered in *Tate v. The Minister for Social Welfare* [1995] 1 I.R. 418, in which she had held that a claim for damages arising out of a breach of the law of the European Community was a claim for a breach of duty, and accordingly a claim "founded upon tort" for the purposes of s. 11(2) of the 1957 Act. She also observed that the same reasoning applied to a claim for breach of constitutional rights.

53. In *McDonnell*, the Supreme Court was unanimous in dismissing the appeal but differed significantly as to the reasons for which that conclusion was reached.

Hamilton C.J. agreed with all the judgments delivered. Counsel for the respondents in this case, properly conceded that this judgment must be taken as concurring as to result, but not preferring or endorsing one route to that conclusion over another.

54. Barrington J. considered that the plaintiff could have sued for a declaration that as the forfeiture under s. 34 of the 1939 Act being considered to be invalid and of no effect, he was entitled to hold the office he had held in 1974, and for arrears of salary or for damages for being wrongfully deprived of his office. If the Minister had raised s. 34 of the 1939 Act in the defence of that claim, the plaintiff would have been entitled to deliver a reply (serving notice on the Attorney General under Order 60 of the Rules of the Superior Courts) seeking a declaration that that section was invalid and of no effect. However, Barrington J. considered that that claim became statute barred and/or precluded by laches in or around 1980. He observed that the plaintiff had resorted to an ingenious claim which did not seek any such declaration or relief at common law, but instead claimed damages for an alleged breach of the plaintiff's constitutional rights, being a right to pursue his livelihood. Barrington J.'s description of the argument on behalf of the plaintiff is similar to the argument now advanced on this appeal: -

> "*The gist of the plaintiff's claim is that the Statute of Limitations does not apply to claims based on constitutional rights. The reason for this may be, the plaintiff's claim, that while the Statute of Limitations date from 1957 the first case in which damages for breach of constitutional*

rights were expressly rewarded (Meskell v. Coras Iompair Éireann [1973] I.R. 121) was not decided until 1972."

55. Barrington J. considered it was not necessary to decide "*whether all breaches of constitutional rights are torts within the meaning of the Statute of Limitations*". He considered that in *Meskell,* the courts had been dealing with special or exceptional cases where the general body of the law provided no appropriate remedy. However, in the vast majority of cases, legislation or the general body of the common law would provide a remedy, and Article 50 of the Constitution carried forward the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of the Constitution, including the Statute of Limitations on the equitable remedies then in force. Barrington J. at p. 148 of the reported judgment commented that "*… constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules. If the general law provides an adequate cause of action to vindicate a constitutional right, then it appears to me that the injured party cannot ask the court to devise a new and different cause of action.*" The existing law also came with existing defences, and there was nothing inconsistent with the Constitution in providing for such a defence. In *McDonnell*, the plaintiff had not proceeded after the forfeiture of his office and could not wait indefinitely to do so. In any event, the position had changed with the incorporation of An Post in 1983. Even if there was a subsisting claim, it was barred in 1991, when the plaintiff instituted proceedings.

56. It appears, therefore, that Barrington J. refrained from determining the question of whether a claim for breach of constitutional rights was a tort within the

meaning of the Statute of Limitations. Instead, although the plaintiff's claim was framed as damages for breach of constitutional rights, he saw it as a claim either for loss of office, or for a declaration that the plaintiff was entitled to remain in office, but in either case, he considered that such a claim was either barred by the Statute of Limitations, or out of time by 1991, when the proceedings were commenced.

57. Barron J., for his part, considered that the case did not raise any question as to the applicability of the Statute of Limitations to a claim for breach of constitutional rights. In his view, that was not the appropriate cause of action in the case. Once s. 34 had been declared invalid, it did not affect the plaintiff's rights, and therefore did not infringe his constitutional rights or any right, and he is entitled to assert that his position in law had never been forfeited and the refusal to reinstate him was a breach of the terms of his contract. Any cause of action, therefore, could only be based upon that breach of contract.

58. Here, he considered the plaintiff's cause of action to arise from breach of contract, and therefore any right of action in relation to any *Meskell* type claim was co-extensive with that right. Once the Statute of Limitations applied to the right of action for breach of contract, it applied equally to any co-extensive right in relation to the Constitution. Accordingly, he considered the case was not one where the plaintiff's cause of action stemmed solely from the provisions of the Constitution itself or whether such a cause of action would be barred under the statute, instead, he preferred to reserve the question of whether such a cause of action could be barred under the Statute of Limitations to another time.

Therefore, it appears that Barron J. considered that the claim should be considered as one for breach of contract, and statute barred as such.

59. Both Barrington and Barron JJ. were able to decide the case without addressing the issue of the applicability of the Statute of Limitations to a claim for breach of Constitutional rights, but only by recharacterising the claim as one in private law against an employer, (who was no longer a party to the appeal, and where the Constitutional issue only operated to remove a provision on which the defendant would have relied). However, that was not how the plaintiff had formulated his claim.

60. The judgment of Keane J. with whom O'Flaherty J. expressly agreed, is the judgment which has tended to be cited most in subsequent cases on this issue. He observed that the plaintiff's claim was limited "*to damages for breach of constitutional rights*". Keane J. had some difficulty understanding what the plaintiff's cause of action was. The plaintiff lost his job on his conviction, which involved a prison sentence, and there was not the slightest reason to suppose that even absent the provisions of s. 34 of the 1939 Act, the Minister would have restored him to his previous employment on release from prison. In those circumstances, Keane J. could not understand how it could be said that the plaintiff was, at any stage, entitled to damages for an alleged breach of constitutional rights. Since, however, the case had been argued on that basis, he proceeded to consider that issue.

61. Keane J. referred to the definition of tort in the 20th edition of Salmond & Heuston on the *Law of Torts* (Sweet & Maxwell: 1992) as "*some act done by the defendant whereby he has without just cause or excuse caused some form of*

harm to the plaintiff", and further "*[t]he law of torts exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs*". He considered that the law of torts had, as a matter of history, demonstrated over the centuries, a flexibility and a capacity to adapt to changing social conditions, even without legislative assistance, which made it the obvious instrument for the righting of civil wrongs when the Constitution was enacted in 1937.

62. He observed that an unenumerated constitutional right to privacy had been upheld in the case of *Kennedy v. Ireland* [1987] I.R. 587, but, even in the absence of a written Constitution, a tort of privacy could readily have flourished sturdily in this jurisdiction. The fact then that the claim developed in the form of an action for an infringement of a constitutional right, did not prevent it, in his view, as being classified as a civil wrong. Indeed, he could not conceive of any other category to which it could be assigned. Accordingly, the action would seem to be appropriately described as an action in tort, and given the fact that, in principle, the law of torts had been evolved by the courts, and there was no obstacle to an action for damages for breach of a constitutional right being identified as such. The claim had, he considered, all the indicia of an action in tort, and there was no reason why it should have a different limitation from that applicable to actions in tort generally, or indeed no limitation period at all, other than its origin in the Constitution itself, which was a classically circular argument. Accordingly, it is clear that Keane J. considered that a so-called pure *Meskell* claim for a breach of constitutional rights was founded on tort for the purposes of s. 11(2) of the 1957 Act. O'Flaherty J. agreed.

63. The difference of opinion between the respective judges in *McDonnell* was perhaps a reflection of the somewhat protean nature of the pleading and argument in that case. But it also reflected a number of the distinctions identified at the outset of this judgment and is its own illustration of the fact that the claim can be formulated in a number of different ways, each of which may give rise to a different analysis. While the judgment of Keane J. is regularly cited for the purposes that a pure *Meskell* claim is one to be treated as a claim founded on tort for the purposes of s. 11(2) of the 1957 Act, I would accept that it cannot be treated as the ratio decidendi of the case and binding on future courts. First, as has been pointed out, it was a judgment which was expressly agreed to by only one other member of the Court, and the two other judgments delivered on this issue cannot be taken as agreeing with it. Furthermore, it was not, in any event, a pure *Meskell*-type claim, that is, a claim made by one private party against another private party for a breach of a constitutional right. Rather, the cause of action followed upon a claim that legislation enacted by the Oireachtas was invalid having regard to the Constitution. Such a claim for damages arguably raises other issues touched on at the outset of this judgment. Accordingly, the observations of Keane J. in *McDonnell* must be taken as strong *dicta* from high authority, but strictly speaking did not and do not determine this issue, although they have largely been accepted as stating the law ever since. In theory, therefore, it remains open to this Court to reconsider that issue without having to address the circumstances in which this Court may depart from a previous decision. However, the judgment of Keane J. in *McDonnell* does not stand alone.

Savickis v. Governor of Castlerea Prison and ors (No. 2)

64. In *Savickis v. Governor of Castlerea Prison and ors (No. 2)* [2016] IECA 372, [2016] 3 I.R. 292, the Court of Appeal considered the appropriate application of cost rules introduced in 1991 in an action in respect of an assault which occurred in prison. The plaintiff had succeeded on the issue of liability in the High Court before a jury, but which had awarded only €225 in damages. The plaintiff's appeal to the Court of Appeal was successful, which substituted the jury's award with an award of €17,225, including exemplary damages for breach of constitutional rights: see *Savickis v. Governor of Castlerea Prison and ors (No.1)* [2016] IECA 310, [2016] 3 I.R. 268. The second judgment, however, is concerned with the appropriate costs order. Section 17 of the Courts Act, 1981, as amended by s. 14 of the Courts Act, 1991, provided, in effect, that where an action was commenced in the High Court and the claimant recovered less than £15,000 (being €19,046) the plaintiff should, in effect, be limited to the amount of costs which he would have been entitled to recover if the action had been commenced and determined in the Circuit Court. In the course of considering the application of that section, the Court of Appeal was required to consider whether the claim could have been maintained in the Circuit Court. Part of the argument was that the claim involved a claim for breach of his constitutional rights, which did not come within the jurisdiction of the Circuit Court which, as a court of local and limited jurisdiction certainly had, pursuant to the Third Schedule of the Courts (Supplemental Provisions) Act, 1961, jurisdiction to entertain actions "*founded on tort*", but which Act did not expressly refer to claims for breach of constitutional rights.

65. Hogan J. delivered a judgment on this aspect of the case with which the other members of the Court (Irvine and Hedigan JJ.) agreed. Applying the reasoning

of both Barrington and Keane JJ. in *McDonnell*, Hogan J. considered that it could not be the case that the appropriate jurisdictional limits and system of hierarchy of courts provided for by law in the case of tort actions could be set at nought by the expedient of suing for damages for breach of constitutional rights instead of pursuing the standard common law action in tort. It was clear that an action for assault was a tort and therefore within the jurisdiction of the Circuit Court under the 1961 Act. Hogan J. went on to consider what might be the case if the claim had been framed as a pure *Meskell* claim.

66. In an important passage at paragraph 41 of *Savickis (No.2)*, Hogan J. said at p. 306: -

> "*But even if the plaintiff had succeeded in recovering damages for what might be termed a 'pure' breach of constitutional rights (i.e., independently of any action for a common law tort) – such as occurred in recent cases such as Herrity v. Associated Newspapers (Ireland) Ltd. [2008] IEHC 249, [2009] 1 I.R. 316 (constitutional right to privacy) and Sullivan v. Boylan [2013] IEHC 104, [2013] 1 I.R. 510 (violation of Article 40.5 and the protection of the dwelling) – this would still have been an action in tort for the purposes of the Third Schedule of the 1961 Act in the sense that I have just described.*"

67. I would reserve for further consideration the observation contained in the subsequent paragraph of Hogan J.'s judgment to the effect that the Third Schedule of the 1961 Act excluded a claim for wrongful detention from the scope of the Circuit Court's jurisdiction, and accordingly a claim for breach of the constitutional right to liberty could not be maintained in the Circuit Court.

It is correct that reference number 6 of the Third Schedule includes in the jurisdiction of the Circuit Court actions founded on tort where the damages claimed were (in 1961) less than £600 and excluded claims of wrongful detention. I would, however, tend to the view that such detention refers to what was then the tort of detinue of goods, which was, per reference 7 of the Third Schedule, specifically provided for with a slightly different jurisdictional limit, i.e. where the value of the goods did not exceed £600. An action for false imprisonment, which is the normal form of vindication of a right to personal liberty would, it seems to me, fall within the general heading of reference 6. Nothing, however, turns on this for present purposes.

Bailey v. Commissioner of An Garda Síochána

68. It may also be noted that in *Bailey v. Commissioner of An Garda Síochána* [2017] IECA 220 (Unreported, Court of Appeal, Birmingham and Hogan JJ. (writing jointly) and Finlay Geoghegan J., 26 July 2017), Birmingham and Hogan JJ. in a joint judgment stated at paragraph 37: -

> "*It should be added that these limitation periods also apply to any claim brought by the plaintiff for breaches of constitutional rights. Insofar, therefore, as the plaintiff is maintaining a claim for a breach of constitutional rights which is separate and distinct from any claim for a breach of a nominate torts, it should be recalled that such a claim is, in any event, a "tort" for the purposes of the Statute of Limitations: see McDonnell v. Ireland [1998] 1 I.R. 134*".

Blehein v. Minister for Health and Children and ors

69. The final case in this sequence is *Blehein v. Minister for Health and Children and ors* [2018] IESC 40, [2020] 2 I.R. 164. In that case, the plaintiff had been committed to a hospital pursuant to s. 185 of the Mental Treatment Act, 1945 (the "1945 Act"). S. 260 of the 1945 Act provided that no civil proceedings could be instituted in respect of an act purported to have been done in pursuance of the 1945 Act, other than by leave of the High Court, and leave should not be granted unless the High Court was satisfied there was substantial grounds for contending that the person against whom the proceedings were to be brought acted in bad faith or without reasonable care. The plaintiff had sought to commence proceedings and had been refused permission under the 1945 Act. He then commenced proceedings and the High Court found that the section was invalid having regard to Article 6 and 34 of the Constitution, and the Supreme Court upheld that decision. The plaintiff then claimed damages consequent on that invalidity. The claim for damages was for "*infringement of constitutional rights for personal injury, loss and damage*".

70. The High Court ([2013] IEHC 319, [2014] 2 I.R. 38) dismissed the claim, holding that the plaintiff had not established an entitlement to redress beyond the redress he had already obtained, namely, a declaration of invalidity of s. 260 of the 1945 Act. At the time those proceedings were sought to be commenced, they would have been statute barred and he had not therefore suffered any loss as a result of the application of the procedure found to be impermissible. The plaintiff accordingly sought to argue that the personal rights guaranteed to him by the Constitution were not subject to or amenable to a valid limitation by statute. Laffoy J. in the High Court, having referred to *McDonnell*, dismissed this contention at paragraph 60 of her judgment saying: -

> "*Having regard to the current jurisprudence of the Superior Courts, which I have outlined earlier, that contention does not stand up to scrutiny*".

71. In the Supreme Court, a court of three was divided on the question of the recovery of damages. McKechnie J., with whom Charleton J. agreed, reviewed the law, and emphasised that *Meskell* type claims occurred only exceptionally when the existing law was ineffective to provide a remedy. Charleton J. at paragraph 91 of his reported judgment observed that "*[t]hat exercise of resort to the Constitution as the wellspring of a new remedy is uncertain, however. Therefore, it requires restraint…*". McKechnie J. agreed with Laffoy J. in the High Court, that any claim for damages for personal injuries (or for the loss of the opportunity to pursue a personal injuries claim) was statute barred and any residual claim was adequately remedied by a declaration of invalidity of s. 260(1) of the 1945 Act.

72. Hogan J. dissenting, focused on what McKechnie J. had described as the residual claims. He agreed that the cause of action in respect of the personal injuries claims were statute barred, but considered that although not particularised, quantified, or vouched, the plaintiff was entitled to recover damages measured at two amounts of €500 each for two s. 260 applications he had been obliged to make in the six years prior to the commencement of the plenary proceedings, which had, in the event, established the invalidity of s. 260(1).

73. It may be necessary to return to these matters at some point, and I should say that I would, with respect, question the view that the claim in *Blehein* was a

"pure *Meskell* claim". Rather, at least by the time it was considered by the Supreme Court, it was a claim for damages alleged to flow from the operation of an Act of the Oireachtas found to be unconstitutional, a class of claim discussed at paragraph 4 above. Nor would I necessarily agree, at least without further argument, with the view expressed by Hogan J. that the continuation in force of law by Article 50 of the Constitution has critical relevance to the capacity of the law of torts to develop by judicial decision-making as it had prior to 1937, and indeed, since. There may in practice be little difference in any given case, but I would not necessarily agree either that modern development in the law of torts, or the common law more generally, must, in Hogan J.'s phrase at p. 208, "*in general, be shown to amount to an organic, incremental development of the common law of torts which can be legitimately traced to its pre-1937 roots*". There has always been a question as to the legitimacy, and indeed sometimes the practicability, of the development of the common law by judicial decision, but those are matters which, in my view at least, are not necessarily to be approached through the prism of Article 50 or by reference to the law as it stood in 1937. While I do recognise that these are perhaps fine distinctions which may often mean only that the same result is arrived at by different routes, I would, at present, incline towards the view expressed by Keane J. in the High Court in *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321, at p. 366 of the report, that the law in force continued by Article 50 included the common law and which contemplated its further development:

> "*When the framers of the Constitution required the State to protect the personal rights of the citizen and to vindicate them in the case of injustice done, they were aware that the same instrument provided for*

the retention of the common law in the Irish law, of which it had formed a central part since its first migration from its homeland in the twelfth century. Although there has been some judicial support for the view that the reference in Article 50, s.1 to "the laws in force" which are to be preserved is to statute law only, it seems difficult to establish any constitutional origin other than Article 50 for the common law doctrines applied by Irish courts since 1937 and which, indeed, had been similarly applied by them since 1922 on the basis of Article 73 of the Constitution of the Irish Free State, which was in similar terms. No doubt it was envisaged that the Irish courts would continue to develop the common law, as they had done since independence, in the light of changing social conditions in Ireland and decisions in other common law jurisdictions. No doubt it was also contemplated that the Oireachtas would, as circumstances demanded, intervene to amend or codify the law from time to time. But when they spoke of "injustice done", they must surely have had in mind not simply the right of the citizens to protect against oppression by the organs of the state, but also their right to a remedy if they became the innocent victims of the blameworthy conduct of others, the historic province of the law of tort. And while that law is not spelled out in the Constitution, any more than the precise nature of the trial by jury to which the citizen was entitled in the case of serious crime was identified, there can have been little doubt in the minds of those who gave their assent to the document as to the system of civil justice which was envisaged in Article 40, s. 3 sub-s. 2 as providing for the protection and vindication of the rights of citizens."

74. It is, perhaps, only appropriate to say that, as I understand his judgment in *Blehein*, this passage from Keane J. is not necessarily inconsistent with the views of Hogan J. which he expressed in that case. This simply serves to illustrate how very fine the distinctions between the various positions on this issue of Article 50 and the development of the law of torts (and, indeed, the common law more generally) actually are, and why the issue will require close attention should it be central to the determination of any case.

75. Finally, I would agree that *Meskell* can be seen broadly as an early example of a development of deriving private law claims from public law such as was to occur later in the famous decision of the CJEU in *Francovich v. the Italian Republic* (Joint Cases C-6/90 and C-9/90 [1991] ECR 1-5357 and *Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (Case C-414/16 [2018] ECLI:EU:C2018:257 at paragraphs 70-82). In one sense, the comparison with, and distinction from, *Francovich* illustrates the significant and distinctive breadth of the *Meskell* principle. In that case, failure to implement a directive which would have given a right of action against another private party was held not to give rise to a claim against the private party, as occurred in *Meskell*, but rather to give rise to a claim for damages against the State for failure to implement the directive. However, these are all matters which do not require decision in this case. The differences of approach and emphasis may not lead to a difference of result in most, if not all, cases. But where the issue of the impact, if any, of Articles 15 and 50 of the Constitution on the development of the law of torts truly arises for decision, it will require full argument and detailed, careful consideration. For present purposes, *Blehein* is important because all of the judgments were agreed that an action for breach of the Constitution was a

tort, for the purposes of the Statute of Limitations, (McKechnie J., paragraph 50, Charleton J. generally concurring, paragraph 97, and Hogan J. paragraph 104). Laffoy J. in the High Court was of the same view. There is, thus, an impressive current of recent authority to that effect.

III ANALYSIS

76. It is apparent that the analysis of the entitlement to recover damages in reliance on the Constitution, whether directly or indirectly, raises a number of distinct issues upon which the case law has not always been clear or consistent. As just observed, however, there has been a relatively high degree of consensus that a claim for *Meskell*-type damages is one which is properly characterised as a breach of duty, and which falls under s. 11 of the 1957 Act as being "founded on tort". It remains to consider however, if that consensus if well founded.

77. This is a clear case of a claim of the type contemplated by *Meskell* where infringement of the constitutional right to protection of the person read in the light of the constitutional value of dignity, was breached by the manner of the appellant's detention. For present purposes, the identity of the defendant can be ignored. In theory, such a claim could be brought against any party, at least one which had a power of detention or perhaps is responsible for the living conditions of another person. The claim is based not just on *Meskell*, but also on *Hanrahan's* recognition that for the most part, the law of torts was the method by which the State performed part of its constitutional duty to and by its laws to respect, protect and vindicate the personal rights of its citizens. It follows from this analysis that while the State takes on direct obligations towards citizens (and other rights holders) under the Constitution, it also

performs part of its duty by having in place just laws which, subject to the qualifications and vicissitudes of litigation, permit a claim to be made against another wrongdoer and if possible, the recovery of damages for any alleged wrongdoing. While it is necessary to focus upon this analysis for the purposes of this decision, it should however, be recognised that this is not the only or indeed, primary method by which the State performs its obligation under Article 40.3.

78. *Meskell* and *Hanrahan* both recognise the possibility that the common law either inherited and developed, or the statute law of the State in respect of private law, may not be comprehensive, and the Constitution may be required to provide a remedy in some cases, or, perhaps more accurately, the Constitution may oblige the State, through the medium of courts, to provide a remedy. In such a case, rather than permit a vertical claim to be made against the State for what is *ex hypothesi* a failure to provide for a law covering such circumstances, and by broad analogy with *Francovich*, the State has rather, through the judicial branch, provided a direct, horizontal remedy available against the wrongdoer.

79. Looked at in this way, it is apparent that a Meskell claim performs exactly the same function as an action for damages for a nominate tort established by the common law or by statute. Just as a claim in defamation can be read as the State performing a constitutional duty to protect and vindicate the good name of the citizen, this claim can be read as a functionally identical claim to vindicate the person or dignity of the appellant. If an action to vindicate the good name of a citizen is properly analysed as founded upon tort for the purposes of s. 11 of the 1957 Act, and as a civil wrong, and as some act done by the defendant whereby,

he has without just cause or excuse caused some form of harm to the plaintiff (as per Keane J., in *McDonnell* at p. 157), then the claim in this case is properly characterised in the same way and can properly be said to be founded upon tort. It is, to borrow the words of the same judge in *Iarnród Eireann* quoted at paragraph 73 above, a case of an innocent victim of the blameworthy conduct of others, the historic province of the law of torts. Also, as observed in *McDonnell*, the existing law of torts already protected aspects of privacy, and perhaps influenced by the Constitution, could readily have developed to permit a broader cause of action. If so, such a claim would certainly fall under s. 11 of the 1957 Act as founded upon tort. It is difficult to understand how a different conclusion should follow if the action was framed simply as a claim for damages for breach of a constitutional right of privacy. That would be formalism of a high degree in an area whose development has been driven by the logic of function.

IV CONCLUSION

80. To return to the observations of Salmond & Heuston *op. cit*, which was quoted with approval by Keane J. in *McDonnell,* "*[t]he law of torts exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs*". It could be said that such matters also represent some at least of the personal rights of the citizen which the Constitution obliges the State by its law to defend and vindicate. Where that vindication takes the shape of permitting a claim for damages against other wrongdoers, then such a claim is properly characterised as an action founded upon a civil wrong, and therefore, an action founded upon tort. It follows that such a claim is subject to the provisions of s. 11 of the Statute

of Limitations Act, 1957, as amended. Accordingly, I would dismiss the appeal and affirm the order of Barr J.