



An Chúirt Uachtarach

The Supreme Court

McKechnie J
Charleton J
Hogan J

Supreme Court appeal number: 2013 no 373

[2018] IESC 000

High Court record number: 2002 no 9652 P

Between

Louis Blehein

Plaintiff/Appellant

- and -

The Minister for Health and Children, Ireland and the Attorney General

Defendants/Respondents

Judgment of Mr Justice Peter Charleton delivered on Tuesday 31 July 2018

1. Since the issue of torts arising from an infringement of the Constitution has taken centre-stage on this appeal, a brief observation in concurrence with the judgment of McKechnie J, and the reasoning for differing from the reasoning of Hogan J, is appropriate.
2. The entitlement to recover damages for civil wrongs is based on the law of torts. Where a plaintiff has suffered recoverable harm and, in addition, proves that this resulted from some wrong of the defendant that accords with the definition of the tort pleaded, the plaintiff is entitled to damages. Over centuries of experience, the parameters of individual torts were set. Collectively, these operate as a resource for the settlement of civil disputes within boundaries that are both certain and fair. Rarely has any deficit been found in that corpus of law denying a plaintiff a remedy where fair-mindedness as a reflex would suggest that deprivation of damages against a defendant would be a denial of justice.
3. With the enactment of the Constitution in 1937, such entitlements as the freedom of speech and the freedom to associate were explicitly declared. The exercise of such rights might not necessarily be a reflection of the pre-Independence society which, through its tort law, protected neighbours against nuisances, provided remedies against false imprisonment and assault, gave damages to those whose reputations were unjustifiably diminished, had an amorphous action in conspiracy, circumscribed State liability, and held back the tide of liability against office holders. Only in 1932 were the various decisions that used negligence as an element of liability amalgamated to finally declare that negligence was an independent tort with a stand-alone, though often since disputed, definition.
4. Thus, a plaintiff losing his job because he wished not to join a trade union, a form of association protected by Article 40.6.1^o (iii), might fairly be seen as excluded from work because of his conviction. For people holding that view, this would be more than the right to "express freely their convictions and opinions" under Article 40.6.1^o (i) but, rather, an entitlement of choice that a free, Christian and democratic society should protect. Those excluding him ought to be liable as defendants under a species of wrong created under the Constitution; a form of civil wrong having all the features of a tort but based squarely on the text of our fundamental law.
5. With the enactment by the people of Ireland of the Constitution in 1937, Article 50 provided for the prior laws to "continue to be of full force and effect". Since *Meskeil v CIÉ* [1973] IR 121, plaintiffs who have suffered an injustice through the infringement of their constitutional rights may pursue actions in damages where no civil wrong already exists; see in particular the judgment of Walsh J at pages 132-133.
6. Those cases which followed *Meskeil* were rare instances of the inadequacy of existing tort law to uphold rights that were declared under the Constitution but which did not fit within an existing tort remedy. Most often, such entitlements as bodily integrity under the Constitution would offer the remedy of assault in tort law for actions such as the misuse of force or invading the body of a patient without their consent. Similarly, where there is a constitutional right to a good name positively declared by Article 40.3.2^o, those wronged, as opposed to exposed, have vindication in the remedy of defamation. While defamation is labyrinthine and, in terms of litigation before a jury in the High Court certainly, as opposed to a judge alone in the Circuit Court, ruinously expensive, the Oireachtas has determined to keep and amend the existing law. It would thus be more than odd for judges to start declaring an alternative remedy, shorn perhaps of the burden of proving a defence such as truth, honest opinion, fair and reasonable publication on a matter of public interest, or privilege, or even, through judicial decision, placing a requirement on a plaintiff to prove himself or herself of good character. Nor would judges be free to decide that the right to a good name under the Constitution could only be properly dealt with by a judge, thereby abolishing the right of a plaintiff to jury trial in defamation.
7. In a number of cases, it has been necessary for the courts to have resort to torts based on the Constitution; generally in order to identify a lacuna in the law. In *Kearney v Minister for Justice* [1986] IR 116, nominal damages were awarded to a prisoner whose letters were withheld in breach of the right to communicate. *Kennedy v Ireland* [1987] IR 587 was a case of invasion of privacy, not then generally protected at common law; though the law has since markedly developed. However, as Fleming remarks, in C Sappideen and P Vines (Editors), *Fleming's Law of Torts*, (10th edition, Sydney, 2011) at paragraph 26.1, in a way that encompasses many of the current problems in tort law:

No simple answer can be given to the question of how contemporary law affords protection for what is compendiously called the "right of privacy". In its broadest sense, the interest involved is that of "being left alone", of sheltering one's private life from the degrading effect of intrusion or exposure to public view. Demand for legal protection of this interest appears only in a relatively advanced culture, with increasing refinement in the social and aesthetic values of the

community.

8. In respect of privacy, resort to the tort of constitutional infringement protected plaintiffs in this jurisdiction in a way that anticipated common law developments elsewhere. Other instances are useful in demonstrating the necessity to declare a remedy which overrides judicial restraint. Denial of provision of free primary education was central to *Hayes v Ireland* [1987] IRLM 651, as it was in *Conway v INTO* [1991] 2 IR 305 and *Sinnott v Minister for Education* [2001] 2 IR 545. The constitutional right of access to the courts and to fair procedures was at the heart of *O'Donoghue v Legal Aid Board* [2006] 4 IR 204, a case concerning a statutory provision which caused considerable delay in the plaintiff obtaining legal aid. In *Redmond v Minister for Environment (No 2)* [2006] 3 IR 1, the plaintiff sought damages for loss of chance of election to Dáil Éireann due to the requirement for candidates to pay a deposit to do so, and for a breach of his constitutional right to equality of treatment. *Keating v Crowley* [2010] 3 IR 648 concerned the result for a plaintiff where legislation had been successfully challenged by him and declared unconstitutional.

9. In *Sullivan v Boylan (No 2)* [2013] 1 IR 510, damages were awarded for a breach of constitutional rights as it was found that the tort of nuisance was inappropriate in this case given that it protected the ownership of the land itself, and not the individual resident and their rights. Judges are entitled to treat breaches of the Constitution as a tort. That exercise of resort to the Constitution as the wellspring of a new remedy is uncertain, however. Therefore it requires restraint; *McDonnell v Ireland* [1998] 1 IR 147.

10. Under Article 15.2.1^o, the "sole and exclusive power of making laws for the State ... is ... vested in the Oireachtas". That same Article also declares that there is "no other legislative authority" with "power to make laws for the State". While, originally, there was a political resonance to this provision, from the prior decade, and while provision is sensibly made for the delegation of limited legislative "powers and functions", the reality remains that the Constitution is in itself a law. Thus, where a law is sought to be nullified through a legal action, it being said that this law undermines the basis of our legal order, an award of damages is within the province of the courts provided some wrong has been committed thereby. It is not an exercise in law-creation for a judge to award damages in that context. The separation of powers as between the exclusive parliamentary power to create laws and the role of the judiciary in administering justice may thereby meet, but not as a trespass.

11. Constitutional torts should be seen in the context of the adoption by the people, through the Constitution, of an ostensibly adequate set of civil remedies which were designed as instruments of appropriate legal redress: that is the continuation of tort law under Article 50 and the affirmation of its adequacy through multiple legislative amendments since 1937. In addition, the Constitution has established organs for democratic lawmaking which have the function of scrutinising and adopting laws, or adapting existing laws, for the benefit of the Irish people. Circumstances where novel remedies and whereby existing laws would be found inadequate for civil suit in the vindication of constitutional rights would therefore rarely lead to tort actions based on the Constitution.

12. Further, the principle of the pursuit of "true social order" as a declared aim of the Constitution in the Preamble, places certainty of law at the heart of the legal system. In *North Western Health Board v HW* [2001] 3 IR 622 at page 764, Hardiman J warned against novel duties in tort law being generated out of mere inference from the Constitution. He said that the "primary purpose of the provisions of the Constitution" was to protect the rights therein enshrined "from unjust laws and from arbitrary state action." While the concept of legal certainty is not completely developed in Irish law, it is a foundational principle of European law. As an independent actor on legal norms, legal certainty can give rise to entitlements based on legitimate expectation, and will generally forbid non-retroactivity of legislation; see Craig and de Búrca - *EU Law: Text, Cases and Materials*, (4th edition, London, 2008) at pages 551 to 558 and Hartley - *The Foundations of European Community Law*, (6th edition, London, 2007) at pages 146 to 149. In terms of legal measures promulgated by the European institutions, the principle of certainty of law requires that legislation be clear and predictable; *Duff & Others v Minister for Agriculture and Food, Ireland and the Attorney General* Case C-63/93, [1996] ECR I 569.

13. Professor Takis Tridimas in *The General Principles of EC Law*, (Oxford, 1999) at page 163 puts the general concept this way:

The principle of legal certainty expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly. The affinity of the principle with the rule of law is evident. In *Black Clawson Ltd v. Papierwerke AG*, Lord Diplock stated that 'the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it {[1975] AC 591 at 638}'. ... The principle acquires particular importance in economic law. Economic and commercial life is based on advance planning so that clear and precise legal provisions reduce transaction costs and promote efficient business. Legal certainty may thus be seen as contributing to the production of economically consistent results.

14. In *Cromane Foods Limited & anor v Minister for Agriculture, Fisheries & Food & ors* [2017] 1 IR 119, the majority judgments warned that negligence had not swamped every other tort; see Charleton J at paragraph 241 and see also *Bates & anor v Minister for Agriculture, Fisheries & Food & ors* [2018] IESC 5. Resort is still to be had to the appropriate remedy based on the relevant tort definition. In the same way, speculation about the existence of amorphous, at best yet-to-be-defined remedies would be an even more enveloping incoming tide and one that would render simplicity in litigation, a basic component of resort to the courts in an affordable way, a forlorn memory of a golden age.

15. In concurring, therefore, with the judgment of McKechnie J, a caution is appropriate. There are not two existing systems for the award of proportionate damages. There is the law of tort and, where necessary, because of a definite gap in the remedies the common law provides, the ability to have resort to the Constitution as the source of justice. Any such resort is not to a parallel system but rather to an existing law. Judicial restraint and the duty not to legislate requires any such resort to be only where it is absolutely necessary. In that context, judicial restraint requires precise definitions of whatever constitutional tort is invoked. The principle of legal certainty which is the foundation of a system of justice requires this, and that any constitutional tort adheres to precedent and thus to intelligibility. While freedom of judicial action may be alluring, resort to the 'Chancellor's foot' to decide cases can erode the rule of law.

16. Thus far, the right to access the courts has been a recognised aspect of the structure of the Constitution whereby there is a forum for the resolution of disputes. Of course, accessing that forum can cost money, sometimes far beyond the reach of any ordinary citizen, and, by necessity, it takes trouble and time. In so far as a plaintiff wins any action and achieves, for instance, a declaration as opposed to a monetary award against a defendant, that is the vindication of the right. That is what the administration of justice offers. There is no sense in any existing judgment that in addition to damages for, to give two examples, negligence giving rise to a bad back, or defamation lowering the plaintiff in the eyes of a right-thinking person, a plaintiff must get something additional for his or her trouble. While litigation is trouble, there is no right to damages for the trouble of litigation. Nor should any such tort be created under the Constitution.

