THE SUPREME COURT

[Appeal No. 2013/373]

[High Court Record No. 2002/9652P]

McKechnie J.
Charleton J.
Hogan J.

Between /

LOUIS BLEHEIN

Plaintiff/Appellant

-and-

THE MINISTER FOR HEALTH AND CHILDREN, IRELAND and THE ATTORNEY GENERAL

Defendants/Respondents

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 31st day of July, 2018

Introduction:
1. Under section 260 of the Mental Treatment Act 1945 ("the 1945 Act"), no civil proceedings could issue in respect of any act purported to have been done under its provisions, save by leave of the High Court, which leave could only be granted if there were substantial grounds for suggesting that the cited defendants acted "in bad faith or without reasonable care" (subsection (1)). If leave was granted, a plaintiff had to establish both of those matters once again at trial (subsection (3)) and had to do so, at the level of probability. If he or she could not so establish, then on that ground alone no relief could be obtained under the section.

2. For ease of reference, the actual wording of section 260 in the form applicable to this case is as follows:

> " 260.—(1) No civil proceedings shall be instituted in respect of an act purporting to have been done in pursuance of this Act save by leave of the High Court and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the person against whom the proceedings are to be brought acted in bad faith or without reasonable care.
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> (2) Notice of an application for leave of the High Court under sub-section (1) of this section shall be given …
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> (3) Where proceedings are, by leave granted in pursuance of sub-section (1) of this section, instituted in respect of an act purporting to have been done in pursuance of this Act, the Court shall not determine the proceedings in favour of the plaintiff unless it is satisfied that the defendant acted in bad faith or without reasonable care.
>
> (4) …"

Whilst a leave requirement is still in place it has been very much altered by the amendment to that section, which is next referred to.

3. Section 260 was replaced in its entirety by section 73 of the Mental Health Act 2001 ("the 2001 Act"), effective by Ministerial Order as and from the 1st November, 2006 (S.I. No. 411/2006). Its relevant terms are: -

> "73(1) No civil proceedings shall be issued in respect of an act purporting to have been done in pursuance of this Act save by leave of the High Court and such leave shall not be refused unless the High Court is satisfied: -
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> (a) that the proceedings are frivolous or vexatious, or
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> (b) that there are no reasonable grounds for contending that the person against whom the proceedings are brought acted in bad faith or without reasonable care.",

Subsections (2) and (3) replicate in precise form those which they replaced.

4. As can be seen this provision, in the first instance is much more responsive to current social, philosophical and legal thinking regarding mental health than its predecessor would be if still in force and secondly, is much more reflective of the required balance between affording protection from unjust legal threats to those who operate such coercive but necessary measures on the one hand, and preserving fundamental rights, such as the right to liberty, to bodily integrity and access to the courts, of those affected by such measures on the other hand. However, although the original provision has been removed from our statute book for well more than a decade, section 260 still forms the essential backdrop to this appeal.

5. Insofar as I can tell, this judgment is at least number fifteen in a long sequence of judgments arising out of several sets of proceedings instituted by the plaintiff/appellant against various parties between 1995 and 2002. One can add to this at least one *ex-tempore* decision, and perhaps even more. As all written judgments are available, with many being reported, it is not necessary to recite once again the protracted and perhaps even torturous history of such litigation, which surely must have imposed great hardship and caused much stress and suffering for all concerned. Whatever the outcome of this appeal may be and whichever party it may

favour, I can only hope that the judgments of this Court will be the concluding chapter in this long-running narrative.

6. As I will explain more fully in a moment, the plaintiff, having successfully challenged the constitutionality of section 260(1) of the 1945 Act, pursued a damages claim against the defendants above named. That claim came to an end in the High Court with the judgment of Laffoy J. delivered on the 26th June, 2013 ([2014] 2 I.R. 38) ("the 2013 judgment"), wherein his claim for loss, damage and personal injuries, including hurt, distress and humiliation, arising out of the events herein described was held to be statute barred, even if it was otherwise sustainable as a matter of law. Further, his secondary assertion that he "felt greatly humiliated and demoted to the rank of a second class citizen" and that his reputation was prejudiced in being obliged to seek leave under the subsection, in the first instance, was also rejected. The learned trial judge so concluded for two essential reasons: first that the declaration of invalidity in and of itself was a sufficient vindication of rights but secondly and in any event, this heading of claim was governed by the decision of this Court in *Keating v. Crowley* [2010] 3 I.R. 648 at 670 (para. 33 *infra*). Accordingly, the plaintiff's entire claim for damages was dismissed.

7. In his Notice of Appeal dated the 20th August, 2013, Mr. Blehein alleges that the learned trial judge erred on mixed questions of fact and law which he described as follows:

> (a) that acquiescence in a decision of the court constitutes agreement therewith;
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> (b) that he was not entitled to damages for the injuries suffered by reason of section 260 of the 1945 Act, which was subsequently deemed unconstitutional; and
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> (c) that his damages claim was statute barred.

The appellant also claims that the liability of the respondents to him in these proceedings is the same as what the liability of the proposed defendants would have been in the various actions which he sought to issue or pursue - under the provisions of the now invalidated section 260. Finally, he further submits that the decision in *In Re Philip Clarke* [1950] I.R. 235 violates his constitutional rights and therefore should be both vacated and reversed. In reality, however, and despite how these grounds are phrased, the major issues on appeal are those referred to at subparagraphs (b) and (c) herein.

Background:

8. Although the historical detail of Mr. Blehein's litigation has been outlined exhaustively elsewhere, nonetheless some background is still necessary in order to provide context for this judgment. What is required in that regard can conveniently be considered by referring to the following: first, during the periods next mentioned, the appellant claims that he was "escorted" by the gardaí to St. John of God Hospital, Dublin, where he was involuntarily detained under the provisions of the 1945 Act and whilst so held was administered drugs against his will; second, the pre-2002 series of proceedings instituted by him, and finally, those proceedings which issued on 11th of July of that year, within which the current judgment is given.

9. There is no dispute about the periods of detention involved, which were three in number and were as follows:

- From the 25th February, 1984, to the 16th May, 1984
- From the 29th January, 1987, to the 16th April, 1987
- From the 17th January, 1991, to the 7th February, 1991

No other restraint or confinement, if either took place, is relied upon.

Proceedings: 1995 – 2001

10. The following series of proceedings were issued during this period:

> (i) In November 1995, Mr. Blehein instituted proceedings in which the primary relief sought was a declaration that sections 185 and 186 of the 1945 Act were invalid having regard to the provisions of the Constitution, and that as a result he, who had suffered loss and harm, was entitled to personal injury damages in respect thereof. Those proceedings were struck out for no appearance in 1999, with the plaintiff's application for re-entry being dismissed by Laffoy J. on the 16th March, 2009 ([2009] IEHC 182). That decision was apparently appealed to this Court: its current status remains unclear. In any event, it is not germane to the issues currently arising.
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> (ii) On the 4th November 1996, the plaintiff's application for leave to apply for *certiorari* by way of an application for judicial review was refused by both the High Court and, on appeal, by this Court. These proceedings do not further feature as the same were outside the ambit of section 260 of the 1945 Act.
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> (iii) In 1997, Mr. Blehein instituted plenary proceedings ("the 1997 proceedings") against St. John of God Hospital which were struck out by the High Court on the 3rd November, 1997, on the basis that leave had not been obtained under section 260 of the 1945 Act. An appeal to the Supreme Court (Appeal No. 353/97) was dismissed in a judgment of Lynch J. delivered on the 20th May, 1998.
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> (iv) An application seeking leave under section 260 was made in July, 1999 ("the 1998 proceedings") in which the plaintiff named six individuals as defendants, being two doctors, his estranged wife and three members of the gardaí. This application was refused in the High Court by Geoghegan J. on the 2nd July, 1999, and the appeal therefrom was dismissed by the Supreme Court in July, 2000 on the basis that he had failed to establish "substantive grounds" within the meaning of the section (*Blehein v. Murphy (No.2)* [2000] 3 I.R. 359). In addition, an earlier application within those proceedings to amend the Notice of Appeal to include a challenge to the constitutional validity of section 260 was also rejected by the Supreme Court (*Blehein v. Murphy* [2000] 2 I.R. 231).
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> (v) A further application was made in July, 2000, again seeking leave under section 260 of the 1945 Act ("the 1999 proceedings"). The defendant named was St. John of God Hospital, with the Attorney General being cited as a notice party. Once again, this application was refused on the 6th day of July, 2000, by O'Sullivan J. in the High

Court and on appeal by the Supreme Court (McGuinness J., judgment delivered on the 31st May, 2002).

In styling the various proceedings as I have, I have followed the nomenclature used by Laffoy J. in the judgment under appeal (para. 6 above) and also in an earlier judgment of hers in 2010 [2010] IEHC 329, which is also relevant (para. 17 *infra*).

11. In addition and for completeness it should be noted that, there were proceedings earlier than 1995, which featured in the 2013 judgment: these are referred to at para. 28(iii), *infra*. A further two sets of proceedings on the family law side, instituted in Galway, are also mentioned in that judgment: the learned judge could indeed have also added in the plaintiff's constitutional challenge to various provisions of the Family Law (Divorce) Act 1996 [2008] 1 I.R. 134 (H. Ct) and [2009] (S. Ct.)), and the plenary proceedings in which Mr. Blehein argued that he was entitled to compensation against the state for having to transfer property to his spouse under the 1996 Act (2011 10255 P). The appeal from a dismissal of that action was rejected by the Supreme Court in a judgment of 15th January, 2015 (2015 IESC 1). None of these proceedings however, save perhaps for those first mentioned, have any bearing on the within appeal.

The Current Proceedings (2002 No. 9652P)
The Invalidity of section 260 of the 1945 Act

12. In the 1999 proceedings, the Supreme Court once again refused a late application by Mr. Blehein to amend the pleadings so as to permit a challenge to the constitutionality of section 260 of the 1945 Act. In her judgment however, McGuinness J. pointed out that if the plaintiff so wished a further set of proceedings could be instituted for that purpose: hence the plenary proceedings in the present case, which issued on 11th July, 2002.

13. The substantive relief in these proceedings was directed to the constitutionality of section 260 of the 1945 Act. In addition, however, and in the event of that claim being successful, the plaintiff also sought damages in the manner and pursuant to the particulars which are referred to later in this judgment. On the 7th December, 2004, the High Court (Carroll J.) granted a declaration that the entirety of the section was repugnant to the Constitution (*Blehein v. Minister for Health* [2004] 3 I.R. 610). By agreement of the parties and the Court, all other matters, both substantive and procedural, were left standing, until that issue had been finally determined

14. The respondents moved to have that judgment and the resulting order set aside. They were unsuccessful in that regard, with this Court dismissing the appeal on 10th July, 2008 (*Blehein v. Minister for Health* [2009] 1 I.R. 275). It did so on the basis that the restrictive nature of the provision was disproportionate to the otherwise legitimate aim of giving some protection to those operating the Act. As a result, the plaintiff's Article 40.3 rights to liberty, bodily integrity and access to the court had been unlawfully interfered with.

15. This Court's ultimate order, however, was somewhat more limited than that ordained by the High Court. Whilst affirming the decision of the trial judge, it did so by reference solely to the provisions of subsection (1) of s. 260, being of the view that subsections (2) and (3) were not inherently unconstitutional as in substance these were only giving procedural effect, to subsection (1). The relevant part of the Court's judgment, delivered by Denham J., as she then was, reads as follows:

> "19. The High Court found that the whole of s. 260 was invalid. In essence, this was a finding as to the specified grounds of s. 260(1). The decision as to s. 260(2) and s. 260(3) was entirely consequential to the findings as to the specified grounds in s. 260(1) and not an inherent finding on s. 260(2) or s. 260(3). It is on this construction that the order is affirmed, there being no specific infirmity at issue in s. 260(2) or s. 260(3), but rather the foundations of s. 260(1) which is found to be infirm."

The resulting order of the Supreme Court reflected this view.

16. Before leaving that judgment it is worth noting what was pointed out by Denham J. at paras. 4 and 8, respectively, of her decision; she said that "[Mr. Blehein] also seeks damages for infringement of his constitutional rights and for personal injury, loss and damage" and that "the issue in this appeal is historic as it relates to s. 260 of the Act of 1945 which has been repealed. However, it is relevant to the plaintiff, who has a claim for damages outstanding". Accordingly, it seems clear that given the pleadings, both the existence and nature of such a claim, including the time line of the antecedent factors relied upon, was well recognised by the court from an early stage, even if its precise contours were not that well articulated. In those circumstances and purely as an aside, one perhaps could ask why the limitation issue, which would inevitably arise, was not dealt with prior to the constitutional point. In any event, as we know that did not happen.

The Damages Claim: The 2010 Judgment [2010] IEHC 329: [2014] 2 I.R. 1:

17. The proceedings were then re-entered in the High Court list by consent so that the residual matters could be progressed to final determination. In trying to identify accurately what the remaining issues were, reference was primarily focused on the pleadings, which, apart from seeking the various constitutional declarations as mentioned, also sought damages "for infringement of constitutional rights, for personal loss and damage".

18. In the Statement of Claim in this case, as in virtually all of the other proceedings, the plaintiff, whenever a factual context was outlined alleged that during each of his "unlawful" periods of detention in St. John of God Hospital, he had been treated involuntarily, and contrary to his express wishes, with neuroleptic/psychotropic drugs, which had adverse effects on, and consequences for, his person. The only variations of note to this plea were two in number: first, that in the 1998 proceedings reliance was placed only on the 1987 admission (p. 361 of report), and second, in the 1993 proceedings the wrongdoing alleged was confined to the 1991 admission (para. 20 of the 20913 judgment). Save for this, the description given by the appellant has never changed, as a matter of substance.

19. In the period leading up to the hearing, which gave rise to the 2010 judgment, it became clear at an early stage that the defendants wanted to have a particular issue determined prior to the question of damages being litigated: namely, their contention that as a matter of law the Court had no jurisdiction to award damages to the plaintiff on the basis only of the declaration given. It was said that the declaration of itself was the sole remedy available, and that in any event the same was a sufficient vindication of the rights infringed. The issue was thus formulated as "what relief or remedy (if any), as a matter of law, flows from the decision of the Supreme Court, that is to say, whether or not, and to what extent, the declaration as to the invalidity of s. 260 of the Act of 1945 gives rise to any further remedy and, if so, the nature of such remedy". Although technically this matter was not determined as

a preliminary issue, for ease of reference I will so describe it.

20. As the advisability of trying this issue in the manner contemplated was being considered, it became clear, according to the trial judge, that the pleadings in and of themselves did not disclose a sufficiently detailed context in which that substantive issue could be resolved. As the parties had failed to agree a set of facts for this purpose, the High Court, with some reluctance, proceeded on the basis of the facts above set out, that is, the three periods of detention, the drugs administered without consent and the narrative of the earlier proceedings issued by Mr. Blehein. On such basis final submissions were heard on the preliminary issue in December, 2009. Judgment was delivered in August, 2010, ("the 2010 judgment").

21. In a detailed and comprehensive decision, Laffoy J. summarised the rival contentions of the parties, which appear from the following paragraphs of her judgment:

> "[73] In essence, what the defendants assert is that the State is immune from liability for any loss or damage which the plaintiff incurred as a result of acts done in purported reliance on the Act of 1945, which he alleges were wrongful and which he was unable to pursue in litigation before s. 260 was struck down on the ground of unconstitutionality. In considering that assertion, I am acutely conscious of the *caveat* issued by Henchy J. as to the inadvisability of entering on a general consideration of such a fundamental issue of constitutional law. Accordingly, I will deal with the issue against the facts of this case as they are before the court, although it is doubtful that, constrained as the court is by having to rely on the defendants' statement of facts, they can be accurately described as what Henchy J. referred to as 'concrete facts'.
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> [74] The plaintiff's case is that he has suffered damage as a result of the application of s. 260 of the Act of 1945 to him and that he is entitled to redress for that damage. The redress which the plaintiff seeks is damages. He has formulated his claim for damages as damages "for infringement of constitutional rights, for personal injury, loss and damage". As is pointed out in Kelly (para. 8.2.69), it is clear that an action lies in respect of "a breach of a personal constitutional right". The Supreme Court has found in this case that the application of s. 260 to a person in the position of the plaintiff was a disproportionate restriction of his constitutional right of access to the courts, in the context where his fundamental constitutional right to liberty had itself been restricted, and, as such, s. 260 infringed the plaintiff's personal constitutional rights. In determining whether the plaintiff has incurred damage and whether the damage is redressable, it is necessary to analyse what the effect of s. 260 of the Act of 1945 was on the plaintiff before it was struck down and how, in its application, it impacted on him as set out in the statement of facts."

22. In considering whether in principle any relief above and beyond the declaration of invalidity was available to Mr. Blehein, and in particular whether a damages claim could be sustained, the learned judge considered the following authorities:

> (a) *Murphy v. The Attorney General* [1982] I.R. 241;
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> (b) *An Blascaod Mór Teoranta v. Commissioners of Public Works (No.4)* [2000] 3 I.R. 565;
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> (c) *Redmond v. Minister for the Environment (No.2)* [2006] 3 I.R. 1 ("*Redmond (No. 2)*");
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> (d) and, in particular, as the same was heavily relied upon, *McDonnell v. Ireland* [1998] 1 I.R. 134.

There were of course many other cases noted, but those listed formed the foundation for the Court's decision.

23. It becomes clear from the judgment that as the case went on, the learned trial judge became increasingly concerned about deciding the preliminary issue in what for her was still a very unsatisfactory factual situation. In particular, she was troubled by a passage in the judgment of Henchy J. in *Murphy v. the Attorney General* [1982] I.R. 241 at 314, where that learned judge stated "[that] the law has to recognise that there may be "transcendent considerations" which make it "undesirable, impracticable, or impossible" to correct "prejudice suffered at the hands of those who act without legal justification, where legal justification is required". Although satisfied that a decision on the presenting issue was neither impracticable nor impossible, nonetheless, she felt that it would be "undesirable" to try and assess the impact of those "transcendent considerations", in such limited circumstances. To do so in her view might give rise to a finding that the plaintiff did not have a good cause of action under this heading of claim. A further outline of the material background would therefore be required.

24. In addition, and in any event, the learned judge was of the view that it may not be necessary to determine such issue as the defendants had insisted that if given the opportunity they intended to plead the Statute of Limitations 1957, as amended ("the 1957 Act") (para. 32, *infra*). Therefore, if the damages claim was barred by virtue of those provisions, a consideration of the more fundamental matter would not be required. Accordingly, Laffoy J. held that the better approach would be to defer making a decision, *pro tem*, on what I have described as the preliminary issue: instead the learned judge invited the parties to make further submissions as to how the matter should proceed from that point onwards. The end result, in her own words, was that "the outcome of the consideration of that [preliminary] issue … in the 2010 judgment was inconclusive" (para. 2 of the judgment next referred to).

The 2013 Judgment ([2014] 2 I.R. 38)

25. At the outset it is worth making the point that subject to the issue dealt with at para. 67 *et seq*, the compensation claim could only arise in any event, on the basis of the plaintiff having being denied an "opportunity" of establishing his right to damages by virtue of the provisions of section 260(1) of the 1945 Act. He made three unsuccessful attempts to do so; as above appears, these involved the 1997 proceedings and the intended 1998 and 1999 proceedings (para. 10 above), none of which proceeded because of subs (1). Disregarding entirely the 1957 Act, and even if that requirement had not existed or if leave had been granted, for Mr. Blehein to succeed it would have been necessary for him to have established as a consequence of the Supreme Court decision, that those who operated the legislative provisions in respect of him did so "in bad faith or without reasonable care" (subsection (3)). Whilst this may have been no easy task for the appellant, it is not however directly germane to this appeal

26. Having carried out an exhaustive review of the three sets of proceedings which fell foul of the section, including the affidavit evidence sworn in each, Laffoy J. was satisfied that, subject to one aspect of the case later mentioned, the claims asserted came squarely within a tort action, as commonly understood, in which damages were sought for personal injuries caused by the wrong allegedly committed. This finding was essentially based on the judgment of Keane J. in *McDonnell v. Ireland* [1998] 1 I.R. 134 at 149, and again in line with that decision, it followed in her view that the provisions of the 1957 Act referable to negligence, causing such loss, equally applied in this instance. As a result, the learned judge conducted her analysis of the limitation point on this basis.

27. As originally enacted, section 11(2) of the 1957 Act provided that any action founded on tort, claiming damages for personal injuries, had to be brought within three years from the date on which the cause of action accrued. That section was amended by the Statute of Limitations (Amendment) Act 1991 ("the 1991 Act"), and also by subsequent provisions which do not apply to this case. The changes effected by the 1991 Act appear, *inter alia*, from section 3(1), which states that an action seeking damages in respect of personal injuries caused by negligence, nuisance or breach of duty "shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured". Therefore there were two possible commencement dates from which the period may run: the date on when the action accrued or, if later, the date on which the plaintiff first had knowledge of the facts outlined in section 2 of the 1991 Act. This can be contrasted with the period for non-personal injury actions founded on the same basis, namely, negligence, nuisance or breach of duty which have but one end date, that is six years from the accrual date (section 11(2) of the 1957 Act). Accordingly, these were the provisions which the learned judge had to consider.

28. For the purposes of determining which was the relevant commencement date, evidence was given in person by Mr. Blehein on two occasions. From an appraisal of that evidence and of the documentary material made available, as well as from a further searching examination of the pleadings, the following relevant findings were made by Laffoy J:

> (i) On the 8th July, 1991, some five months following his final discharge from St. John of God Hospital, the plaintiff wrote to Dr. Dermot Walsh, Inspector of Mental Hospitals, outlining the essence of the complaints which he then had and continues to have, and sought whatever assistance the Inspector might be able to offer in that regard. He detailed all three periods of detention, alleged that these resulted from his unlawful arrest and committal and that, by reason of the drugs administered, his powers of recollection and reasoning were compromised for a substantial period after each of the discharge dates.
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> (ii) In December 1992, the plaintiff also communicated with the Attorney General wherein he requested the Attorney to seek an injunction suspending the operation of section 260 of the 1945 Act pending a full hearing into its constitutionality. That request was declined.
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> (iii) In 1993, having instructed both solicitor and counsel, proceedings were instituted on the plaintiff's behalf wherein, in respect of one period of detention, he sought damages for a violation of his constitutional rights, *inter alia*, being those to bodily integrity, good name, liberty etc., and also damages for a variety of wrongs, classified as being assaults, false imprisonment, breach of statutory duty, negligence etc. In the Statement of Claim which followed, it was alleged that he had been involuntarily detained during the period which was specified and also that he had been administered with the type of drugs above described, against his wishes. It was on the basis of these allegations that he sought the damages as mentioned. These proceedings, for which leave was obtained under section 260 of the 1945 Act, seem to have abated *sine die* following a High Court order permitting his solicitor, Garrett Sheehan & Co., to come off record in March, 1998. Their precise status to-date is not known.

29. The significance of the proceedings last mentioned, is that the only wrongdoing alleged for which damages were claimed, was in respect of the detention period which took place in 1991. On being asked to explain why this was so, the plaintiff volunteered the following information, namely, that "the urgency with the 1993 case was to ensure that it would be within the Statute of Limitations and other periods of detention were excluded for fear they might put the case at risk of the Statute of Limitations". Although the accuracy of this was subsequently questioned by Mr. Blehein, the trial judge was satisfied that the record accurately reflected what he had previously stated.

30. The matters above outlined were referred to by the learned judge, so as to demonstrate the plaintiff's state of knowledge, as of those dates in respect of the events and circumstances giving rise to the three sets of various proceedings referred to at para. 10(iii), (iv) and (v) above.

31. Taking the latest period of detention, which terminated on the 7th February, 1991, as a starting point, the trial judge was satisfied on the evidence to conclude that the appropriate commencement date, even by reference to the date of knowledge, was not later than the date of the letter to the Inspector of Mental Hospitals, which was sent on the 8th July, 1991 (see also para. 64, *infra*). This date applied even if the plaintiff could have availed of the disability provisions of sections 48 and 49 of the 1957 Act: in which context however it should be noted that a cornerstone of his claim was that he was never of unsound mind and that the imposed events above described were entirely unrelated to his psychiatric condition. Therefore, on this basis even the earliest proceedings taken, namely, those issued by Plenary Summons on the 30th July, 1997, were statute barred. Logically it had to follow that all later proceedings were likewise barred. This conclusion evidently applied to the three year limitation period, but in addition, Laffoy J. also held that in case any of the claims as pleaded could benefit from the longer period of six years, these too were statute barred.

32. As above noted, the 1997, 1998 and 1999 proceedings were terminated at a point short of when defences were required to be filed. It followed that the defendants so named did not have an opportunity of formally putting in place a plea under the Statute of Limitations in respect of such claims. As is common knowledge, the 1957 Act does not prevent the institution of proceedings: rather, if it is successfully asserted the relief or remedy sought is barred. Notwithstanding the absence of a formal plea however, the trial judge was satisfied on the evidence that, as a matter of probability, the defendants, if called upon, would have raised and relied upon the statute in each set of proceedings, with the inevitability of the outcome as predicted. Accordingly, the proceedings had to be regarded as being statute barred. Therefore Mr. Blehein's personal injury claim was dismissed.

33. The secondary claim as asserted (para. 6 above), was based on a plea that the appellant was grievously harmed, personally humiliated and suffered reputational damage by having to apply for leave under subs (1) of s. 260 of the 1945 Act, in the proceedings above identified: he also sought damages under this heading. Laffoy J., on this aspect of the case, took the view that the declaration of unconstitutionality was in itself sufficient to redress the "wholly understandable" grievance which he held in this regard but secondly, and of more importance, was the fact that when applying for leave he was engaging with both the High Court and the Supreme Court. Accordingly, "the outcome which gave rise to the feelings of hurt and the prejudice which he has outlined came about, to use the words of Murray C.J. in *Keating v. Crowley* [2010] IESC 29, [2010] 3 I.R. 648 at p. 670, from 'acts *bone fide* done by judge exercising his jurisdiction under a law which at the time enjoyed the presumption of constitutionality'". Accordingly, on either or both of these grounds this claim was also dismissed.

Appeal to this Court

34. Despite the formality of the Notice of Appeal, Mr. Blehein, in his written submissions as filed, sees the sole issue on this appeal as

one concerning "the amount of compensation, aggravated and exemplary damages, to which [he is] entitled for the gross violation of rights guaranteed [to him] by the Constitution of Ireland, 1937". He sets out the factual background and alleges that all his periods of detention were arbitrary, had no lawful authority and were entirely wanting in due process. Such infirmity, he claims, equally attaches to the drugs administered to him contrary to his declared wishes. He submits that these and other associated events have all had a devastating effect on him personally.

35. As a result, several constitutional rights, which he lists as more than ten in number, including his right to liberty, to bodily integrity, to good name, and not be subject to torture or inhuman or degrading treatment, are said to have been violated by the respondents or those for whom the state is liable. He claims that he had a good cause of action in respect of the underlying matters at all times, but that his constitutional right to pursue these issues was frustrated by reason of section 260 of the 1945 Act. Therefore, the doors of justice were barred against him. He now seeks redress for that grievance.

36. As a consequence of the declaration of invalidity, confirmed by the Supreme Court, the appellant now asserts that he is entitled to compensation in respect of this injustice. He says that to deny him a remedy is to deny him the right: that in turn would violate all Constitution norms. Accordingly, at a high level of principle, he claims that this action should be allowed to proceed.

37. In answer to a submission that the factual side of his case is governed by *Hay v. O'Grady* [1992] 1 I.R. 210, the appellant says that both judgments of Laffoy J., but in particular the 2013 judgment, constitute no decision as the same were made outside the rule of law. As far as I can tell, this claim is based on an allegation that the learned judge determined the wrong question and neglected to address the real issue in the case. As a consequence, he submits that the decision in *Hay v. O'Grady* cannot be applied against him. Therefore, he is inviting this Court to consider afresh the issues raised and to reverse the judgment under appeal.

38. Despite the evident care, attention and commitment given to the submissions, it must be noted that Mr. Blehein did not address one of the central issues determined by the High Court, namely, how his cause of action should be classified, whether limitation periods should apply and, if so, whether his damages claim is statute barred as a result. Consequently, the Court has no submissions from him in this respect, and unfortunately despite many invitations to so do, he again failed to engage with the point in his oral presentation. Rather he maintained a position that once a breach of his constitutional rights had taken place, he was entitled to damages almost as of course. In so asserting, he must be taken as expressly rejecting any suggestion that the declaration itself is sufficient redress.

39. The respondents, for their part, having set out the relevant history, suggest that the real issue is whether or not the appellant is entitled to damages in light of and/or in addition to the declaration of invalidity given by this Court in 2008. In addition, they plead the provisions of the 1957 Act, and in that regard they rely not only on the judgment under appeal and the series of cases therein referred to, in particular *McDonnell v. Ireland* [1998] 1 I.R. 134, but also on the judgment of Keane C.J. in *Blehein v. Murphy (No.2)* [2000] 3 I.R. 359, part of which dealt specifically with the limitation question. Having reviewed some of the case law, their essential submission is very much that the trial judge was correct and that her conclusion should not be interfered with.

Discussion/Decision

Constitutional Position

40. The core issue on this appeal must be:

> (i) whether, in principle, limitation periods can apply to a damages claim following a breach of a person's constitutional rights; if so
>
> (ii) how should the instant claim be classified; having done so
>
> (iii) what is the relevant period(s) to apply; and by reference to this analysis;
>
> (iv) is the decision of the trial judge sustainable as a matter of both fact and law?

In addition, I propose to say something about the possibility of damages being awarded, even if only at a nominal level, on a *per se* or virtually *per se* basis for a breach of such rights. Finally, I will also deal with the secondary claim.

41. During one of the earliest and most dynamic periods of judicial creativity in this jurisdiction, certainly in the context of constitutional exploitation, the Supreme Court made it clear that "no one can with impunity set [the citizen's] rights at nought or circumvent them [by depriving him of access to the courts] and … the Courts' powers in this regard are as ample as the defence of the Constitution requires" (*The State (Quinn) v. Ryan* [1965] I.R. 70 at 122).

42. That powerful declaration of principle was quickly seized upon: several statements to like effect followed, such as:

> (i) that where the Constitution imposes obligations on the State and confers rights on citizens against the State, and where such are not honoured, either by breach, omission, failure or otherwise, a wrong has occurred;
>
> (ii) that, in principle, such a wrong constitutes a justifiable controversy cognisable by the courts, and as such, gives rise to a cause of action in the person affected; and
>
> (iii) that the right to enforce the obligation or seek redress for the harm caused, does not depend on the wrong falling within any of the recognised species of actions as known in the law of tort or even in the common law more generally.

43. In summary, this stated position is captured in the following passages from the judgment of Walsh J. in *Byrne v. Ireland* [1972] I.R. 241:

> "(i) In several parts of the Constitution, duties to make certain provisions for the benefit of citizens are imposed on the State in terms which bestow rights upon the citizens and unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights (p. 264).

> "(ii) Where the People by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce those must be deemed to be also available. It is as much the duty of the State to render justice against itself in favour of the citizens as it is to administer the same between private individuals (p. 281)."

See also para. 53 of this judgment.

44. It would perhaps be remiss not to point out a potential precursor to the essence of the point above made: it was the decision of Budd J., then of the High Court, in *Educational Company of Ireland v. Fitzpatrick (No.2)* [1961] I.R. 345. There the learned judge made the general comment that the courts would not stand aside or be found wanting in circumstances where a person had been deprived of his constitutional rights. Although appealed to the Supreme Court, I can see no dissent from this view, even if it could be said that such was somewhat opaquely phrased. Not so, however, with *Byrne v. Ireland*, which on any reading was a seminal decision in the constitutional order of this country.

45. In the year following that judgment, this issue of whether a breach of or a failure to honour a constitutional right gave rise to a cause of action was again dealt with in *Meskell v. Córas Iompair Éireann* [1973] I.R. 121 ("*Meskell v. C.I.É.*"), where, speaking for the court, Walsh J. at 132/133 said:

> "It has been said on a number of occasions in this Court, and most notably in the decision in *Byrne v. Ireland*, 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."

It was not necessary for the Court either in *Byrne* or *Meskell v. C.I.É.* to be any more specific than it was: in particular, neither case required any consideration of what the parameters of such an action might be or how it might be classified or regulated. These matters, however, come to the fore in subsequent cases including that next mentioned.

46. In *McDonnell v. Ireland, The Attorney General & Ors* [1998] 1 I.R. 134 ("*McDonnell*"), the plaintiff had been convicted in May, 1974 of membership of an illegal organisation, namely, the IRA, and on the basis of section 34 of the Offences Against the State Act 1939, the relevant Minister informed him, that as an established civil servant his position was being forfeited under that section. Having been released from prison he sought unsuccessfully on one occasion to rejoin the Department of Posts and Telegraphs, and on another occasion, its successor, An Post. Following the decision of this Court in *Cox v. Ireland* [1992] 2 I.R. 503, holding that section 34 of the 1939 Act was unconstitutional, Mr. McDonnell instituted High Court proceedings against Ireland, and, in what Barrington J. described as an "ingenious" Statement of Claim, did not seek any declarations or relief at common law; but rather, he simply claimed "damages for alleged breach of constitutional rights", which he identified as the right to earn a livelihood and also some unspecified property right. On such a basis he alleged that the Statute of Limitations had no application to his claim, or indeed to any claim based on a violation of constitutional rights: the defendants strongly disagreed. Accordingly, the core issues in the instant case were directly in context before that court. Incidentally, Mr. McDonnell's damages, if allowed, were agreed by reference to his loss of earnings and loss of superannuation: the sum involved was IR£198,491.

47. Of the four judgments delivered, I believe that those of Barrington and Keane JJ., with whom Hamilton C.J. agreed, are the most influential for the issues under discussion: in so saying, I intend no disrespect whatsoever to what O'Flaherty and Baron JJ. also had to say. First, the following two passages illustrate the views of Barrington J. on this issue:

> "The general problem of resolving how constitutional rights are to be balanced against each other and reconciled with the exigencies of the common good is, in the first instance, a matter for the legislature. It is only when the legislature has failed in its constitutional duty to defend or vindicate a particular constitutional right pursuant to the provisions of Article 40.3 of the Constitution that this Court, as the court of last resort, will feel obliged to fashion its own remedy. If, however, a practical method of defending or vindicating the right already exists, at common law or by statute, there will be no need for this Court to interfere." (pp. 147-148)

And, secondly:

> "But, at the same time, 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, it appears to me that the injured party cannot ask the court to devise a new and different cause of action." (p. 148)

48. The first point which agitated Keane J., as it did O'Flaherty J., was to understand exactly what in fact the asserted cause of action was. He found considerable difficulty in this regard, postulating a possible claim of misfeasance in public office, which could not however be sustained, as the essential ingredients of that tort were absent. Despite having considerable misgivings on this issue, nonetheless, since the State apparently had conceded in both the High Court and the Supreme Court that such a cause of action existed, the learned judge went on to consider whether or not in the circumstances it was barred either by virtue of the 1957 Act, or on some equitable ground. His judgment on this issue does not in any way suffer from the concession which he identified.

49. Having posed the question whether there was any reason why the plaintiff's action should not be classified as a "tort" for the purpose of section 11(2) of the 1957 Act, the learned judge examined how the parameters of that principle of law had evolved over the years: having done so, he came to the conclusion that a constitutional breach of rights should be regarded as a civil wrong. Accordingly, there could be no reason in principle why the limitation periods set out in the relevant statutory provisions should not apply.

50. Keane J. then quoted the following passage from *Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd* [1988] I.L.R.M. 629, and was quite satisfied that there was nothing inconsistent between that statement and the observations of Walsh J. in *Meskell v. C.I.É.* (para. 43, *supra*). Henchy J. in *Hanrahan* had said:

> "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.É.* [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."

I respectfully agree with the conclusion reached by Keane J.

51. As previously indicated (para. 43 above), follow on issues regarding cause of action classification, limitation periods etc. did not fall for consideration as such in *Meskell v. C.I.É.*. There seems to be nothing in the passage last quoted which is in conflict with that decision. In essence, Henchy J. was pointing out that where an existing tort provides an adequate remedy for a breach of constitutional rights, the affected person must pursue his grievance within the parameters of that tort, and in so doing will be subject to the limitations and restrictions, but will also obtain the benefits, normally associated with such an action. If anything, in my view *Hanrahan* not only adopts but also re-asserts the existing position. See also *W. v. Ireland (No.2)* [1997] 2 I.R. 141 at 166/167. I therefore do not believe that there is any need to distinguish between what Walsh J. and Henchy J. respectively stated on the issue under consideration, and neither in my opinion is it necessary to assign subsequent case law as falling within one stream of authority or the other: this for the simple reason that in my view there is no distinction in principle between them.

52. Although arising in a variety of different circumstances, this Court in a number of later cases has again considered what the general position is, with regard to a damages claim which follows the establishment of a constitutional violation. Whilst the particular facts of the case are not significant, save that the compensation claim followed a declaration that certain provisions of the Domestic Violence Act 1996 were unconstitutional (*D.K. v. Crowley* [2002] 2 I.R. 744), it is worth quoting two passages from the judgment of Murray C.J. in *Keating v. Judge Crowley & Ors* [2010] 3 I.R. 648 where, when speaking for the Court, he said:

> "79. It is undoubtedly the case that in certain circumstances the State is liable to pay compensation to individuals for breach of their constitutional rights. This may be particularly so when the State at the time the damage was caused, was acting unlawfully and with *mala fides* or in misfeasance public office.
>
> …
>
> 82. As has been seen, the wrongs alleged by the applicant against the State have been framed under the general rubric of breach of constitutional rights. Generally speaking, it can be said that such rights are vindicated through the establishment of well established remedies and causes of action known to the law. Certainly it may be the case that established causes of action may not provide an adequate remedy so as to properly vindicate the breach of the constitutional right. In such circumstances the courts have jurisdiction to provide a remedy, even if in another form, in order to ensure that a right is vindicated where all other necessary criteria for establishing legal liability are established."

The Chief Justice continued by citing with approval much of the judgment of Barrington J. in *McDonnell*, deprecating in the process Mr. Keating's failure to pursue his claim through the medium of well-established and recognised causes of action.

53. In moving straight from the origins of establishing and recognising a right of action for breach of constitutional rights, to the *McDonald* judgment, I should not be taken as having overlooked many other decisions during the intervening period which built on, *inter alia, Byrne v. Ireland* and *Meskell v. C.I.É.*. One in particular should be acknowledged for its impressive analysis of this developing area of jurisprudence. In *W. v. Ireland (No.2)* [1997] 2 I.R. 141, Costello P., reviewed how the law stood at the time and under the second issue dealt with, namely whether the defendants had a constitutional obligation to the plaintiff to speedily consider and process a request for the extradition of Fr. Brendan Smyth, highlighted a number of important points, two of which only I will refer to. Firstly, in his view constitutionally guaranteed rights may be conveniently divided into two classes, "…(a) those which, independent of the Constitution, are regulated and protected by law (common law and/or statute law) and (b) those which are not so regulated and protected". Secondly, if and where within the widespread corpus of existing law there can be identified a means of protecting constitutional rights, either by way of enforcement or compensation, then such a vehicle will provide an adequate means of vindicating a person's entitlement. If however on the rare occasion where no such means is to be found, then in accordance with the principle established in *Meskell v. C.I.É.*, the courts, in the discharge of their constitutional obligations will of themselves provide, and if necessary design, such a means. I respectfully agree with the generality of the view so expressed by the learned President.

54. Could I briefly mention one further decision, this time from the Court of Appeal, namely, *Bailey v. Commissioner of An Garda Síochána* [2017] IECA 220. Para. 37 of the joint judgment of Birmingham and Hogan JJ. encapsulates what the present position is:

> "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 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 purpose of the Statute of Limitations: see *McDonnell v. Ireland* [1998] 1 I.R. 134".

See also the judgment of Court of Appeal, given by Hogan J., in *Savickis v. Governor of Castlerea Prison* [2016] 3 I.R. 292 ("*Savickis*").

55. An example of providing a remedy not damages related, but one which was both specific to the facts and fitting as to outcome, is to be found in *Carmody v. Minister for Justice, Equality and Law Reform & Ors* [2010] 1 I.R. 635 ("*Carmody*"). In that case the Court held that the failure of the Criminal Justice (Legal Aid) Act 1962 to empower the District Court to grant a certificate for counsel as well as solicitor, where the judge thought it appropriate to so do, constituted a breach of Mr. Carmody's constitutional right to a trial in due course of law. The remedy, although simple, was highly effective: the trial could not proceed until such time as the accused person could obtain the assistance of counsel via an amended legal aid scheme (see also *Ogieriakhi v. Minister for Justice and Equality* [2016] I.E.C.A. 46 (Ryan P.)). So evidently, monetary compensation is but one of the remedies which is available.

56. Before I set out what I believe can be distilled from the judgments mentioned above, I should expressly make the point, although obvious, which is that the focus of this case is on a claim for damages following the establishment of a constitutional breach with resulting loss. It is not concerned with declarations or injunctions, whether *quia timet* or otherwise, which, on the liability side, are a common feature of constitutional actions. Equally so, it is not concerned, as such, with how the breach or failure to honour that right has occurred or was established. In this case the plaintiff himself obtained a declaration of invalidity; in *McDonnell* it was Mr. Cox who obtained it. In several other situations the constitutional wrong might arise in a variety of different ways, including circumstances not involving a statutory infirmity. Nothing turns in this case on the method of how such a violation is established. Further, as the claim is purely for compensatory damages the issue of exemplary or punitive damages does not fall to be addressed. Finally, other disabling or restraining events, such as causation, remoteness, *novus actus interveniens* etc. do not arise.

57. The following principles can be deduced from the case law above discussed:

(i) It is generally accepted that in the vast majority of cases, a breach of constitutional rights will give rise to a remedy for the resulting loss, causatively arising: there will be some limited situations where for policy reasons this will not necessarily be so. (*Murphy v. A.G.* [1982] I.R. 241: *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88).

(ii) On the principle of *ubi jus ibi remedium* ('for every wrong, the law provides a remedy') the court itself may be called upon to create and define such a remedy, but only where this becomes necessary. In so doing, the court would be exercising its judicial power, as the organ of the state ultimately responsible for the enforcement of constitutional rights. However, it will be called upon to so do only in very rare circumstances.

(iii) The "necessity" referred to is very much a fallback position; it will only come into play if a cause of action at common law is not available to vindicate the right which has been breached, or is otherwise inadequate or ineffectual to that effect. This is how *Byrne v. Ireland* and *Meskell v. C.I.É.* should be read, as, when speaking the passage above quoted (paras. 43 & 45 above), Walsh J. was dealing with special or exceptional cases which by their nature, stood isolated from and external to, actions within the general body of the common law.

(iv) Accordingly, the first task in any such exercise is to examine the facts as alleged, and ascertain whether such can be identified within the general *corpus* of the common law, for if they can, as a great number will be, that cause of action will provide an adequate vehicle by which to vindicate the antecedent constitutional breach.

(v) Classification of the asserted cause of action will not depend on how it is pleaded: it will depend on the true nature of the claim and the type of relief sought for any causative loss which has occurred. Thus seeking damages for a breach of constitutional rights, *simpliciter*, will not of itself take the case outside the general principles herein outlined. Howsoever termed or phrased, it is the substance which is of importance.

(vi) If, having conducted such an examination, the facts and circumstances set out fall within a recognised category of action at common law, then the issues pleaded, always to be considered against the backdrop of a constitutional violation, must be determined within those parameters. This means that in whatever way the action is circumscribed at common law, such features will equally apply to the action in question.

(vii) If, however, in the rare and exceptional case the suggested cause of action cannot be so classified, or as stated, cannot attract an appropriate or effective remedy, then the court, in the discharge of its constitutional obligation, will create a means by which to vindicate the loss established.

For clarity, I should add that if an appropriate cause of action with a suitable remedy could be found within equitable principles or in statute law, such would equally suffice.

58. Some judges have expressed the view that any and all claims for damages for breach of constitutional rights can only be regarded as tort claims; others are not so sure. For the former, such a claim has all the indicia of an action in tort, and whilst not specifically mentioned in the 1957 Act, nonetheless, the words used in section 11(2) of that Act, and in particular the phrase "breach of duty", are sufficiently wide to capture such claims. For those in the latter category, a case-by-case approach is preferred. It is not necessary to decide that issue in this case, for most, if not all, of the claims are readily recognisable in common law. I therefore leave over the question of when and in what circumstances such a cause of action might be otherwise classified. Even then, however, it is not seriously contended but that similar limitation periods to those contained in the 1957 Act would have to apply in such circumstances.

59. I should say that I have never considered the ratio of either *Byrne v. Ireland* or *Meskell v. C.I.É.* on this issue, as ever remotely infringing the separation of powers under the Constitution. It is inconceivable that the common law, be it either pre-1937 or post-Article 50 of the Constitution, could restrict not simply the power but the duty of the court to declare, uphold and protect fundamental rights. That obligation whilst resting with all organs of the state, lies at the forefront of one of the most important responsibilities which the courts of this country have. The fundamental basis of this jurisdiction is the most basic law of all, which is the Constitution itself. In declaring what it ordains the Court, *inter alia*, is invoking the provisions of Articles 6, 34, 38 and 40 thereof: such is what it is mandated to do. When a *Meskell* type of action is involved, the Court has left aside the common law as this has been found wanting. I am therefore entirely satisfied that the power identified in *Byrne v. Ireland, Meskell v. C.I.É.* and the like cases which followed, is embedded within the Constitution itself and its exercise, when otherwise necessary, is the prerogative of the judicial power. As such, Article 15.2 is not involved.

60. I am not suggesting that this is the last word on this important issue, or on the relationship between the law of tort and the means of redressing breaches of constitutional rights. One cannot and should not foreclose on the possibility of some form of generalised 'constitutional remedial regime' being established, which might not simply fill a lacuna where such exists, but which of itself might operate in conjunction with the pre-existing statutory and common law remedies. A thoughtful and incisive discussion on this issue is contained in McMahon and Binchy, *Law of Torts* (4th Ed., Bloomsbury Professional, Dublin, 2013). Those learned authors point out that it would be a mistake to assume that *Meskell v. C.I.É.* is not capable of developing into a mature constitutional medium for protecting constitutional rights, and point to the judgment of Hogan J. in *Sullivan v. Boyle (No.2)* [2013] 1 I.R. 510 as an example of the "creative use of that decision". Evidently for such to occur however, much judicial thinking would need to be devoted to this topic; certainly so if the *Meskell* doctrine is to assume a freestanding vitality as a mechanism for the vindication of constitutional rights, as the authors seem to suggest it might. Clearly that debate has not occurred and in my view, this is not the case for a root and branch reappraisal of the current system. Given the issues involved and the submissions made, I am quite satisfied that the underlying areas of concern can adequately be dealt with by the application of existing principles.

61. Laffoy J., in her 2013 judgment characterised the vast majority of the claims made as seeking damages for personal injuries, a view which also reflects what the Supreme Court had earlier said in the passages quoted at para. 16 of this judgment. I respectfully agree: further, I believe that following s. 260(1) of the 1945 Act being declared unconstitutional, the outstanding claims in respect of compensation could not be otherwise described.

62. On any view of the facts therefore, it is clear that the essence of Mr. Blehein's personal injury claim, howsoever pleaded, falls squarely within the existing parameters of the law of tort. Applying that law as it stands, his claim is therefore subject to the relevant tortious limitation periods. This is precisely the route followed by the learned trial judge.

63. If this is correct, as I believe it to be, then section 11 of the 1957 Act and sections 2 and 3 of the 1991 Act apply to this case: accordingly, it has to follow that the three year limitation period covers all claims referable to personal injuries and that, if such should exist, the outer limit for any other claim must be six years. In the latter context it might possibly have been argued that there was

some intentional trespass to the person, and that following *Devlin v. Roche* [2002] 2 I.R. 360, the period would then be six years. Whilst no such suggestion has ever been made, nonetheless, even if theoretically possible, such a cause of action would also be statute barred on the dates above outlined. In the circumstances, therefore, the only remaining question is to identify the commencement date from which these periods begin to run.

64. Laffoy J., in her final judgment having extensively reviewed all of the available material came to the conclusion that it could not have been later than the 8th July, 1991, this to coincide with the appellant's letter to the Inspector of Mental Hospitals. In this respect there was available to her an abundance of evidence to support this finding, which, in the absence of some countervailing circumstances, would of course have to be accepted by this Court [(*Hay v. O'Grady*) 1992 1 I.R 210]. Even apart from this line of authority, however, no other possible date has been canvassed. Consistent with his position, Mr. Blehein steadfastly maintains that he was never under a disability in the sense of unsoundness of mind: therefore the extension provisions of the 1957 Act could not apply. Even if they did, however, it was quite open to the trial judge to find, as she did, that any continuing "disabling" effects had ceased to exist by July, 1991. That being so, the damages claim was rightly considered to be statute barred.

65. This conclusion had in fact been anticipated several years earlier by Keane C.J. when giving judgment in *Blehein v. Murphy (No.2)* [2000] 3 I.R. 359. Having agreed that leave was correctly refused by the High Court in respect of the 1998 proceedings, the Chief Justice referred to the judgment of Geoghegan J. to the effect that in any event, the subject proceedings were statute barred and therefore no useful purpose would be served by granting leave. He then continued:

> "It is quite clear that any proceedings which were now instituted would be well outside the limitation period prescribed by the Statute of Limitations, 1957, and that none of the provisions of the Statute of Limitations (Amendment) Act, 1991, enabling proceedings to be brought outside the limitation period in cases of fraud, mistake or (in the case of personal injuries) lack of knowledge, relied upon by the plaintiff, have any application to the facts of this case." (p. 366)

Whilst the views of the learned Chief Justice might be said to have been conditional in the sense that the Statute of Limitations has to be pleaded in the first instance, nonetheless it is now clear, given the judgment of Laffoy J., that the defendants would have asserted that plea if given the opportunity to so do, with the inevitable consequences which would have followed.

66. I am therefore satisfied that the decision of the learned judge must be upheld.

67. The *caveat* above mentioned (para. 25), relates to the point referred to at para. 33 above. It will be recalled that in his pleadings the appellant claims that the provisions of section 260(1) of the 1945 Act denied him his constitutional right of access to the courts; he submits that in having to apply for leave under a provision subsequently declared unconstitutional, he suffered humiliation, personal hurt and much distress. In addition, he says that he felt like a second class citizen, that is, his personal dignity was undermined. He seeks damages in this context.

68. Laffoy J. dealt with this claim by being satisfied that the understandable feelings which Mr. Blehein had, came about "…to use the words of Murray C.J. in *Keating v. Crowley* [2010] I.E.S.C. 29, [2010] 3 I.R. 648 at 670 from 'acts *bona fide* done by a judge exercising his jurisdiction under a law which at the time enjoyed the presumption of constitutionality'" (para. 64 of 2013 judgment). Such could therefore give rise to a cause of action. In these circumstances, she was satisfied that the constitutional rights in question were clearly vindicated by the declaration obtained and that such of itself was sufficient to redress any wrongs occasioned by the operation of the impugned provisions, including any hurt, humiliation, distress or prejudice which the appellant may have suffered. She also therefore refused relief under this heading.

69. In this context, could I now refer to the judgment of Hogan J. which he is about to deliver. He concurs with this judgment in that he agrees that by reason of the 1957 Act, any loss or damage which the appellant may have suffered by reason of his various periods of detention are statute barred. However, my learned colleague goes on to consider what he describes as "the net issue", namely, whether Mr. Blehein is entitled to claim damages, in respect of the time, trouble and expense which he was put to by having to apply for leave in the various proceedings above mentioned. Having accepted that the three year limitation period applies, this claim could only relate to the 1998 and 1999 proceedings.

70. Describing this claim for damages as a "pure" *Meskell* type claim, Hogan J. refers to two cases in support of his view: the first is *Heneghan v. Allied Irish Bank* (Unreported, High Court, Finlay P., 19th October, 1984) ("*Heneghan*") and the second, *McHugh v. Garda Commissioner* [1986] I.R. 116. Having reviewed both of those authorities, the learned judge (held) that the analogy between *McHugh* and the instant appeal "is a rather complete one". As a result, he is of the view that the declaration of itself is not entirely sufficient and that it is necessary to go slightly further: he awards Mr. Blehein €500 in respect of the two section 260 applications in question, making a total of €1,000.

71. It must first be noted that Laffoy J. did not see the action before her as involving a claim for this type of loss. The harm suffered by the requirement for leave was the hurt, humiliation, distress and degradation suffered by Mr. Blehein: it was not for the difficulty involved, or for the trouble or inconvenience caused. Secondly, in *Heneghan*, for reasons not material, the court directed the defendants to pay to the plaintiff "his costs of the proceedings when taxed and ascertained". On a consideration of the Bill of Costs, in which a total of over £6,000 was claimed, the Taxing Master disallowed, and on objection maintained the disallowance, of all items other than those for stamp duty and the sum of £50 for telephone calls, postage *etc*. He did so on the basis that as the plaintiff was a litigant in person, he could not as a matter of law obtain any costs or expenses for the time, trouble or loss of earning involved in the preparation of his case, for if he could, it would in effect be granting him recompense for professional work which of course not being a lawyer, he could not obtain. That was the background in which the issue came before the learned President of the High Court; Finlay P., concluded that effective access to justice by a citizen must include reimbursement for travelling and other expenses necessarily and properly incurred by him, where a cost order has been made in his favour. That was the context of *Heneghan*. With great respect, I do not readily see how it bears any comparison to the instant case.

72. The other authority relied on was *McHugh v. Commissioner of An Garda Síochána* [1986] I.R. 116. Garda McHugh, having been subject to a series of suspensions, was then the subject of a sworn inquiry directed to be conducted under the Garda Síochana (Disciplinary) Regulations 1971. Following the holding of that inquiry and the results thereof, he was dismissed from An Garda Síochána. Such suspensions, the establishment of the inquiry and the purported dismissal were carried out under the name of one Patrick McLoughlin, who purported to be acting as Commissioner at the time. In fact, the position of Commissioner was not vacant at the relevant time as the attempted dismissal of his predecessor, Mr. Edmund Garvey was found by both the High Court and the Supreme Court to have been unlawful.

73. Mr. McHugh instituted proceedings challenging the validity of these actions taken by or on behalf of Mr. McLoughlin. Before trial it

was conceded that the steps in question were null and void. All back pay had been reimbursed, but there was also a claim for the costs incurred in attending and being represented at the inquiry so established. Being satisfied that the defendants were guilty of breaching a duty of care to the plaintiff, in that they failed to protect his property rights by instituting an inquiry which would result in a nullity and would cause him to incur unnecessary expense, it followed that the damages claimed were recoverable. Accordingly, the court made an order for the plaintiff's costs and expenses, when taxed and ascertained on a solicitor and client basis.

74. Once again, the context of the *McHugh* decision seems to me to be entirely distinguishable from that present in the instant case. Even however if I am wrong in that regard, it would quite evidently have been entirely unjust for Mr. McHugh to obtain a declaration that his property rights had been infringed without more. As a direct cause of this infringement, he had incurred costs and expenses, a move entirely foreseeable by being the subject matter of disciplinary proceedings carrying with it the possibility of being dismissed from the force. Without having those recouped to him, there would obviously have been a significant shortfall in the vindication of his rights. That is not the situation in the present case. Therefore, with the greatest of respect, I cannot endorse the approach of Hogan J. on this issue.

75. At para. 40, *supra*, I indicated that I would come back to the question of whether it is possible to award damages even where the constitutional breach did not result in any remediable loss or harm. I do not believe that the law has ever so established. Cases which might at first glance appear to suggest otherwise are in fact easily explainable by reference to the principles outlined at para. 57, *supra*. Take the constitutional right to privacy as an example. In both *Kennedy v. Ireland* [1987] I.R. 587 and *Herrity v. Associated Newspapers (Ireland) Ltd* [2009] 1 I.R. 316, damages were awarded for a breach of this right despite the fact that, independently of the Constitution, such a claim did not fall within existing tort law. *Meskell v. C.I.É.*, *McDonnell* and the other cases above mentioned expressly provide for this. Likewise, in *Redmond v. Minister for the Environment (No.2)* [2004] IEHC 24: [2006] 3 I.R.1, where the nominal award made, appears to be consistent with this approach: otherwise and if not, the case should be treated as an isolated one. In any event, even if there was such a jurisdiction it would seem highly unlikely that it should be invoked where the loss and harm pleaded, fall comfortably within an existing cause of action.

76. Two further points in this context about to be made: even if there was such a jurisdiction, the first is that its operation could not be open-ended and would almost certainly be subject to appropriate limitation periods as contained in the 1957 Act, and/or to the equitable doctrine of *laches.* Although in a different context, Hogan J., for the Court of Appeal in *Savickis,* made very much this point where at para. 13 he said:

> "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 common law tort) – such as occurred in recent cases such as *Herrity v. Associated Newspapers Ltd* [2009] 1 I.R. 316 (constitutional right to privacy) and *Sullivan v. Boylan* [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 purpose of the Third Schedule of the 1961 Act in the sense that I have just described."

If that is correct, as I respectfully believe it to be, there could be no reason in principle why the 1957 Act would not apply.

77. The second point is that, I do not see how it could be open to the appellant to advance this line of argument, nor how he could benefit from same. Mr. Blehein had a cause or causes of action which could have been navigated through recognised principles of common law. He has been unsuccessful in obtaining a remedy for the reasons above mentioned. It would entirely circumvent that conclusion if damages could be awarded on a *per se* or virtually "*per se*" basis. The nominal nature of the amount is not of concern: rather, the point at issue is one of principle and not quantum. While it may be that the courts will one day embark upon a process of developing a freestanding regime for the vindication of constitutional rights, (one) unconnected to the protection offered by, *inter alia*, the law of tort, I am totally satisfied that this is not an appropriate case in which to do so: Mr. Blehein always had a cause of action in tort and there can be no question of a claim for breach of "pure" constitutional rights in such circumstances.

78. It must be remembered that many of the rights guaranteed under the Constitution are adequately protected by the law of tort and other branches of the civil law, be it under statute or at common law. Without in any way attempting to be exhaustive one can say, generally speaking, that the right to freedom of expression and one's good name is protected by the law of defamation; the right to liberty is protected by, *inter alia*, by *habeas corpus* and by the tort of false imprisonment; one's right to bodily integrity can be vindicated by actions for torts such as negligence, trespass and many more; likewise with one's property rights, where actions in trespass and nuisance are readily available: *Rylands v. Fletcher* 1866 L.R. 1 Ex 265; L.R. 3 H.L 330 may also play a role. There are of course many other examples, but those listed are illustrations of the State, through its laws, vindicating the rights in question.

79. Whilst some other constitutional rights may not similarly be covered by the general civil law, it must be observed that in some such cases at least, the question of damages may not even arise, in light of the availability of more appropriate remedies (e.g. *Carmody*). Finally, there are some constitutional rights which are not protected elsewhere but in respect of which a damages claim based directly on the Constitution is maintainable; the right to privacy immediately spring to mind. This is an evolving jurisprudence where further examples will emerge from time to time.

80. Despite the appellant's inability to pursue this claim for damages and notwithstanding my view on the approach adopted by Hogan J., it should not be thought that his successful attack on section 260 of the 1945 Act was futile: far from it. He obtained a declaration that the section was invalid from both the High Court and from this Court. That in itself is a powerful remedy, reflecting the view of the highest appellate court that his challenge was entirely well founded. Such a declaration represents to the world at large an unequivocal vindication of the rights which he complained of. In this respect, and in the circumstances of the case, I agree with the remarks of Laffoy J. at paras. 62-63 of her judgment, to the effect that the declaration was an adequate remedy for the asserted violation of the appellant's constitutional right of access to justice and for any personal humiliation he had experienced in being required to seek leave under that section. Therefore, he has not been without meaningful redress.

81. Finally, could I refer to the discrete ground of appeal containing the assertion that the decision of this Court in *In Re Phillip Clarke* [1950] I.R. 235 violates the Constitution and should be reversed. It must be said that this case and the decision of the court thereon does not arise out of the judgment under appeal, nor is it relevant to the essential issues to be determined by this Court. Accordingly, it would be inappropriate in such circumstances to consider it further.

Conclusion

82. Even had he not been impeded in bringing his action by virtue of the now-invalidated provisions of section 260(1) of the 1945 Act, I am satisfied that Mr. Blehein's case would have failed. His claim for damages for personal injury falls squarely within the existing law of torts, and as such are subject to the relevant limitation periods, which, if occasion permitted, would have been successfully

invoked by the defendants. Any residual claims not involving personal injuries, were adequately remedied by the declaration of invalidity made in respect of section 260(1). Accordingly, I would dismiss the appeal.