**THE SUPREME COURT**

**[Appeal No. 2013/373]**

**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 Gerard Hogan delivered on the 31st day of July 2018**

1. Where the plaintiff has been put to the trouble and expense of seeking the leave of the High Court under s. 260 of the Mental Treatment Act 1945 ("the 1945 Act") in order to bring proceedings for damages following his compulsory detention as a patient under that Act, is he entitled to recover damages for breach of constitutional rights by reason of that trouble and expense to was put to as a result given that the section was subsequently found to be unconstitutional? Or, alternatively, is the fact that the section in question was found to be unconstitutional sufficient in the circumstance to redress the wrongdoing against him of which he complains? These, essentially, are the issues which are presented on this appeal.

2. In 2004 the High Court (Carroll J.) held in proceedings involving this plaintiff, that s. 260 of the 1945 Act was unconstitutional having regard to the provisions of Article 6 and Article 34 of the Constitution: see *Blehein v. Minister for Health and Children* [2004] IEHC 374, [2004] 3 I.R. 610. This decision was affirmed by this Court in 2008: see [2008] IESC 40, [2009] 1 I.R. 275. The issue of damages was ultimately remitted to the High Court where it was dealt with by Laffoy J. in two separate judgments delivered in 2010 and 2013 respectively.

3. In her judgment in the High Court delivered on 26th June 2013, Laffoy J. ultimately found that the finding of constitutional invalidity was sufficient in the circumstances for the purpose of vindicating the plaintiff's constitutional rights. She held that the plaintiff was not entitled to any further redress and, specifically, rejected his claim to be entitled to damages for breach of constitutional rights: see *Blehein v. Minister for Health and Children* [2013] IEHC 319, [2014] 1 I.R. 1. The plaintiff has now appealed against that decision.

**The claims for damages in respect of the detentions under the 1945 Act in 1984, 1987 and 1991**

4. A key part of the plaintiff's case is that following the invalidation of s. 260 of the 1945 Act in 2004 and affirmed in 2008, he is now free, so to speak, to march through the resultant gap in the law and sue the relevant hospitals and medical personnel in respect of his compulsory detention under the 1945 Act without the necessity for any prior leave of the High Court. As those detentions occurred as far back as 1984, 1987 and 1991, Laffoy J. held that the defendants would in all probability have pleaded the Statute of Limitation in order to bar the plaintiff's claim for damages in such circumstances and that such a plead would have been successful.

5. So far as these claims are concerned I agree with the judgment which McKechnie J. has just delivered rejecting this aspect of the plaintiff's appeal. I consider that Laffoy J. was perfectly entitled to find on the evidence that any proposed defendant would have pleaded the Statue of Limitations and, irrespective of how the claim was characterised, that these defendants would in all probability have been successful in raising this plea. It follows, therefore, that any claims made by Mr. Blehein that any loss or damage suffered by him by reason of his detention in 1984, 1987 and 1991 would have been statute-barred and could - and would - have been successfully defeated on that basis. It follows equally that the plaintiff could have had no reasonable expectation of loss in respect of these events and so the question of damages for breach of constitutional rights in respect of these matters simply does not arise.

**The time and expense associated with the applications made under s. 260 of the 1945 Act**

6. There remains the fact that the plaintiff was obliged to go to the trouble and expense of seeking the leave of the High Court to commence s. 260 proceedings when it later transpired that this section was actually unconstitutional. The net issue before this Court is whether Mr. Blehein is entitled to claim damages in respect of this matter. It should first be noted that the present proceedings were commenced in 2002 so that Mr. Blehein's claim for damages is necessarily confined to time and expense he incurred in initiating the s. 260 proceedings which he had been obliged to commence in the six year period prior to 2002, i.e. from 1996 onwards. I do not propose for this purpose to have regard to the s. 260 application which Mr. Blehein made in 1993, since any claim arising from is statute-barred. Like McKechnie J., I agree that an action for breach of constitutional rights is a tort, at least for the purposes of the Statute of Limitations. In any event, that was what this Court decided in *McDonnell v. Ireland* [1998] 1 I.R. 134.

7. There were in fact two s. 260 applications which were made by the plaintiff within the six years prior to the commencement of the present proceedings in 2002, the first being in 1998 and the second in 1999. The 1998 proceedings were ultimately dismissed by this Court: see *Blehein v. Murphy (No. 2)* [2003] I.R. 359. The second set of proceedings seeking leave under s. 260 were commenced in 1999 and culminated in the dismissal of the second set of proceedings by this Court on the 31st May 2002.

**Constitutional torts and the separation of powers**

8. One might approach this question by asking: what wrong has been done by the State to Mr. Blehein? The answer must be that he has been forced to go to the trouble and expense of pursuing (admittedly as a personal litigant) two sets of s. 260 applications on foot of a statutory provision later found to be unconstitutional. As wrongs go, these were, in the circumstances, relatively modest

wrongs, but wrongs they were nevertheless. As this Court found in 2008, the effect of s.260 of the 1945 Act was to impede Mr. Blehein's right of access to the courts in an unconstitutional manner.

9. The plaintiff admittedly cannot sue by reference to the ordinary law of torts. None of the nominate torts - negligence, nuisance etc. - even remotely address the provision of a remedy in this sort of class. This is scarcely surprising since the very idea of fundamental rights in the sense understood by the Constitution and judicial review of legislation in the manner provided for by Article 40.3.2 was entirely foreign to the common law.

10. The present case, accordingly, contains what might be described as a pure *Meskell* style claim for an infringement of a constitutional right, namely the right of access to the courts as guaranteed by Article 34 and protected by Article 40.3.1: see *Meskell v. Coras Iompair Éireann* [1973] I.R. 121. As I say, it is a "pure" *Meskell*-style claim in the sense that the claim is one for a pure infringement of constitutional rights, even though it does not approximate to an existing claim recognised by the common law of torts. In that respect, therefore, it is slightly different from what might be termed a *Hanrahan*-style claim (*Hanrahan v. Merck, Sharpe & Dohme* [1988] I.L.RM. 626) in the context of the existing law of torts. As Henchy J. pointed in that case, in such circumstances where the existing law of torts provides a cause of action, the plaintiff is, broadly speaking, confined to the parameters of the existing law of torts, although it might be different if those torts were shown to be "basically ineffective" to protect the constitutional rights in question.

11. It is, of course, true that, broadly speaking, the courts are confined to applying the corpus of the common law of torts as it existed on the date of the coming into effect of the Constitution on 29th December 1937 and which common law was carried over by Article 50.1 of the Constitution on that day. Article 50.1 did not, of course, have the effect of freezing the common law of torts as they existed on that day in some sort of constitutional permafrost. Nevertheless, any modern development in the common law of torts, must, in general, be shown to amount to an organic, incremental development of the common law of torts which can be legitimately traced to its pre-1937 roots. One might, moreover, observe that one effect of Article 50.1 is that the courts have no jurisdiction to create any new common law torts: see, *e.g.*, *Healy v. Stepstone Finance Ltd.* [2014] IEHC 110.

12. This judicial reticence with regard to the development of the common law beyond the contours of 1937 is reflected in a series of recent judgments of this Court . As Clarke J. said in *R. v. An tArd Chláraitheoir* [2014] IESC 60, [2014] 3 I.R. 533, 675:

> "However, it is clear that the role of the courts in that process, while important, is limited. Short of the existing law being found to be in breach of the Constitution, the only proper role of the courts is to play their appropriate part in the evolution of the common law in its application to new conditions and circumstances or to interpret legislation. Even where it is clear that the existing law is no longer fit for purpose it may well be that the only solution lies in legislation. This will particularly be so where any solution to identified problems requires significant policy choices and detailed provisions beyond the scope of the legitimate role of the courts."

13. Clarke J. further stated in *H. v. H.* [2015] IESC 7 in relation to the issue of the further development of the common law (on this occasion in respect of the law relating to the recognition of foreign divorces as it existed prior to the Domicile and Recognition of Foreign Divorces Act 1986):

> "Much of the reticence which has been expressed in this jurisdiction concerning the over-ambitious change of the common law by judicial decision has been placed in the context of a desire not to overstep the separation of powers by permitting the courts to slip into what might properly be regarded as the constitutional legislative function of the Oireachtas….."

14. The question presented here is, however, rather a different one, namely, whether the State has adequately vindicated the plaintiff's constitutional rights by redressing the infringement of those rights in the manner required by Article 40.3.1 and Article 40.3.2. As I have pointed out, this is a pure *Meskell* claim rather than what one might term a *Hanrahan* style claim. More fundamentally, the separation of powers concerns identified by this Court in *R.* and *H.* arising from the combined impact of Article 15.2.1 and Article 50.1 - which serve to prevent the courts effecting broad and radical changes to the pre-1937 common law, this being a task reserved to the Oireachtas by Article 15.2.1 – do not apply to case such as the present one because the fundamental issue is whether the State has discharged its obligations under Article 40.3.1 and provided this plaintiff with an effective remedy.

15. While the *Meskell* doctrine must be applied cautiously and confined to clear cases of constitutional infringement for which there is no other adequate remedy, it is not in its proper exercise an infringement of the separation of powers. I say that because not only does *Meskell* represent binding authority of long standing, but also because it is intimately bound up with the obligation imposed on the State – including its judicial arm - by Article 40.3.1 to defend and vindicate constitutional rights and to provide an effective remedy in the case of infringement. Simply put, the courts are not infringing the separation of powers when they supply the remedy which another provision of the Constitution requires them to provide.

16. In this respect the *Meskell* doctrine simply pre-figures developments in other comparable jurisdictions with constitutional systems providing for higher norms and judicial review, of which the subsequent development by the Court of Justice of the European Union of a remedy in damages for infringement of European Union law independently of national systems of torts and delictual wrongs in cases such as Joined Cases C-9/90 and C-9/90 *Francovich* [1991] E.C.R. I-5357 and Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur* [1996] E.C.R. I-1029 is simply the most obvious example.

**The plaintiff's *Meskell*-claim**

17. Turning now to the present appeal, there are, admittedly, no earlier cases which are directly on point. But two decisions of Mr. Justice Finlay are, I think, helpful. In *Heneghan v. Allied Irish Banks*, (High Court, 19th October, 1984), Finlay P. modified an old common law rule which precluded a personal litigant from recovering the cost of his travelling expenses to and from court. He said that there was "a patent illogicality and injustice" in such a rule, and that, in order to give effect to the constitutional right of access to the courts, "the order for costs, when made within the discretion of the court should include properly incurred and vouched travelling expenses for the purpose of presenting the case".

18. The second example is, perhaps, even closer to the present one. In *McHugh v. Garda Commissioners* [1986] I.R. 116 Finlay C.J. held that the protection afforded of the property rights by Article 40.3.2 require that the State compensate him in respect of legal costs which he incurred as a result of a Garda disciplinary enquiry which, it subsequently transpired, was invalid. On this point the Chief Justice stated ([1986] I.R. 228, 233):

> "It is clear that there is no provision in the [Garda Síochána (Discipline)] Regulations of 1971 for the payment of the costs of a member of the Garda Síochána into whose conduct a sworn inquiry is being held. However that does not appear to

me to be relevant to the issue now, because, if a further inquiry is ordered, then the plaintiff would find himself necessarily obliged to be represented at that inquiry also and would be in the uniquely disadvantageous position of a member of the Garda Síochána whose disciplinary conduct is being investigated and who is put to the expense of two separate full inquiries in order to defend himself.

Counsel on behalf of the plaintiff submitted that the claim for the costs incurred by the plaintiff in regard to the avoided inquiry was covered by the decision of this Court in *Byrne v. Ireland* [1972] I.R. 241. In particular, reliance was placed on the portion of the judgment of Walsh J. in that case, in which it was stated, at p. 279, that where constitutional obligations were placed upon the State, breach of them or a failure to honour them on the part of the State would clearly have been a wrong which was the subject matter of remedy in the courts; it being of no consequence that the wrong or breach might not be within the recognised fields of wrongs in the law of tort.

I am satisfied that the second defendant and, vicariously, Ireland, owed a duty to the plaintiff in protection of his property rights, not to initiate an inquiry which might result in being a nullity and put him to entirely unnecessary expense. In the alternative, if they decided for good reason to initiate such an inquiry, they owed an obligation to recoup to him the expense to which he was unnecessarily put. On this basis I am satisfied that the plaintiff is, under this heading of his claim, entitled to the costs and expenses of his representation and attendance at the inquiry in 1979."

19. In *McHugh*, therefore, the plaintiff was compensated for the cost and expense associated with the holding of a statutory disciplinary inquiry which turned out to be a nullity. *Heneghan* is significant in that it shows that the compensation of a personal litigant for the cost of travelling to court as part of a successful costs award is a dimension of safeguarding the constitutional right of access to those courts and *McHugh* shows that a plaintiff must be compensated for the cost of going through a statutory procedure which later transpires to be a nullity.

20. It is true, of course, that the decision in McHugh refers to legal costs only, because the plaintiff in that case was legally represented. But Mr. Blehein was a litigant in person who presumably incurred the costs and expenses in pursuing these two s. 260 applications and wasted some time and money in the process. In that respect, therefore, I find that the analogy between *McHugh* and the present case is a rather complete one.

**Conclusions**

21. Mr. Blehein has admittedly not quantified or vouched these particular claims. For my part, however, I would nonetheless award him a relatively modest sum on an *ex aequo et bono* basis in respect of the time and expense which he was obliged to incur in pursuing the two s. 260 applications in what turned out ultimately to have been a legal nullity and unnecessary. Contrary to what Laffoy J. suggested in the High Court, I think it is necessary to go slightly further and to make this award in order more fully to vindicate the infringement of Mr. Blehein's rights by this section in the manner required by Article 40.3.1 of the Constitution. I would accordingly allow the appeal in that one minor respect only and award Mr. Blehein €500 in respect of each of the two s. 260 applications which he was required to make pursuant to the unconstitutional legislation in question, making a total sum of €1,000.

22. I would otherwise affirm the decision of Laffoy J. in the High Court and dismiss the appeal.