

THE HIGH COURT

[2022] IEHC 210

[Record No. 2014/10869 P]

BETWEEN

CHRISTOPHER MCGEE

PLAINTIFF

AND

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

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 6th day of April, 2022.

Introduction.

1. The plaintiff was an inmate in Portlaoise Prison from 2000 to 2004. During that time he was detained in a single cell. He was required to engage in the practice of "slopping out", whereby he had to use a bucket with a specially designed lid, for toileting purposes. He was required to empty and wash the bucket at various intervals during the day.
2. On 14th November, 2019, the Supreme Court gave judgment in *Simpson v. Governor of Mountjoy Prison* [2019] IESC 81, which held that the practice of "slopping out" was a breach of a prisoner's rights under Art. 40.3 of the Constitution.
3. On 22nd December, 2014, the plaintiff instituted the present proceedings by issuance of a plenary summons. On 10th August, 2020, the plaintiff served a statement of claim in which he sought damages, including aggravated and exemplary damages, for breach of his constitutional rights.
4. On 19th March, 2021, the defendants filed their defence, in which they pleaded, *inter alia*, that the plaintiff's action against them was statute barred having regard to the provisions of s.11(2) of the Statute of Limitations, 1957.
5. In his reply to defence, the plaintiff pleaded as follows: -

"In respect of the plea that the action is barred by the statute of limitations, the plaintiff's claim arises under the Constitution and is not a claim in tort and it is in the circumstances not barred by s.11(2) of the statute of limitations, or subject to any limitation period provided for in that statute."

6. The issue before this Court concerned the trial of a preliminary issue as to whether the plaintiff's action against the defendants is barred pursuant to the provisions of s.11(2) of the Statute of Limitations 1957, as amended.

Statutory Provisions.

7. The relevant provisions in s. 11 of the Statute of Limitations 1957, as amended, are as follows:

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

Submissions of the parties.

8. The defendants were the moving party on this application. Mr. Farrell SC submitted that s.11(2) of the Statute of Limitations 1957, applied a time limit of six years for actions "founded on tort". While the breach of the right to bodily integrity and the right to be treated with dignity, as established in the *Simpson* case, concerned what might be termed a "constitutional tort", it was submitted that case law prior to that time and the *Simpson* decision itself, made it clear that such causes of action come within the normal rules relating to actions "founded on tort": see *McDonnell v. Ireland* [1998] 1 IR 134; *Blehein v. Minister for Health and Children* [2014] 2 IR 38.
9. Insofar as the plaintiff sought to argue that those cases and the *Simpson* case, only apply to cases where a "constitutional tort" could be mapped onto an existing tort at common law, and that the dicta therein did not apply to what might be termed a "pure constitutional tort", being causes of action that were recognised in respect of breaches of rights guaranteed under the Constitution, which were not mirrored in existing torts at common law; it was submitted that that argument had been explicitly rejected by the Court of Appeal in *Savickis v. Governor of Castlerea Prison* [2016] 3 IR 292. In this regard, counsel referred to dicta in the judgment of Hogan J. at p.305/306, which established that for the purposes of the third schedule to the Courts (Supplemental Provisions) Act 1961, actions that came within the description of being "pure constitutional torts" were actions "founded on tort" as provided for in that statutory provision.
10. It was further submitted that insofar as the plaintiff had referred to Art. 3 of the European Convention on Human Rights, as providing an absolute prohibition on inhuman and degrading treatment, that was not relevant, as it ignored the fact that people had a right of action under the European Convention on Human Rights Act 2003 to seek a declaration of incompatibility of a measure, or practice, with the provisions of the Convention, but that right of action was subject to a time limitation, insofar as persons affected could seek a declaration of incompatibility under s.5 of the Act. In addition, they could bring an action before the European Court of Human Rights in respect of an alleged breach of their rights under the Convention, once they had exhausted all their domestic remedies. However, that right was subject to a limitation, in that they had to institute their proceedings before the European Court of Human Rights within six months of obtaining a decision from the final domestic court.
11. It was submitted that what the plaintiff was attempting to do, was to put himself in a position that no other plaintiff could hope to attain, being in the position of being able to bring his action without any limitation at all as to a time limit. It was submitted that that was not warranted under the correct interpretation of s.11(2) of the 1957 Act. It was submitted that the 1957 Act referred, not to particular torts, but to causes of action in a generic way. In sub-s.(1) it referred to actions founded on "simple contract" and "quasi-contract", neither of which were specific terms of art or law, but were general descriptive terms of the type of action that was regulated by the statute. It was submitted that on the basis of the decisions mentioned above and in particular, on the basis of the *Savickis*

decision, the plaintiff's action was one "founded on tort" and therefore came within the statute. That being the case, the plaintiff's action against the defendants was clearly statute barred.

12. On behalf of the plaintiff, Mr. Dermot Sheehan BL submitted that, while there were dicta in the cases mentioned that "constitutional torts", which had the indicia of torts, were subject to the normal defences and limitations on such causes of action; where one was dealing with a "pure constitutional tort", meaning one that recognised rights that were solely guaranteed under the Constitution, rather than being mirrored in rights that were protected under the law of tort at common law, it could not be argued that such causes of action were actions "founded on tort". Therefore, they did not come within the provisions of s.11(2) of the 1957 Act.
13. It was submitted that as the plaintiff's action was based on the right to dignity, respect for his private life and the right not to be subjected to inhuman and degrading treatment, as guaranteed in Art. 40.3 of the Constitution and as recognised in the *Simpson* case, his cause of action was one for damages for a "pure constitutional tort".
14. Counsel submitted that that did not mean that people whose rights under the Constitution had been breached were completely at large in relation to when such actions could be brought. It simply meant that the limitation period was not that imposed by s.11(2) of the 1957 Act.
15. It was submitted that a claim made along the lines of that which had been made in the *Simpson* case, was not a tort, nor did it have the indicia of a tort. That had been stated by the Supreme Court when it recognised this particular cause of action. This was due to the nature of the claim under the Constitution, being in respect of the State's absolute duty to prevent torture or inhuman treatment. It was submitted that it was not equivalent to a tort, nor did it give rise to a concurrent tort claim. Therefore, it was not subject to the limitation period in s.11(2) of the 1957 Act. The *McDonnell* case and previous cases in respect of the application of the Statute of Limitations to constitutional claims, arose in situations that were also concurrent torts. The legal system, in giving a remedy in the circumstances, was entitled to impose a limitation on the remedy.
16. It was submitted that a *Simpson* claim was an exclusive constitutional cause of action. If it was to be subject to any judicial limitation, that ought to be under the delay and laches doctrine, rather than by the application of the Statute of Limitations. In this regard, counsel noted that a number of actions in equity, such as an action for specific performance of a contract, were not subject to limitation periods under the 1957 Act; rather their exercise was regulated by the judicial application of the doctrine of laches and acquiescence.
17. It was submitted that, as the plaintiff's constitutional rights here were alleged to have been breached by the practice of "slopping out", but the plaintiff had not suffered personal injuries as such, the court was entitled to have regard to the absolute nature of the prohibition on inhuman and degrading treatment as contained in Art. 3 of the

European Convention on Human Rights, which was reflected in the rights guaranteed under Art. 40.3 of the Constitution. Where it had been held in the *Simpson* case that such rights had been breached by the practice of "slopping out", this meant that it was correct to say that such cause of action was not one founded on tort, but was a pure constitutional tort, not within the provisions of the 1957 Act.

Conclusions.

18. The issue of actions for breach of a person's constitutional rights and their relationship to the law of torts at common law, has been recognised in a number of cases. In *McDonnell v. Ireland*, a man who had been employed in the postal service, had been convicted by the Special Criminal Court of membership of a proscribed organisation on 30th May, 1974. Pursuant to s.34 of the Offences Against the State Act, 1939, he automatically forfeited his position of employment upon being convicted of that offence. On his release, he applied in March 1975 for reinstatement, but was refused. A further request made in 1984, was also refused. In July 1991, the Supreme Court held in *Cox v. Ireland* [1992] 2 IR 503, that s.34 of the 1939 Act, was unconstitutional.
19. On 1st October, 1991, the plaintiff instituted proceedings seeking damages against the defendants for breach of his constitutional rights in relation to the loss of his position of employment. The issue before the court was whether his action was statute barred. In holding that the action was statute barred, Barrington J. stated as follows in relation to what may be termed constitutional torts, at p.148: -

"There is no doubt that constitutional rights do not need recognition by the legislature or by common law to be effective. If necessary the courts will define them and fashion a remedy for their breach. There may also be cases where the fact that a tort is also a breach of a constitutional right may be a reason for awarding exemplary or punitive damages.

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. Thus the Constitution guarantees the citizen's right to his or her good name but the cause of action to defend his or her good name is the action for defamation. The injured party, it appears to me, has to accept the action for defamation with all its incidents including the time limit within which the action must be commenced. Likewise the victim of careless driving has the action for negligence by means of which to vindicate his rights. But he must, generally, commence his action within three years. He cannot wait longer and then bring an action for breach of his constitutional right to bodily integrity."

20. In his judgment in the *McDonnell* case, Keane J. (as he then was) made a number of observations that are of relevance to the present proceedings. He began by noting that there was no reason why the Statute of Limitations 1957, could not encompass new forms of tort action. He stated as follows at p.157: -

"The dynamic nature of the tort action was well understood when the Act of 1957 was enacted. It had been graphically illustrated by the manner in which the action for negligence outgrew the medieval constraints of the action for "trespass on the case". The law had seen new species of tortious principles, such as the rule in Rylands v. Fletcher (1868) 2 H.L. 330, impose novel forms of liability on defendants. I see no reason to suppose that the Oireachtas legislated in 1957 on the basis that the law of tort was at that stage petrified for all time. It may be, however, - and surmise on the topic would be both unjustifiable and unprofitable - that the draughtsman did not envisage the extent to which the developing constitutional jurisprudence of the High Court and the Supreme Court in later decades would powerfully reinforce the progressive development of the law of civil wrongs."

21. Keane J. went on to note that the action before the court would seem to be appropriately described as an action in tort and bearing in mind that major legislative interventions such as the Civil Liability Act 1961 apart, the law of torts – including the categorisation by name of specific forms of wrongdoing as torts – had been evolved by the courts, there was no obstacle to an action for damages for breach of a constitutional right being identified as such.
22. Keane J. went on to note the dicta of Walsh J. in *Meskeil v. Córas Iompair Éireann* [1973] IR 121, which recognised that a right guaranteed by the Constitution, or granted by the Constitution, could 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 carried within it its own right to a remedy, or for the enforcement of it. He was of the view that that passage was perfectly consistent with the constitutional right being protected by a new form of action in tort, provided, the form of action thus fashioned, sufficiently protected the constitutional right in question. He went on to make the following observation in relation to what might be termed new forms of tort:

"There is nothing in that passage to suggest that where a plaintiff is obliged to have recourse to an action for breach of a constitutional right, because the existing corpus of tort law affords him no remedy, or an inadequate remedy, that action cannot in turn be described as an action in tort, albeit a tort not hitherto recognised by the law, within the meaning of, and for the purpose of, the Act of 1957."

23. Keane J. went on to deal specifically with the issue of a defence that may be raised under the Statute of Limitations. He stated as follows at p.159: -

"Whatever may be the position in regard to other possible defences, no one has been able to identify in this case any ground for supposing that an action for breach of a constitutional right which has all the indicia of an action in tort should have a different limitation period from that applicable to actions in tort generally, or indeed no limitation period at all, other than its origin in the Constitution itself, which is a classically circular argument. Nor could it be seriously argued that the fact that the

action for breach of a constitutional right frequently takes the form of proceedings against organs of the State is of itself a reason for treating a limitation statute as inapplicable. Even if it were, it is to be borne in mind that, as is made clear by Meskell v. Coras Iompair Éireann [1973] I.R. 121, the defendant in such actions need not necessarily be an organ of the State."

24. Having referred to the policy considerations which underlie statutes of limitations such as the Act of 1957, as had been comprehensively stated by Finlay C.J. in *Touhy v. Courtney* [1994] 3 IR 1, Keane J. gave the following colourful explanation as to why the argument that constitutional torts did not come within the provisions of the Statute of Limitations, was untenable:

"I can see no reason why an actress sunbathing in her back garden whose privacy is intruded upon by a long-range camera should defer proceedings until her old age to provide herself with a nest egg, while a young man or woman rendered a paraplegic by a drunken motorist must be cut off from suing after three years. The policy considerations identified by the learned Chief Justice in the passage which I have cited are applicable to actions such as the present as much as to actions founded on tort in the conventional sense."

25. In *Blehein v. Minister for Health and Children*, Laffoy J. looked at the case law on the issue of time limitation on actions for breach of constitutional rights at para. 35 *et seq.* She went on at para. 44 to consider the nature of a defence that a claim is statute barred. She noted that in *Touhy v. Courtney*, Finlay C.J. had quoted a passage from the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] IR 151, wherein he had noted that although the statute says that the action "*shall not be brought*" after the statutory period, such prohibition in a statute of limitations had been construed, not as barring a right to sue, but as vesting in a defendant a right to elect, by pleading the statute, to defeat the remedy sought by the plaintiff. She went on to deal with the assertion made by the plaintiff in that case that, as his claim related to a breach of constitutional rights, he was not subject to the Statute of Limitations, in the following way at para. 60: -

"The response of the plaintiff in his reply was that personal rights guaranteed to him by the Constitution are not subject to, nor amenable to, valid limitation by statute. Having regard to the current jurisprudence of the Superior Courts, which I have outlined earlier, that contention does not stand up to scrutiny."

26. In *Simpson v. Governor of Mountjoy Prison*, which established that there had been a breach of the plaintiff's rights in circumstances similar to those pertaining to the plaintiff in this case, MacMenamin J. stated as follows at paras. 121 and 122: -

"121. It will be borne in mind that the courts have repeatedly emphasised that resort to constitutional remedies should take place only where strictly necessary. As Barrington J. pointed out in McDonnell v. Ireland [1998] 1 I.R. 134, at p. 138, only if necessary will the courts define a right and fashion a remedy for a breach of the Constitution. There may be cases where the fact that a tort is also the violation of a

constitutional right may give rise to an award for exemplary or punitive damages. But, as Barrington J. warned, constitutional rights should not be seen as "wild cards" to be played at any time to defeat all existing rules (p. 148). If the general law provides an adequate cause of action to vindicate a constitutional right, an injured party cannot ask a court to devise a new and different cause of action. So, too, with remedy. I believe there is much substance in Keane J.'s observations in McDonnell that, insofar as practicable, constitutional remedies are to be seen as the vindication of a wrong and therefore subject to the necessary limitations which apply within the constraints of tort law and civil liability (pp. 157-159).

122. But here, the fact that it is not possible to identify the situation which evolved with any nominate tort does not prevent a remedy in damages."

27. MacMenamin J. went on at para. 129, to note that the infringement of rights in that case was not susceptible to identification with any nominate tort. However, as the Constitution itself provided, that fact did not prevent a court from granting a suitable remedy where the evidence showed that there was a violation of a person's rights under, and values contained in, or derived from, Art. 40.3 of the Constitution. He stated that the approach adopted in his judgment therefore sought, insofar as practicable, to adhere to principles applicable in tort law, albeit in circumstances where the infringement in question was not easy to classify as a tort. He stated that the award should be categorised as compensatory damages.
28. Counsel for the plaintiff sought to distance the plaintiff in this case from the dicta in the cases cited above, by pointing to the fact that the rights recognised in *Simpson*, were not only rights guaranteed under Article 40.3 of the Constitution, but those rights stemmed from, or were mirrored in the absolute prohibition on inhuman and degrading treatment, contained in Art. 3 of the European Convention on Human Rights. He argued that the court should have regard to the fact that the rights recognised in the *Simpson* case and the breach of those rights, constituted a "pure constitutional tort" in that they were not mirrored in any of the normal torts recognised at common law. On this basis, he submitted that the cause of action did not come within the statutory limitation period.
29. In relation to the first part of this submission, to the effect that Art. 3 of the ECHR was engaged, that was dealt with in the *Simpson* case, where it was held that while the rights enshrined in Art. 3 did not give rise to a cause of action, they could inform the interpretation of rights guaranteed under Art. 40.3 of the Constitution and were relevant to the issue of whether those rights had been infringed by the practice in question. However, MacMenamin J. rejected any attempt to give direct application to Art. 3 of the Convention in Irish law. He stated as follows at para. 74: -

"The appellant's case ultimately rests on this "overlap" or mingling of constitutional and ECtHR jurisprudence. It derives from what can only be described as a "category error", and is contra-textual. It effectively seeks to give direct application of Article 3 of the ECHR in Irish law as constituting elements of a tort claim sounding in damages. This is constitutionally impermissible."

30. As regards the second limb of the submission, to the effect that “pure constitutional torts” are outside the ambit of the phrase “founded on tort”; that argument was rejected in the concurring judgment of Hogan J. in the *Savickis* case. That case concerned an issue in relation to what costs were appropriate to be awarded following the trial of an assault action before a jury in the High Court, which had only given rise to damages on appeal of less than €19,000. One of the questions which arose for determination, was whether the Circuit Court had jurisdiction in the matter. In this regard, the third schedule to the Courts (Supplemental Provisions) Act 1961 provided at section six thereof, that the Circuit Court had jurisdiction, subject to appropriate geographical and monetary limits, in respect of “an action (other than an action for wrongful detention or matrimonial proceedings) founded on tort”.
31. In his concurring judgment, Hogan J. stated that it was clear from the decision of the Supreme Court in *McDonnell v. Ireland* that an action for damages for breach of constitutional rights, was also a tort for the purposes of the relevant provisions of the Statute of Limitations 1957. He noted that Barrington and Keane JJ. had acknowledged in powerfully argued judgments, that the fact that the traditional common law causes of action often overlap with corresponding actions for breaches of constitutional rights, did not mean that the latter were not also actions in tort, at least for certain statutory purposes.
32. Hogan J. went on to deal with the issue as to whether actions that were for “pure constitutional torts” could be seen as being “founded on tort” in the following way at para. 41: -
- “But even if the plaintiff had succeeded in recovering damages for what might be termed a ‘pure’ breach of constitutional rights (i.e., independently of any action for a common law tort) – such as occurred in recent cases such as *Herrity v. Associated Newspapers Ltd.* [2008] IEHC 249, [2009] 1 I.R. 326 (constitutional right to privacy) and *Sullivan v. Boylan (No.2)* [2013] IEHC 104, [2013] 1 I.R. 510 (violation of Article 40.5 and the protection of the dwelling) – this would still have been an action in tort for the purposes of the Third Schedule of the 1961 Act in the sense that I have just described.”*
33. Based on the authorities cited above, the court holds that insofar as the plaintiff’s action herein is for breach of his constitutional rights under Art. 40.3 of the Constitution, by virtue of the fact that he had to engage in the practice of “slopping out” while incarcerated in Portlaoise Prison between 2000 and 2004, that is an action for damages “founded on tort”. As such, it comes within the provisions of s.11(2) of the Statute of Limitations, 1957.
34. As the plaintiff knew that he had engaged in the particular practice while in prison between 2000 and 2004, and in view of the fact that he was not under a disability, or otherwise prevented from pursuing his cause of action in respect of that practice, the court finds that the plaintiff’s cause of action against the defendants became barred as and from sometime in 2010. As the plaintiff’s plenary summons issued on 22nd

December, 2014, the court finds that the plaintiff's action herein is statute barred as against the defendants, having regard to the provisions of s.11(2) of the 1957 Act.

35. It is proposed that the final order of the court shall be to dismiss the plaintiff's action against the defendants.
36. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.