Neutral Citation Number: [2010] IEHC 329

THE HIGH COURT

2002 9652 P

BETWEEN

LOUIS BLEHEIN

PLAINTIFF

AND

THE MINISTER FOR HEALTH AND CHILDREN, IRELAND

AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Ms. Justice Mary Laffoy delivered on the 24th day of August, 2010

1. The proceedings, the procedural history and the issue before the court

1.1 The primary relief claimed by the plaintiff in these proceedings, which were initiated by plenary summons which issued on 11th July, 2002, was a declaration that s. 260 of the Mental Treatment Act 1945 (the Act of 1945), as amended, was invalid, having regard to the provisions of the Constitution. The proceedings came on for hearing in this court before Carroll J. in October 2004. Judgment was delivered on 7th December, 2004. The judgment is reported at [2004] 3 I.R. 610. The Court found that s. 260 was unconstitutional, having regard to Article 6 and Article 34 of the Constitution. That finding was reflected in the order of the Court, as perfected, which also ordered that the plaintiff recover costs against the defendant. The defendants accept that no further order was made in the High Court in the proceedings and no further appropriate remedy was considered by the High Court, it having been agreed between the parties that all matters, other than the issue of the alleged invalidity of s. 260, should be left over.

1.2 The defendants appealed the decision of the High Court to the Supreme Court. The judgment of the Supreme Court was delivered on 10th July, 2008 by Denham J. It is reported at [2009] 1 I.R. 275. The appeal was dismissed and the order of the High Court was affirmed. However, Denham J. clarified the effect of the decision of the Supreme Court (at p. 281) as follows:

> "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 order of the Supreme Court, as perfected, dismissed the appeal and affirmed the order of the High Court. It also ordered that the plaintiff recover his costs against the defendants.

1.3 In the judgment of the Supreme Court, Denham J. pointed out (at p. 278) that the Act of 1945 had been repealed by the Mental Health Act 2001 (the Act of 2001). Section 73 of the Act of 2001, the text of which is set out at the end of the report (at p. 282), replaced s. 260. As Denham J. pointed out, s. 73 came into force on 1st November, 2006. However, she commented as follows:

> "Thus 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."

While the issue of the plaintiff's entitlement to damages if the impugned provision was constitutionally invalid was not before the Supreme Court, this Court must take cognisance of that comment.

1.4 Following the decision of the Supreme Court, the plaintiff brought a motion before this Court seeking to have the proceedings re-entered in this Court for the purposes of hearing his outstanding claims therein. By order made on 17th November, 2008, with the consent of the defendants, the proceedings were re-entered and were subsequently listed for hearing on 27th March, 2009.

1.5 When the matter came on for hearing on 27th March, 2009, the plaintiff appeared in person. When he was opening his case, counsel for the defendants intervened and stated that there was a fundamental issue in the case as to what relief or remedy, if any, flows from the decision of the Supreme Court, indicating that it would be the defendants' submission that the Court has no jurisdiction to award damages on the basis of the decision of the Supreme Court that the procedural limitation contained in s. 260(1) was unconstitutional. Counsel for the defendants submitted that the issue as to whether the Court has jurisdiction to entertain the claim for damages should be determined first. In fact, the defendants had furnished comprehensive written submissions to the plaintiff on the previous day. In the written submissions, the issue, which it was submitted should be determined by the Court before the matter should proceed further, was formulated as follows:

> What relief or remedy (if any), as a matter of law, flows from the decision of the Supreme Court, *i.e.* whether or not, and to what extent, the declaration as to the invalidity of s. 260(1) gives rise to any further remedy and, if so, the nature of such remedy.

The answer which counsel for the defendants suggested was the correct answer at the end of their comprehensive written submissions was that there is no basis in law for an award of damages following the declaration of the invalidity of s. 260.

1.6 Given that the plaintiff had not had an opportunity to consider the defendants' contention that he did not have an entitlement to

damages, with the consent of the defendants, the matter was adjourned to enable the plaintiff to consider the position. However, the Court raised with counsel for the defendants the appropriateness of arguing such a fundamental point of constitutional law in proceedings in which the proponent was a lay litigant. Arising out of those comments, the defendants suggested to the plaintiff that he should apply for legal aid and that he should revert to the defendants if there were any problems in that regard. However, when the matter was next before the Court, the plaintiff made it clear that he did not want legal representation and that he would represent himself.

1.7 The matter came on for hearing again on 26th June, 2009, when the plaintiff again appeared in person. Initially, the plaintiff contended that the defendants, in applying to have the issue heard as a preliminary issue were out of order, his contention being that the defendants should have pleaded the point as a matter of defence and then should have invoked order 25 of the Rules of the Superior Courts to have a preliminary issue tried. Notwithstanding that, after certain interaction between the parties and the Court, the plaintiff agreed to the issue raised by the defendants being determined by the Court first. Following that, counsel for the defendants, whom it was agreed would make his submissions first, made his submissions on the issue and the plaintiff followed with his submissions. However, as a result of that process, it became clear that the issue was being argued on the basis of legal submissions which were not being given a factual matrix. The absence of an agreed or an established factual basis has blighted the various steps taken in these proceedings and in other proceedings instituted by the plaintiff arising out of the same incidents as have given rise to these proceedings. In the judgment of the Supreme Court, Denham J. stated (at p. 280):

> "Unfortunately, because of the history of serial proceedings by the plaintiff, this constitutional issue has been separated from findings of fact. Determinations of constitutionality of legislation are best made on a bed of fact. However, special circumstances have given rise to these proceedings, as referred to earlier in the judgment."

1.8 In any event, in consequence of the Court's intervention, the matter was again adjourned to give the parties an opportunity to see whether they could put before the Court an agreed statement of facts relevant to the issues in these proceedings.

1.9 The parties did not agree a statement of facts. The plaintiff submitted a statement of facts dated 6th July, 2009 to the Chief State Solicitor, who prepared a statement dated 27th August, 2009, which set out the facts which the defendants were prepared to agree "for the purpose of preliminary issues of law" in these proceedings. The matter was listed for further argument on 30th October, 2009. While the plaintiff agreed the facts as set out in the defendants' statement of facts, his position was that the Court should rule on the preliminary issue on the basis of a more expansive statement of facts presented by him. The Court ruled that the facts, as set out in the defendants' statement, were the only facts which were necessary as a foundation for the Court dealing with the preliminary issue. On that basis, the matter was adjourned for further argument until 17th December, 2009.

1.10 On 17th December, 2009, final submissions were heard from the parties on the issue.

1.11 For completeness I record that, prior to the initiation of these proceedings on 11th July, 2002, the plaintiff had, in 1995, initiated separate proceedings against the defendants in these proceedings [1995 No. 8934P], in which the primary relief sought was a declaration that s. 185 and s. 186 of the Act of 1945 were invalid having regard to the provisions of the Constitution and in which the plaintiff also sought damages for personal injury. The history of those proceedings is set out in a judgment delivered on 16th March, 2009, under Neutral Citation [2009] IEHC 182 on an application by the plaintiff to re-enter those proceedings on foot of a notice of motion of 21st July, 2005, the proceedings having been struck out on 18th March, 1999, when there was no appearance by the plaintiff when a list of uncertified cases was called over by the Court. The application to re-enter was refused and that decision is subject to an appeal to the Supreme Court [2009 No. 154]. In my judgment of 16th March, 2009, I found that the plaintiff had not been precluded by s. 260 from prosecuting the 1995 proceedings.

2. The pleadings

2.1 In his statement of claim, the plaintiff alleged that the defendants had failed, by law, to protect from unjust attack, as best they might, his personal rights, including, *inter alia*, his right to access to justice. In particularising his allegation, he alleged that the defendants were in breach of Article 40 of the Constitution. In the prayer for relief in the statement of claim, he sought declarations that the defendants had failed, by law, to respect his personal rights guaranteed to him by the Constitution, including his right of access to justice, in breach of Article 40.3 of the Constitution. The plaintiff's claim for damages was formulated as damages "for infringement of constitutional rights, for personal injury, loss and damage". In his statement of claim he has alleged that he was involuntarily treated with neuroleptic/psychotropic drugs contrary to his express wishes and has set out what he alleges were the adverse effects of the drugs on him.

2.2 The main thrust of the defence delivered by the defendants was to uphold the validity of section 260, which was dealt with in the first round of the proceedings. However, the defendants denied that they had acted in breach of the plaintiff's constitutional rights. They also denied that he sustained the personal injury, loss or damage he alleged and, in the alternative, they pleaded that his claim for damages for personal injury, loss or damage was statute-barred.

3. Statement of facts

3.1 The defendants' statement of facts is prefaced with the statement that "the defendants are strangers to the allegations made by the plaintiff in relation to the incidents and occurrences" and, as I have already indicated, they agreed the facts set out "for the purpose of preliminary issues of law". The facts and events summarised in the statement fall under two broad headings.

3.2 The first relates to the factual foundation of the plaintiff's complaints in all of the process initiated by him and sets out the three occasions on which the plaintiff was "escorted" by the Gardaí to St. John of God Hospital in Dublin, and detained there. The periods of detention were from 25th February, 1984, to 16th May, 1984, from 29th January, 1987 to 16th April, 1987, and from 17th January, 1991 to 7th February, 1991. While I understand why the defendants' legal advisors have been cautious in the terminology which they have used in the statement, the whole basis of the variety of claims which the plaintiff has made in the proceedings since 1995, is that his admissions to, and detention in, St. John of God Hospital were involuntary. The statement also records that, during two of his periods in St. John of God Hospital, the plaintiff was treated with drugs and medications. The plaintiff's case is that he was improperly treated, in consequence of which he suffered personal injuries. As regards the first heading, therefore, what is relevant is that the plaintiff has had three "escorted" transportations and admissions to, and periods of detention in, St. John of God Hospital, which I assume the Court is entitled to infer, as he contends, were involuntary.

3.3 In between the facts and events which I have classified under two headings there is recorded the fact that on 5th December, 1994 the plaintiff complained to the local Garda Superintendent about the incidents recorded above and about his treatment.

3.4 The events set out under the second heading are the various applications which the plaintiff made to the High Court to seek redress in relation to his transportation and admission to, and his periods of detention, in St. John of God Hospital, and his treatment while there, which were unsuccessful. The applications may be summarised as follows:

> (a) An application made on 4th November, 1996, for leave to apply for *certiorari* by way of application for judicial review, which application was refused by the High Court. An appeal against the refusal was dismissed by the Supreme Court.
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> (b) Plenary proceedings between the plaintiff and St. John of God Hospital [1997 No. 8982 P] (the 1997 proceedings), which proceedings were struck out in the High Court (Kelly J.) on 3rd November, 1997, by reason of the fact that leave pursuant to s. 260 had not been obtained by the plaintiff. The decision of the High Court was upheld by the Supreme Court on appeal [1997 No. 353].
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> (c) An application made on 2nd (8th?) July, 1999 under s. 260 for leave to issue proceedings against six named defendants [1998 No. 24 IA] (the 1998 proceedings), two medical practitioners, the plaintiff's wife and three members of An Garda Síochána, which application was refused in the High Court (Geoghegan J.) The refusal was upheld on appeal to the Supreme Court [Appeal No. 153 of 1999]. The decision of the Supreme Court is reported as *Blehein v. Murphy (No. 2)* [2000] 3 I.R. 359. The decision of the Supreme Court on an application, which was refused, to amend the notice of appeal to include a new ground of appeal challenging the validity of s. 260 is reported as *Blehein v. Murphy* [2000] 2 I.R. 231.
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> (d) An application made on 6th July, 2000 under s. 260 for leave to issue proceedings against St. John of God Hospital [Record No. 1999 No. 73 IA] (the 1999 proceedings), which was refused by the High Court (O'Sullivan J.). The refusal was upheld in the Supreme Court on 31st May, 2002. As is pointed out in the decision of the Supreme Court in this case by Denham J. (at p. 277), McGuinness J., in her judgment in that case, had refused a late application to amend pleadings to include a constitutional challenge to s. 260 but stated that, if the plaintiff wished to challenge the constitutionality of the legislation, the correct course would be to commence new proceedings by plenary summons. These are the new proceedings.

3.5 Apart from the events which I have summarised above, the decision of the High Court of 7th December, 2004 declaring s. 260 to be invalid, and the decision of the Supreme Court of 10th July, 2008 affirming the decision of the High Court, are also relied on as facts in support of the issue now before the Court.

3.6 Apart from the involuntary nature of the plaintiff's detention in St. John of God Hospital, which I assume the Court is entitled to infer, the statement of facts does not address the factual complaints which formed the basis of the 1997 proceedings, the 1998 proceedings and the 1999 proceedings, which the plaintiff was unable to prosecute because of the existence of s. 260(1), and on which he grounds his claim for damages in these proceedings. Therefore, to a large extent, the Court is required to determine the issue on a theoretical basis.

4. Basis of decision of Supreme Court on s. 260

4.1 Sub-section (1) of s. 260, as amended, provided as follows:

> "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."

As Denham J. pointed out (at p. 279), the words of that sub-section limit access to the court by requiring a person, when seeking access by way of an application thereunder, to make a case of "bad faith or without reasonable care", even if neither bad faith nor lack of reasonable care is part of the intended litigation.

4.2 In delivering the judgment of the Supreme Court, Denham J. considered the objective of the Act of 1945 (as stated in the long title, to provide for the prevention and treatment of mental disorders and the care of persons suffering therefrom) and the purpose of s. 260. On the latter point, she stated (at p. 280):

> "The purpose of s. 260 was to give a limited protection to persons acting under the Act. This is a legitimate purpose for such legislation. But the section is a restriction of a constitutional right (access to the courts), in the context where the fundamental constitutional right of liberty has itself been restricted. Thus, it is a matter of seeking a reasonable and proportionate process."

4.3 Having stated that the fact that access to the Court is restricted is not of itself unconstitutional, and having given examples of situations in which the Supreme Court so found, one example being the requirement in legislation to show "substantial grounds" to support seeking the relief sought, Denham J. continued (at p. 281):

> "[17] The limitation of access to the court in this case, was not just one of 'substantial grounds', it was to situations where the High Court was satisfied that there were substantial grounds for contending that the person against whom the proceedings were to be brought acted in bad faith or without reasonable care. It was a restriction on the administration of justice where several features of the section are important. It placed a burden on the plaintiff, it related to two specified grounds only, it limited access to the courts, it curtailed the discretion of the court in a situation where a balance of constitutional rights is required to be protected.
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> [18] At issue in the case is the liberty of the plaintiff, an important constitutional right. While the aim of the Act of 1945 was legitimate, the limitation on the right of the plaintiff should not be overbroad, should be proportionate, and should be necessary to secure the legitimate aim."

4.4 Having quoted the oft cited passage from the judgment of Costello P. in *Heaney v. Ireland* [1994] 3 I.R. 593 at p. 367 setting out the proportionality test, Denham J. continued (at p. 281):

> "In this case the objective of the Act of 1945, as set out above, is legitimate. It is important. But it is not of sufficient importance to override the constitutional right of liberty and the constitutional right of access to the courts, in terms of

the section, for the reasons given by the High Court. The terms of the section do not pass a proportionality test, for while being rationally connected to the objective, it is arbitrary (in referring to only two possible grounds of application) and hence unfair. It therefore does not impair the rights involved as little as possible, and so the effect on rights is not proportionate to the object to be achieved."

4.5 I have already referred to the following factors to which counsel for the defendants attached significance:

(i) the clarification contained in the judgment of Denham J. as to the effect of the decision of the Supreme Court, which limited the declaration of invalidity to subs. (1) only of s. 260 (para. 1.2 above); and

(ii) the fact that Denham J. pointed out that by the time the appeal in this matter was heard and determined in the Supreme Court s. 260 had been replaced by s. 73 of the Act of 2001 (para. 1.3 above).

Subs-section (1) of s. 73 differs from subs. (1) of s. 260 in that it provides that leave "shall not be refused" unless the High Court is satisfied:

(a) that the proceedings are frivolous or vexatious, or

(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.

Sub-sections (2) and (3) of s. 73 re-enact the provisions of sub-sections (2) and (3) of s. 260 verbatim. Sub-section (2) requires the application for leave to be on notice. Sub-section (3) provides that, if leave is granted, 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". Counsel for the defendants submitted that it is open to the plaintiff to avail of s. 73, but made the point that, in order to obtain relief in any substantive proceedings the prosecution of which is permitted under subs. (1) of s. 73, the burden is on the plaintiff to satisfy the Court (presumably in accordance with the usual standard of proof in civil cases – on the balance of probabilities) that the defendant "acted in bad faith or without reasonable care".

5. Submissions

5.1 The Court has had the benefit of comprehensive written submissions both from counsel for the defendants and from the plaintiff, which were supplemented by oral submissions. The main thrust of the defendants' submissions was to outline the authorities in which the issue has been considered by the Superior Courts previously.

What I propose to do first is to address the authorities which I consider have a bearing on the issue.

5.2 The authorities in which the issue whether redress over and above a declaration of invalidity of a statute for repugnancy to the Constitution should be available to a successful plaintiff will be considered first in chronological order. These are:

(a) *Murphy v. Attorney General* [1982] I.R. 241;

(b) *An Blascaod Mór Teo v. Commissioners of Public Works (No. 4)* [2000] 3 I.R. 565; and

(c) *Redmond v. Minister for the Environment (No. 2)* [2006] 3 I.R. 1.

It is also necessary to note the circumstances in which that issue did not fall for analytical consideration either in the High Court ([2005] IEHC 375) or the Supreme Court ([2010] IESC 29) following the decision of the Supreme Court in *D.K. v. Crowley* [2002] 2 I.R. 74. Finally, as the defendants placed considerable emphasis on the judgment of the Supreme Court in *McDonnell v. Ireland* [1998] 1 I.R. 134 on the question of the entitlement to damages for breach of a constitutional right where the plaintiff was relying on a previous successful challenge to a statutory provision by another litigant, it will be considered.

5.3 To the extent to which I have not already done so, I will then outline the submissions made which focus on the issue by reference to the declaration of invalidity as to s. 260. However, it is convenient to outline at this juncture some of the basic premises which underlie the position adopted by the defendants. First, it is contended that there was no deliberate attempt by the legislature to violate the plaintiff's constitutional rights. That cannot be gainsaid. Secondly, it is contended that the law in issue was not addressed to, and did not involve any act or omission, against an individual citizen. That is true, but it was a law which the Supreme Court struck down on the basis that it infringed the constitutional rights of an individual citizen, the plaintiff.

6. *Murphy v. Attorney General*

6.1 In this case the Supreme Court held that the imposition, in certain circumstances, of tax on a married couple at a higher rate than would be imposed on two single persons enjoying identical incomes constituted a breach by the State of its undertaking in Article 41.3 of the Constitution to guard with special care the institution of marriage and to protect it against attack, but did not infringe the guarantee of equality before the law contained in Article 40.1 because the unequal treatment of the plaintiffs was justified by the difference of social function between a married couple living together and two single people living together. It held, accordingly, that the impugned provisions of the Income Tax Act 1967, by providing for the aggregation of the earned incomes of married couples and thus normally imposing on them tax at such higher rate, were repugnant to the Constitution and invalid. Further, the Supreme Court held by a majority that the effect of its decision was that the impugned provisions were invalid *ab initio* and had never had the force of law. That latter aspect of the decision of the Supreme Court arose in the context of a question which the Supreme Court considered, at the request of the Attorney General, following the declaration of invalidity. The question was formulated as follows by Henchy J. (at p. 306):

"Where the plaintiffs have paid, or have had deducted from their earnings, income tax collected under statutory provisions which were subsequently declared unconstitutional, can they recover back such income tax. If so, to what extent?"

6.2 Henchy J. considered the implications of an Act of the Oireachtas being declared to be invalid having regard to the provisions of the Constitution. He stated (at p. 313):

> "Once it has been judicially established that a statutory provision enacted by the Oireachtas is repugnant to the Constitution, and that it therefore incurred invalidity from the date of its enactment, the condemned provision will normally provide no legal justification for any acts done or left undone, or for transactions undertaken in pursuance of it; and the person damnified by the operation of the invalid provision will normally be accorded by the Courts all permitted and necessary redress."

6.3 Having given an example of a situation in which the normal outcome had occurred (that the Supreme Court in *Re Haughey* [1971] I.R. 217, having declared the relevant provision unconstitutional, proceeded by way of ancillary relief to quash a conviction and sentence that had been made and imposed in pursuance of the condemned statutory provision), Henchy J. went on to make it clear that the normal outcome does not apply in every circumstance in the following passage (at p. 314):

> "But it is not a universal rule that what has been done in pursuance of a law which has been held to have been invalid for constitutional or other reasons will necessarily give a good cause of action: …. While it is central to the due administration of justice in an ordered society that one of the primary concerns of the Courts should be to see that prejudice suffered at the hands of those who act without legal justification, where legal justification is required, shall not stand beyond the reach of corrective legal proceedings, the law has to recognise that there may be transcendent considerations which make such a course undesirable, impractical, or impossible."

Counsel for the defendant emphasised the first sentence in that passage. In relation to the second sentence, it is clear from the following paragraph that Henchy J. was there addressing both constitutional and non-constitutional contexts in that he listed various factors which are recognised as being bars to what would otherwise be justiciable and redressable claims: laches, the Statute of Limitations, *res judicata* and such like.

6.4 Although Henchy J. did point out that, for a variety of reasons, the law recognises that, in certain circumstances, to adopt the terminology used by Griffin J. in his judgment (at p. 331), "the egg cannot be unscrambled", or should not be, he deliberately avoided any general consideration of the broad question as to when, and to what extent, acts done on foot of an unconstitutional law may be immune from suit in the courts, stating that any conclusion he might have expressed would in the main be *obiter*. He continued (at p. 315):

> "In any event, I think experience has shown that such constitutional problems are best brought to solution, step by step, precedent after precedent, and when set against the concrete facts of a specific case. I confine myself, therefore, to the precise question raised. Notwithstanding the invalidity *ab initio* of the condemned sections, are the taxes collected under them recoverable?"

Counsel for the defendants properly emphasised that Henchy J. made it clear that each case must be examined on its own facts.

6.5 While he advocated, and in that passage practised restraint, it is worth recording the reasons to which Henchy J. pointed as contra-indicating attempting to "unscramble the egg", which are set out (at p. 314):

> "The irreversible progressions and bye-products of time, the compulsion of public order and of the common good, the aversion of the law from giving a hearing to those who have slept on their rights, the quality of legality – even irreversibility – that tends to attach to what has become inveterate or has been widely accepted or acted upon, the recognition that even in the short term the accomplished fact may sometimes acquire an inviolable sacredness, these and other factors may convert what has been done under an unconstitutional, or otherwise void, law into an acceptable part of the *corpus juris*. This trend represents an inexorable process that is not peculiar to the law, for in a wide variety of other contexts it is either foolish or impossible to attempt to turn back the hands of the clock"

6.6 On the facts, the majority of the Supreme Court found that the plaintiffs, Mr. and Mrs. Murphy, were only entitled to limited recoupment and fixed the date as and from which they were entitled to be repaid the sums collected from them by way of tax invalidly imposed was the first day of the financial year immediately succeeding that in which they had challenged the validity of the imposition of the tax in question. In broad terms, the rationale of that finding was the application of what Henchy J. referred to as one of the first principles of the law of restitution on the ground of unjust enrichment – that the defendant should not be compelled to make restitution, or at least full restitution, when, after receiving the money in good faith, his circumstances have so changed that it would be inequitable to compel restitution. On the facts of the case, he found that the State, in its executive capacity, had received the money which represented the excessive deductions of tax from Mr. and Mrs. Murphy in good faith, in reliance on the presumption of the constitutionality of the impugned provisions. In every tax year until the proceedings were instituted, the State had justifiably altered its position by spending the taxes collected and by arranging its fiscal and tax policies and programmes accordingly.

6.7 The remedy which Mr. and Mrs. Murphy were afforded was in the nature of restitution. However, it is clear from the judgment of Henchy J. that "permitted and necessary redress" will normally be accorded to the person damnified by the operation of the invalid provision, which obviously would include an award of damages in an appropriate case.

7. An Blascaod Mór Teo v. Commissioners of Public Works (No. 4)

7.1 Chronologically, this is the first case in which this Court has had to consider whether the Court may award damages against the State for the adverse effects of the passing by the Oireachtas of an Act which has been held to be invalid having regard to the provisions of the Constitution on the litigant who claims that he is thereby damnified.

7.2 The plaintiffs in that case had been successful in a challenge to the constitutionality of provisions of An Blascaod Mór National Historic Park Act 1989. In *An Blascaod Mór Teo v. Commissioners of Public Works (No. 3)* [2000] 1 I.R. 6, the Supreme Court had held that the Act, a provision of which distinguished between lands on the Great Blasket Island which could be acquired compulsorily for the purposes of the National Park (including lands owned by the plaintiffs), and lands which could not be so acquired (being land owned or occupied by a person who had owned or occupied it since 17th November, 1953, and was ordinarily resident on the Island before that date, or land owned or occupied by a relative of such person) was based on the principle of pedigree, which appeared to have no place in a democratic society committed to the principle of equality, was, therefore, invalid having regard to the provisions of the Constitution. The Supreme Court had further held that there was no legitimate legislative purpose for the unfair treatment of the plaintiffs as compared with persons who owned or occupied and resided on the island prior to 1953 and their descendants. As the distinction was central to the Act, the Act fell in its entirety.

7.3 When the matter came back to the High Court, Budd J., by agreement of the parties, considered, as a preliminary issue, the question whether the Court could award damages against the State for the effects of the passing by the Oireachtas of the Act of 1989, which had been found to be unconstitutional.

7.4 In addressing the issue, Budd J. considered a number of bases on which the State's liability might be founded. In relation to the contention of the plaintiffs that the State was strictly liable to compensate plaintiffs, particularly a very restricted category of plaintiffs, for loss and damage caused by unconstitutional legislation, having quoted the passage from the judgment of Walsh J. in *Meskell v. Coras Iompair Éireann* [1973] I.R. 121 to the effect that, "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 … persons who have infringed that right", Budd J. went on to say (at p. 581):

> "The nature of the relationship between a citizen and the State is complicated by the obligations of the State which, through its organs or agents, must engage in such activities as policing, imprisoning and legislating. In the course of making laws, the legislature frequently has to take into account conflicting individual rights and the exigencies of the common good within a process involving balancing and adjusting the scope of rights. There is therefore little justification for a regime of strict liability for an infringement of a constitutional right where such rights are competing and in conflict. In such circumstances 'ubi ius ibi remedium' is too simple a formula and strict liability would in many cases be too low and easy a threshold to reach."

7.5 Later, Budd J. considered the extent to which the State should be liable for legislative acts in the light of the jurisprudence on the liability of the State for executive action and, in particular, the decision of the Supreme Court in *Pine Valley Developments Ltd. v. Minister for the Environment* [1987] I.R. 23. He quoted the passage from the judgment of Finlay C. J., in which he concluded as follows (at p. 38):

> "I am satisfied that it would be reasonable to regard as a requirement of the common good an immunity to persons in whom are vested statutory powers of decision from claims from compensation where they act *bona fide* and without negligence. Such immunity would contribute to the efficient and decisive exercise of such statutory powers and would, it seems to me, tend to avoid indecisiveness and delay, which might otherwise be involved."

7.6 Budd J. also quoted the passage from the concurring judgment of Henchy J. in the *Pine Valley* case (at p. 43) in which he stated that he considered "the exemption of the State from liability in damages for the Minister's invalid planning permission is not alone not an unconstitutionality but is in harmony with the due operation of the organs of government established under the Constitution". Budd J. went on to comment (at p. 584):

> "The Minister in that case was performing an administrative function but the court appears to have regarded him as having a quasi-immunity in his role of discharging this public duty. It is considered that the members of the Oireachtas enjoy absolute privilege in respect of statements in either House. If the Minister enjoys a quasi-immunity in respect of administrative acts, it seems that only in exceptional circumstances could the State be made liable for damages in respect of invalid legislation where the legislature is involved in the balancing of the protection of the right of private property against other obligations arising from the common good."

Counsel for the defendants emphasised the last sentence in that quotation. It was submitted that it would be invidious if a less restrictive approach were to be taken in respect of invalid legislation than in respect of the exercise of a statutory power, particularly, where Article 40 requires the State to weigh in the balance conflicting factors.

7.7 Understandably, Budd J. considered the question of State immunity in the context of the decision of the Supreme Court in *Byrne v. Ireland* [1972] I.R. 241 and pointed out that since that decision the State had frequently been sued and damages had been awarded against the State for breach of constitutional rights and redress had been afforded to the citizen by relief usually modelled on the remedies given in tort. He analysed (at p. 585 *et seq*.) the approach the courts have adopted to infringements of constitutional rights and identified three different approaches. The first was to proceed on the basis that the definition of the scope of a right prescribes the circumstances in which the right may be exercised, instead of the focus being on the question of the carelessness or intention of the infringer of the right, the strict approach, which Budd J. questioned again, while stating that he did not think that the infringement could be taken in isolation from its context, as the detrimental effect on a person's right may have to be balanced against others' rights and the needs of the common good, the point emphasised by counsel for the defendants. The second was to require that there should be proof of intent to infringe the right or negligence on the part of the infringer, which could give rise to difficulty, in that the need for those ingredients might impede the protection for a constitutional right. The third was the pragmatic approach adopted by Henchy J. in the *Murphy* case – that such matters as the remedies for infringement of rights are best dealt with in the factual context of each case.

7.8 In setting out his conclusion on the issue, Budd J. stated (at p. 590):

> "While I do not accept that the Oireachtas has total immunity in respect of legislation, since the courts are specifically given the mandate to review legislation for repugnancy, nevertheless for public policy reasons, it seems to me that there must be considerable tolerance of the legislature particularly when it has to weigh in the balance conflicting rights. …
>
> If the judiciary is to proceed resolutely but cautiously in relation to redress where a claim is brought in a recognised type of suit based on tort when an Act is found to be invalid, then the court should be all the more reticent where the claim is based on the effects of the actual enactment of an invalid Act.
>
> My conclusion is therefore that under Articles $15.4.2^{O}$ and $34.3.2^{O}$ of the Constitution the court has jurisdiction to declare an Act invalid and to give necessary and appropriate redress only for such damage as is proved to have flowed directly from the effects of the invalidity without intervening imponderables and events."

7.9 On the facts before him, Budd J. stated that, having heard cursory evidence, he had concluded that there were a number of imponderables in respect of the heads of damage and that there was a lack of the type of direct causal link necessary. The plaintiffs had never been dispossessed of their property. In the circumstances of the case, Budd J. concluded that the plaintiffs had been largely vindicated by the declaration of invalidity and that redress should not extend to damages.

7.10 Commenting on the decision of Budd J., in *J.M. Kelly: The Irish Constitution* (Fourth Edition), Hogan and Whyte, having quoted the first and last sentences of the last passage which I have quoted above, state (at para. 4.2.90):

> "On the issue of principle, however, Budd J.'s conclusion is surely correct and the ruling itself would seem to be a direct consequence of the nature of the prohibition [on enacting any law which is repugnant to the Constitution or any provision thereof] contained in Article 15.4. The scope of this jurisdiction will surely be tested in the future by reference to cases presenting more problematic facts."

7.11 In a further commentary on *An Blascaod Mór* case, in the context of considering whether damages may be awarded against the State for breach of constitutional duty, it is suggested in *Kelly* that the analogy drawn in *An Blascaod Mór* with the *Pine Valley* decision and the conclusion that only in exceptional circumstances could the State be liable in respect of invalid legislation where the legislation is involved in balancing the right to private property against other obligations arising from the common good may be questionable (para. 8.2.73). It is pointed out that the rationale which underlies the *Pine Valley* decision – that a Minister might be dissuaded from taking forthright action by threat of litigation – scarcely applies to the Oireachtas, especially where members enjoy personal immunity from suit. The conclusion of Budd J. that damages could be awarded in respect of an unconstitutional statute only for such damage as is proved to have flowed directly from the effects of the invalidity, if correct, it is suggested, on analysis may mean that a private citizen cannot recover for breach by the State of a constitutional imperative (which is not at issue in this case), or even for a breach of what would normally be regarded as a personal constitutional right – an analysis which the authors seem to question (para. 8.2.74).

7.12 An important feature of the decision of Budd J., in my view, is that, on the basis of the manner in which he conducted the trial, he was in a position to be satisfied that the plaintiffs had been largely vindicated by the declaration of invalidity. As a matter of fact, it is not possible to reach the same conclusion in this case at this juncture.

8. *Redmond v. The Minister for the Environment (No. 2)*

8.1 It is probably debateable whether the Redmond case presents "more problematic facts" than *An Blascaod Mór* case.

8.2 In the first round of the *Redmond* case, this Court (Herbert J.) had ruled that certain provisions of the Electoral Act 1992, and of the European Parliament Elections Act 1997, were unconstitutional insofar as they required candidates for general or European elections to pay a deposit. That decision is reported at [2001] 4 I.R. 61. In the second round of *Redmond*, Herbert J. stated that he was unable to accept the argument advanced on behalf of the defendants that the Court should either always decline, or should at least be very slow and then only in the most extreme circumstances, to make an award of damages against the legislative arm of the State for the infringement in an Act of the Oireachtas of a right guaranteed by the Constitution.

8.3 Having stated that it had been held by the Supreme Court in *T.D. v. Minister for Education* [2001] 4 I.R. 259 that the doctrine of separation of powers required that none of the three institutions of government be paramount, Herbert J. continued (at p.3):

> "In my judgment, it is essential in a constitutional democracy such as this State, where a rule or convention of parliamentary sovereignty has no place, that the courts should have the power and be prepared, wherever necessary, to vindicate by 'all permitted and necessary redress', to borrow the phrase of Henchy J. in *Murphy v. Attorney General* . . . including, where justice so requires, by an award of damages, the constitutional rights of anyone, even where the transgression of those rights is in an Act of the Oireachtas passed into law by the votes of the elected representatives of the people and signed by the President. This does not amount to unwarranted judicial activism trespassing on the legislative function of the Oireachtas. No evidence was advanced at the hearing of this issue and I am not prepared to assume that this particular power and, indeed the duty of the courts, would in any way inhibit or interfere with the proper functioning of the legislative arm of the State within its own unique sphere of activity under the Constitution."

8.4 Later, having referred to, *inter alia*, the decisions of the Supreme Court in *Byrne v. Ireland* and in *Murphy v. Attorney General*, Herbert J. continued (at p.4):

> ". . . I am satisfied that this court does have full power to award damages, ordinary compensatory damages or aggravated or increased compensatory damages and even punitive or exemplary damages . . . against the legislative arm of the State for breach of a constitutional right by an Act of the Oireachtas or by a provision of such an Act. However, I do not think that it is reasonably possible or even desirable to attempt to formulate any principles of general application as to the circumstances in which the court might so award damages or as to the type or amount of those damages. In this respect, I adopt what was held by Henchy J. in *Murphy v. Attorney General* . . . , where he stated, when speaking of such redress and of the sometimes 'transcendent considerations' which may render any or some particular forms of redress unavailable, *i.e.* damages or restitution:- 'in any event, I think experience has shown that such constitutional problems are best brought to solution, step by step, precedent after precedent, and when set against the concrete facts of a specific case'."

8.5 In the *Redmond* case, Herbert J., having recorded that there was no evidence that the impugned legislation had occasioned the plaintiff any pecuniary loss or damage, awarded the plaintiff nominal damages of €130. He analysed and rejected a claim for loss of chance.

8.6 Counsel for the defendants submitted that the decision in *Redmond (No. 2)* should not be taken as supporting an entitlement to damages arising from invalidity of an Act of the Oireachtas for a number of reasons. First, while the State sought to appeal the decision awarding damages, the Supreme Court refused to deal with it on the basis that what it was being asked to consider was hypothetical, which I assume was predicated on the decision in *Redmond (No. 1)* not having been appealed. Secondly, it was suggested that the fundamental basis on which the declaration of unconstitutionality was made in *Redmond (No. 1)* was undermined by the subsequent decision of the Supreme Court in *King v. Minister for Environment (No. 2)* [2007] 1 I.R. 296, in which the decision in *Redmond (No. 1)* was overruled. Thirdly, it was submitted that in *Redmond* the fundamental issues of principle which were addressed by Budd J. in *An Blascaod Mór* case were not referred to and, in particular, no explanation was provided for a rule of law which would give rise to a liability in damages for *bona fide* legislative acts in circumstances where no similar liability arises in respect of *bona fide* administrative decisions.

9. *D.K. v. Crowley*

9.1 In *D.K. v. Crowley* [2002] 2 I.R. 744, the Supreme Court granted a declaration that s. 4(3) of the Domestic Violence Act 1996 (the Act of 1996) was invalid having regard to the provisions of the Constitution and made an order of *certiorari* quashing an interim barring order which D.K.'s wife had obtained against him on a *ex parte* application pursuant to section 4(3). The Supreme Court held,

inter alia, that the procedures prescribed by s. 4(1), (2) and (3) of the Act of 1996, in failing to prescribe a fixed period of relatively short duration during which an interim order made *ex parte* was to continue in force, deprived the respondents to such applications of the protection of the principle of *audi alteram partem* in a manner and to an extent which was disproportionate, unreasonable and unnecessary.

9.2 Subsequently, the matter having been remitted to the High Court, on 29th July, 2005 Abbott J. delivered judgment on the claim by the applicant D.K. against the defendants (Judge Timothy Crowley, Ireland and the Attorney General) for damages for loss and damage as a result of a breach of his constitutional rights and of false imprisonment arising from the making of the interim barring order, which had been quashed by the Supreme Court. The applicant was awarded €214,000 damages.

9.3 At the hearing of this issue, this Court was informed by counsel for the defendants that no issue of principle was decided in the High Court because the State had not raised in the High Court any issue as to the Court's entitlement to award damages in respect of unconstitutional legislation. However, the issue was raised on an appeal in the Supreme Court and the Supreme Court had reserved judgment on whether the State was entitled to raise the issue on the appeal, it not having raised it before the trial Judge. Judgment had not been delivered in the Supreme Court, when this issue was before this Court, but it has since been delivered.

9.4 Having considered the judgment of the Supreme Court, which was delivered by Murray C.J. on 12th May, 2010, I was satisfied that it was not necessary to re-list this issue for further argument before giving this judgment, in view of the position I propose adopting.

9.5 What the judgment of Murray C.J. discloses is that D.K.'s claim was heard and determined in the High Court as an assessment only, the State appellants having decided not to contest liability. In the Supreme Court, the appellants sought to amend the notice of appeal to include a ground of appeal that the High Court Judge should not have awarded damages to D.K. without first having determined the issue whether the courts have jurisdiction to award damages in respect of the passing by the Oireachtas of a law affecting personal rights that is subsequently found to be unconstitutional and that the High Court Judge ought to have found, as a matter of law, that the appellants had no liability to D.K. in respect of any infringement of his constitutional rights arising solely from the passing by the Oireachtas of legislation and/or implementation and application to the respondent in good faith and without malice of those provisions. The appellants also sought an order remitting the proceedings to the High Court for determination of the issue of the State's liability for damages. The application to amend the notice of appeal and to have the matter remitted to the High Court on the issue of liability was refused by the Supreme Court.

9.6 In relation to the merits of the appeal, Murray C.J. recorded that it had been conceded by counsel for the State that, if the Court were to proceed with the hearing as an assessment of damages, that would be unsatisfactory because the basis for the award would not have been identified. Commenting that that approach was correct, Murray C.J. continued:

> "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 of public office.
>
> It is an altogether different matter to determine the liability of the State, including its vicarious liability, for acts *bona fide* done by a judge exercising his jurisdiction under a law which at a time enjoyed the presumption of constitutionality or other *bona fide* exercise of statutory powers which also enjoyed such a presumption."

The observations in the last sentence, in my view, could be made in relation to the plaintiff's claim for damages in this case. However, this is not the appropriate time to explore the similarities between the *D.K.* case and this case in terms of the legal basis of the claim for damages in each. However, the position I have decided to adopt in this case is informed by later observations of Murray C.J. when, having considered the judgment of Barrington J. in the *McDonnell* case, he emphasised the importance of identifying the legal criteria in a case such as the *D.K.* case for awarding and assessing the quantum of damages, for example, in the case of damages claimed for loss of reputation and good name. In this case the plaintiff has pleaded that s. 260 has affected his right to his good name. Therefore, it seems to me that there can be no "shortcut" to the determination of the remaining issues in this case and the parties will have to have regard to the observations of Murray C.J.

9.7 Prior to dismissing the appeal on quantum because the State had not demonstrated any valid basis on which it could seek to impugn the decision of the High Court, Murray C.J. stated as follows:

> "In the light of the foregoing considerations and the manner in which the State admitted liability, it is simply impossible for this Court to embark on a consideration of heads of damage or their quantification. To attempt to do so would require the Court to endeavour to make a range of speculative assumptions as to the scope of the liability of the State, and indeed the very principle of such liability, for the adverse effects on individuals generally of a statute declared to be unconstitutional. To endeavour to address issues concerning the review and quantification of damages when the High Court has not identified any legal basis for liability in this case due to the general concession made by the State, would be, at best a dubious exercise in the abstract."

10. *McDonnell v. Ireland*

10.1 Unlike the plaintiff in these proceedings and the plaintiffs in *An Blascaod Mór* case and in the *Redmond* case, the plaintiff in the *McDonnell* case did not challenge the constitutionality of s. 34 of the Offences Against the State Act 1939, but was relying on a successful challenge some years previously in *Cox v. Ireland* [1992] I.R. 53, in which the Supreme Court had held that s. 34 was unconstitutional. Under s. 34, whenever a person holding an office in the Civil Service was convicted by the Special Criminal Court of a scheduled offence, for example, membership of an unlawful organisation, he would immediately on such conviction forfeit that office. Mr. McDonnell, who was an established civil servant at the time, was convicted of membership of a proscribed organisation by the Special Criminal Court in May 1974, whereupon he was treated as having automatically forfeited his position. Following the decision in the *Cox* case, he instituted proceedings claiming that his purported dismissal in 1974 was unconstitutional and had no legal effect. His claim was formulated as a claim for damages for alleged breach of his constitutional rights, invoking his right to earn a livelihood and his property rights. The Supreme Court upheld a decision of the High Court (Carroll J.) that his claim, which on the appeal to the Supreme Court was against Ireland, the Attorney General and the Minister for Communications, was statute-barred. It was held that a breach of constitutional rights is a civil wrong which is remediable by an action for unliquidated damages which, having regard to the flexible and evolving nature of tort law, could be described as a tort and, therefore, was within the ambit of s. 11(2) of the Statute of Limitations 1957.

10.2 By way of general observation, in my view, the decision of the Supreme Court in the *McDonnell* case, which, unlike the position

in this case, was based on a claim made by a litigant who had not successfully challenged the validity of the impugned provision, is of no precedential relevance to the issue which is before this Court. However, some aspects of the judgments delivered in the Supreme Court were alluded to by counsel for the defendants and do give guidance as to the general approach to be adopted on the issue which is now before the Court.

10.3 A point raised by the judgment of Keane J., as he then was, in relation to the *Cox* case is of interest but, unfortunately, neither the judgments in the *McDonnell* case nor the submissions made by counsel for the defendants are in any way enlightening on the point. Keane J. pointed out (at p. 152) that in the *Cox* case, while the High Court (Barr J.), had found that Mr. Cox was entitled to damages in respect of the loss of his teaching post, he had adjourned further hearing on that issue to enable evidence to be adduced as to damages. That part of the judgment of Barr J. was not the subject of an appeal and, in consequence, the Supreme Court was concerned only with the issue of the validity of s. 4 having regard to the provisions of the Constitution. Therefore, it is not clear what ultimately happened to the claim for damages in the *Cox* case.

10.4 The main argument which counsel for the defendants have developed in reliance on the *McDonnell* case is based on a passage from the judgment of O'Flaherty J. (at p. 143), in which, having noted the position of the majority in the *Murphy* case that, when a declaration of invalidity of an Act of the Oireachtas is made, the legislation is void *ab initio*, O'Flaherty J. went on to consider the practical application of the legislative provision from the time it comes into force until it is declared to be invalid. He stated:

> "Members of society are given no discretion to disobey such law on the ground that it might later transpire that the law is invalid having regard to the provisions of the Constitution. Every judge on taking office promises to uphold 'the Constitution and the laws'; the judge cannot have a mental reservation that he or she will uphold only those laws that will not some day be struck down as unconstitutional. We speak of something as having 'the *force* of law'. As such, the law forms a cornerstone of rights and obligations which define how we live in an ordered society under the rule of law. A rule of constitutional interpretation, which preserves the distinct status of statute law which, as such, is necessitated by the requirements of an ordered society and by 'the reality of situation' (to adopt Griffin J.'s phrase), should have the effect that laws must be observed until struck down as unconstitutional. The consequences of striking down legislation can only crystallise in respect of the immediate litigation which gave rise to the declaration of invalidity. This is what occurred in *Murphy* . . . as well as in *Cox* . . ."

10.5 The obligation of all persons, including the State, to obey the law once it is enacted, it was submitted on behalf of the defendants, is a further reason why there should be no award of damages. To hold the State liable in damages on the basis that a law has been declared to be invalid would put the State in an impossible position. To impose liability in such circumstances would be to establish a far-reaching principle which could ultimately undermine the rule of law and the respect shown for the law.

10.6 As regards a person in the position of the plaintiff who has successfully challenged the validity of a statutory provision, that proposition is not in line with the decision of the Supreme Court in the *Murphy* case, nor is it in line with the observations of O'Flaherty J., because the plaintiff is in a similar position to the plaintiffs in the *Murphy* case and the *Cox* case.

11. The submissions focusing on s. 260

11.1 While, the broad thrust of the submissions made on behalf of the defendants was to analyse and extrapolate from the authorities which bear on the issue which the Court has been asked to determine, in addition to analysing the judgment of the Supreme Court on the substantive issue of the invalidity of s. 260, counsel for the defendants addressed some matters which are specifically related to s. 260.

11.2 It was submitted that the Court should apply the principle adumbrated by Budd J. in *An Blascaod Mór* case and adopt an approach of considerable tolerance to the legislature in relation to s. 260 because the task of the legislature was to balance competing interests. As regards s. 260 of the Act of 1945, it was submitted that the Oireachtas was self evidently attempting to achieve a balance between the competing concerns of providing proper mental treatment for persons with mental illness and of protecting the rights of such persons, on the one hand, and of protecting those treating them, on the other hand. The provision was self evidently directed towards the common good. Although the legislature got the balance wrong in respect of the pre-conditions for instituting proceedings, that should not form the basis of a claim for damages, it was submitted.

11.3 It was also submitted that the very lengthy period of time which has elapsed since the enactment of the Act of 1945 is a factor to which the Court should have regard. It was also suggested that it was relevant that the objectives of the Act of 1945 generally in the context of Article 40.1 of the Constitution could be regarded to have received the imprimatur of the Supreme Court in *Re Philip Clarke* [1950] I.R. 235 and more recently in *Croke v. Smith (No. 2)* [1998] 1 I.R. 101. Indeed, on the basis of the observations made by Murray C.J. in *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 (at pp. 129 – 130) as to the Constitution being viewed "as a living document" which falls to be interpreted "in accordance with contemporary circumstances including prevailing ideas and mores", and that it is entirely conceivable, therefore, that an Act found to be unconstitutional in the twenty first century might well have "passed constitutional muster" in the 1940s and 1950s, in my view, on the basis of the case law on the Act of 1945, it is conceivable that a challenge to the validity of s. 260 would not have been successful had it been brought even a decade earlier than the plaintiff initiated these proceedings.

11.4 It is noteworthy that s. 260 was applied by the Supreme Court, albeit not in contexts in which its constitutional validity was at issue, on a number of occasions, examples relied on by counsel for the defendants being *O'Dowd v. North Western Health Board* [1983] ILRM 186 and more recently in *Murphy v. Green* [1990] 2 I.R. 566. In the *O'Dowd* case the majority of the Supreme Court held on the facts that there were no substantial grounds for the contention that the medical practitioners against whom allegations were made had acted without reasonable care. In the later case, all five Judges of the Supreme Court held on the facts that the plaintiff had not established substantial grounds that the proposed defendant, a medical practitioner, had acted in bad faith or without reasonable care. Although counsel for the defendants did not press this point, it has to be observed that, as regards the factual complaints which form the basis of the plaintiff's claim in these proceedings, the Supreme Court adopted a consistency of approach in the application of s. 260 before it was declared invalid, as is evidenced by the outcome of the three occasions (outlined in para. 3.4 earlier) on which the plaintiff sought to get leave to institute proceedings governed by s. 260. On each occasion, the decision of the Supreme Court precluded the proceedings being prosecuted. On the last two occasions, in respect of which there are judgments of the Supreme Court, the Supreme Court upheld the decision of the High Court on the basis that the plaintiff had no substantial grounds for contending that the proposed defendants acted in bad faith or without reasonable care.

11.5 The significance attached by the defendants to the substitution of s. 260 by s. 73 of the Act of 2001 was that it was contended that the plaintiff is now entitled to bring proceedings in respect of acts purporting to have been done in pursuance of the Act of 1945 of which he complains. Further, the effect of the declaration of invalidity of s. 260 was compared with the effect of the invalidity of the statutory provision impugned in the *Redmond* and *Cox* cases. In respect of the declaration by the Supreme Court of

the invalidity of s. 260, it was submitted, that its effect was to give the plaintiff the very right he claimed, which was the right to commence proceedings against persons who had purported to act in respect of the plaintiff in reliance on the Act of 1945. Accordingly, it was submitted, the wrong complained of has been remedied by the declaration of invalidity. That was in contrast to the position in *Redmond*, where the plaintiff had lost his opportunity of putting himself forward as a candidate at an election and the opportunity once lost could not be revived, or the situation in *Cox*, where the plaintiff had lost his job as a result of the provision which had been held to be invalid. In this case, it was submitted, the plaintiff has not lost his right to claim damages for the alleged wrongdoing in connection with his detention, but rather the effect of the declaration of invalidity has been to accord him that very right.

11.6 The distinction which the defendants have sought to draw as to the effect of the striking down of s. 260 by comparison to the striking down of other statutory provisions, in my view, wholly ignores the reality of the situation of the plaintiff now. Any action which the plaintiff might have obtained leave to initiate at any time after the decision of the High Court in this case in December 2004, which sought redress by way of damages for events which happened in 1984, 1987 and 1991, would inevitably have been met with a plea that the action was statute-barred. Just a decade ago in *Blehein v. Murphy (No. 2)*, which concerned an application for leave by the plaintiff under s. 260 in relation to the events of 1987 in the 1998 proceedings , Keane C.J. stated (at p. 266):

> "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 that Act or 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 on by the plaintiff, have any application to the facts in this case."

Keane C.J. did go on to state that it could be said that, in theory at least, if leave were granted, the defendant might contest the action on the merits rather than to plead that it was statute-barred, but, as against that, he stated that it could be argued that the fact that there was an absolute defence available to a defendant because of lapse of time was a ground on which the Court was entitled to refuse leave. In the event, he considered it unnecessary to address that issue because the plaintiff had not established a substantial ground under the provision which was subsequently declared to be invalid. Therefore, the reality is that a declaration of the invalidity of s. 260 did not open the way to enable the plaintiff to get redress by way of damages for the wrongs he alleged were perpetrated against him in 1984, 1987 and 1991 against the third parties whom he alleges perpetrated those wrongs.

12. Conclusions

12.1 It could hardly be open to contradiction to suggest that this case presents "more problematical facts" than *An Blascaod Mór* case or, indeed, any other case in which the issue which the Court has to determine was considered. In setting out my conclusions on the issue raised by the defendants insofar as I consider it appropriate to reach conclusions at this juncture, I propose to do so by reference to the guidance given by Henchy J. in the *Murphy* case and with regard to the basis on which the Supreme Court held that s. 260 is invalid having regard to the provisions of the Constitution.

12.2 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".

12.3 The plaintiff's case is that he has suffered damage as a result of the application of s. 260 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 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.

12.4 The effect of s. 260 was to preclude the plaintiff from instituting civil proceedings against a person or institution for acts done in purported reliance on the provisions of the Act of 1945 save with leave of the Court. On the basis of the agreed facts, s. 260 impacted on the plaintiff in that he was –

> (a) precluded from prosecuting the 1997 proceedings against St. John of God Hospital, because the proceedings were struck out for failure to obtain leave under s. 260,
>
> (b) refused leave to issue the 1998 proceedings against six named defendants, which he sought leave to issue under s. 260 in 1999, and
>
> (c) refused leave to issue the 1999 proceedings against St. John of God Hospital, which he sought leave to issue under s. 260 in 2000.

All of those proceedings related to wrongs alleged to have been perpetrated against the plaintiff arising out of the invocation of the provisions of the Act of 1945 in connection with his transportation and admission to, and his detention and treatment in, St. John of God Hospital in 1984, 1987 and 1991. As I understand it, the remedy he would have sought against the intended defendants was damages, although the factual foundation on which he would have sought that remedy is only partially covered in the statement of facts on the basis of inferring that his detention was involuntary.

12.5 In this assessment of the plaintiff's claim in these proceedings I am not taking into account the judicial review proceedings of 1996 which, *prima facie*, were not within the ambit of s. 260.

12.6 Such damage, if any, as the plaintiff suffered by the application of s. 260 to him in the instances which I have summarised must be the consequence of being deprived of an opportunity to establish an entitlement to damages against the intended defendants by not being allowed to prosecute those proceedings. If he would have been successful in any or all of the proceedings, had he been

allowed to pursue them, then he has been deprived of any damages which he would have been awarded, taking account, of course, of any overlap between the claims in the three sets of proceedings. Necessary redress, to adopt the terminology used by Henchy J., would involve compensation for that deprivation and the resulting loss. As subs. (3) of s. 260 was not held to be invalid *per se*, in order to be successful, if he had been granted leave, the plaintiff would have had to satisfy the Court in the substantive proceedings that the defendants or one or more of them had acted in bad faith or without reasonable care.

12.7 The foregoing analysis does not take cognisance of whether there may be what Henchy J. referred to as "transcendent considerations" which may render affording redress to the plaintiff (*i.e.* allowing him to claim damages against the State for being deprived of the capacity to sue intended defendants who had acted in reliance on the Act of 1945 whom he alleges acted wrongfully) undesirable, impractical or impossible. It does not seem to me that it would be either impractical or impossible, as distinct from difficult, to determine whether such redress should be afforded to the plaintiff in these proceedings in which he successfully challenged the validity of s. 260 in accordance with established principles, although such principles would have to be identified. Obviously, in order to succeed in his claim for damages against the State, he would have to prove that, in the proceedings which he was prevented from initiating, he would have established to the satisfaction of the Court wrongdoing in the form of bad faith or want of reasonable care on the part of the intended defendants or one or some of them and also that the damage and loss he alleges he suffered was a consequence of that wrongdoing. While, given the manner in which the issue is now before the Court, whether he would have succeeded is an imponderable, nonetheless, I do not think it can be said that it would be either impractical or impossible to determine whether he would have succeeded against all or any of the intended defendants. Whether it would be undesirable to afford redress to the plaintiff in the unusual circumstances which prevail here is the fundamental question.

12.8 Viewing the plaintiff's claim for redress consequential on his successful challenge to s. 260 as a claim for damages for infringement of his constitutional rights raises the question whether the plaintiff should be treated any differently, because the infringement of his personal constitutional rights of which he complains arose from the application of an unconstitutional statutory provision to him, than he would be treated if the infringement arose, say, as a result of the actions of somebody for whom the State is vicariously liable. An example of the latter situation is to be found in the actions of prison officers in *Kearney v. Minister for Justice* [1986] I.R. 116 in breaching the plaintiff's right to communicate by non-delivery of his mail to him, which led to the first award of damages, which were nominal, for breach of constitutional rights, a case which was followed in the *Redmond* case. It may be that, in order to answer that question, one is brought back full circle to the fundamental question whether it would be undesirable not to treat the plaintiff differently because of the existence of transcendent considerations.

12.9 In addressing that question, a crucial factor undoubtedly would be the basis on which the Supreme Court decided the invalidity of s. 260 – that the right of the plaintiff which was infringed was his constitutional right to access to the court in the context of his fundamental right to liberty having been restricted, which on any consideration of the hierarchical framework of constitutional rights must be a serious infringement. The nature and extent of the adverse impact on him resulting from such civil wrong as the plaintiff would have been in a position to establish in the litigation which he was precluded from prosecuting would also be a factor. As regards countervailing factors, a matter which could be regarded as being significant would be the status of the Act of 1945 for almost 60 years after its enactment, the presumption that it was constitutionally valid and the manner of its application generally. In the particular context of this case, a significant factor would probably be the consistent manner in which s. 260 was applied by the Supreme Court, from which it would have been reasonable to deduce that s. 260 was "an acceptable part of the *corpus juris*". There may be other factors which would be relevant. However, I am of the view that to embark on the task of weighing such factors in the balance, partly in the abstract, would be undesirable. It would also be undesirable to embark on the determination of such a fundamental issue as is raised by the defendants at all, if it is unnecessary to do so.

12.10 It may be, however, that it will not be necessary at all, and at this juncture it is not desirable or appropriate, in circumstances which, in my view, in reality are tantamount to deciding the issue partly in the abstract, to determine whether transcendent considerations exist which render it undesirable that the plaintiff be awarded damages on the ground that the basis of the infringement of his constitutional rights is that a statutory provision which has been found to be unconstitutional was applied to him. If it is not necessary to do so, because there is an answer to the plaintiff's claim to damages which exclude it at a more basic level than determining whether the plaintiff's constitutional rights are transcended, as urged by the defendants, for example, by virtue of some statutory provision or rule of common law, in my view, it would be unwise to attempt to resolve such a fundamental issue. In making that comment and the following comments, it is important to stress that I have formed no view as to whether the claim for damages would succeed apart from that issue. For instance, it may be that, aside from the jurisdictional argument raised by the defendants, it is the case that the plaintiff cannot establish that he has suffered recoverable loss by the application of s. 260 to him or that his claim in respect of loss and damage is not maintainable, for example, because he could not have met the requirement of subs. (3) of s. 260, or it can be absolutely defended in these proceedings on some other legal ground, for example, because the claim is statute-barred.

12.11 Further, in the light of the observations of Keane C.J. quoted in paragraph 11.6 above, it would seem that there may be a possible basis on which proceedings which the plaintiff was precluded from prosecuting because of the application of s. 260 to him might have been unsuccessful. That is on the basis of the application of the Statute of Limitations 1957, as amended. As I understand the position, in the substantive proceedings on the constitutionality of s. 260 in this Court and on appeal in the Supreme Court, it was not argued that the defendant had no *locus standi* to challenge the validity of s. 260 on the basis that any claim he might have had against the proposed defendants in the three actions he sought to initiate would have been statute-barred. It is to be noted that in the 1999 proceedings, in delivering judgment in the Supreme Court, McGuinness J. stated that the plaintiff was in a position to argue that he had *locus standi* to maintain constitutional proceedings. However, the defendants have pleaded in these proceedings that, if the plaintiff has sustained or suffered personal injury, or loss or damage, his claim is statute-barred by virtue of s. 11(2) of the Statute of Limitations 1957, as amended by s. 3(1) of the Statute of Limitations (Amendment) Act 1991, although the plea seems to be related to the claim for damages for personal injuries only. It seems to me that, before the Court is required to determine the fundamental question to which the issue raised by the defendants gives rise, the issue of the application of the Statute of Limitations to the plaintiff's claim for damages should be addressed first.

12.12 Accordingly, while at this juncture I am not ruling out the possibility of having to determine the issue which the defendants have asked the Court to determine, I am postponing such determination until the issues of the maintainability of the proceedings which he was precluded from prosecuting and the defences pleaded by the defendants, including their reliance on the Statute of Limitations, assuming the defendants are persisting in that defence, have been considered by reference to the relevant evidence. Having regard to the observations of Murray C.J. in the *D.K.* case, which I have recorded at para. 9.6 above, I consider that, if the Court has to assess damages, the legal basis for liability of the State will have to be determined by the Court with regard to each head of damages.

12.13 I will hear further submissions from the parties as to how the matter should proceed from here.