

Climate Litigation Against Corporations and the Irish Constitutional Tort

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Abstract: This article examines the merits and efficacy of the Irish 'constitutional tort' as a basis for climate litigation against high-emitting corporations. The overwhelming majority of greenhouse gas emissions stem from private actors, yet climate litigation to date has been primarily directed at public bodies, leaving the threat posed by high-emitting corporations unchecked. The horizontal application of Irish constitutional rights represents a unique and potentially powerful tool to address this threat, by allowing litigants to fashion a sui generis claim potentially absent some of the limitations of nominate torts.

Keywords: Constitutional Law, Climate Litigation, Corporations, Tort Law

Introduction

The horizontal application of constitutional rights in Ireland has occupied a curiously neglected jurisprudential space since the doctrine's inception in the 1960s. This article seeks to elucidate how this seemingly anodyne doctrine, virtually unaltered in the past four decades, represents a unique and potentially powerful legal mechanism to adjudicate climate change. In Ireland, constitutional rights vindication and tort law mechanisms have grown increasingly concomitant, with the latter assuming the role of the presumptive remedial instrument for the former. The extension of this nexus to novel and complex threats seems intuitive; especially given the Constitution's natural law origins, and the failure of traditional tort law mechanisms to adequately respond to the exigencies of climate-related harms.

The overwhelming majority of greenhouse gas emissions ("GHGs") stem from private actors, yet climate litigation has to date been primarily directed at public bodies.¹ This is particularly the case in actions invoking constitutional rights, a trend that reflects the

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¹ Climate Accountability Institute, *Carbon Majors Launch Report* (2024) <https://carbonmajors.org/site/data/000/027/Carbon_Majors_Launch_Report.pdf> accessed 8 July 2025.

broader discourse on climate change, wherein state responsibility is foregrounded while corporate emissions, though significant, often remain less directly scrutinised in litigation. The success of constitutional and human rights-based claims against states, as exemplified by *State of the Netherlands v Urgenda Foundation*² and *Neubauer et al v Germany*,³ has prompted litigants to transpose these arguments into the private sphere, targeting high-emitting corporations through tort mechanisms such as negligence and nuisance. Ordinarily, such cases seek to establish liability in tort by grounding claims in the breach of constitutional rights. However, the Irish constitutional framework presents a different possibility: the invocation of a *sui generis* horizontal constitutional claim or constitutional tort. Such an approach permits arguments that extend beyond the rigid confines of nominate torts, which have thus far demonstrated significant limitations in addressing the complexities of climate change litigation.

Whether a constitutional tort would provide a more effective mechanism for adjudicating climate-related claims requires an examination of the modest constitutional tort case law, which tentatively suggests a more expansive framework for the vindication of some rights (in certain contexts) than the narrower doctrinal constraints imposed by nominate torts.

The Irish 'Constitutional Tort' Doctrine

The Constitution makes no mention of the repertoire of torts, yet an intricate relationship between the two has developed over the past 60 years. The development of this nexus has culminated in tort law assuming the role of the 'presumptive remedial instrument for vindicating constitutional rights.'⁴ This extends to the infringement of constitutional rights horizontally, allowing the Constitution to give 'rise to a cause of action against a private individual or organisation in the form of the "constitutional tort" action, and the rights it protects can be applied directly to regulate the conduct of private actors.'⁵ At the heart of the judicial analysis in this area is the 1973 judgment in *Meskeil v Córas Iompair Éireann*, wherein the Supreme Court (Walsh J) observed that,

² ECLI:NL:HR:2019:2007 (HR 20 December 2019).

³ 1 BvR 2656/18 (BVerfG, 24 March 2021).

⁴ William Binchy, 'Meskeil, the Constitution and Tort Law' (2011) 33 DULJ 339, 339.

⁵ Colm O'Cinneide, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' (2003) 4 Hibernian Law Journal 77.

[A] right guaranteed by the Constitution ... can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of constitutional right ... that person is entitled to seek redress against the person or persons who have infringed that right.⁶

This raised clear questions as to the scope of this new innominate right of action, especially whether it would replace extant nominate 'torts like assault, battery, libel and false imprisonment'.⁷ Binchy concludes that the courts have 'answered that question in the negative; they explained that tort law had not been replaced by a new remedy, or set of remedies, expressed exclusively in constitutional terms. A more modest, but complicated, outcome was envisaged.'⁸

It is worth making note of the composition of the Supreme Court at the time, with Walsh J's progressive attitudes reinvigorating previously quiet points of law. In his effusive account of Walsh J's activism, Gerard Hogan suggested that 'of all the decisions which Walsh J authored, [*Meskeell*] may well be the most radical and, indeed, in the long run, internationally influential.'⁹

This decision was followed by *Educational Company of Ireland Ltd v Fitzpatrick (No 2)* in which the Supreme Court held that 'constitutional rights cast correlative duties of non-interference on citizens'.¹⁰ Therefore, 'a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it.'¹¹

⁶ *Meskeell v Córas Iompair Éireann* [1973] IR 121, 132.

⁷ Robert Heuston, 'Personal Rights under the Irish Constitution' (1976) 11 *University of British Columbia Law Review* 11(2) 294, 314.

⁸ Binchy (n 4) 339, 340.

⁹ Gerard Hogan, 'Mr Justice Brian Walsh: The Legacy of Experiment and the Triumph of Judicial Imagination' (2017) 57 *Irish Jurist* 1.

¹⁰ [1961] IR 345; Guatam Bhatia, *Horizontal Rights: An Institutional Approach* (Hart Publishing 2023), 67.

¹¹ *Meskeell* (n 6).

The broad implications of *Meskill*, were circumscribed by the Supreme Court in its 1988 decision in *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*, a case in which the Court 'evinced great reluctance' to reshape tort law to accommodate this constitutional tort.¹² Henchy J's solution was to posit that this cause of action only be available when particular torts were 'basically ineffective' to protect the constitutional right in question. He stated that when an action is founded on an existing tort, one 'is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right.'¹³

The most prominent recent invocation of the *Meskill* principle was doubtless in *McGee v Governor of Portlaoise Prison*, wherein the Supreme Court affirmed that the constitutional tort is indeed an 'action founded on tort' within the meaning of section 11(2)(a) of the Statute of Limitations 1957.¹⁴ The Supreme Court reasoned that the purpose of the constitutional tort was principally the same as the essence of torts in general, to address private wrongs and to remedy the violation of individual rights.¹⁵

The Basic Ineffectiveness Problem

Concrete definitions of the terms 'basically ineffective' and 'plainly inadequate' have not been reached; in fact, few terms in tort law have proven less amenable to a consensus definition. It is perhaps due to this interpretive intransigence that scholars in this area find themselves proposing working definitions in order to adequately understand and explain the divergent judicial dicta.¹⁶ It could be argued that the high 'basically ineffective' threshold serves as a judicial filter, limiting intervention and liability. It could also be suggested that it was never meant to heighten the bar for direct horizontality but rather to promote indirect horizontality by attaching constitutional claims to existing torts. Either way, the threshold remains central, and courts have been reluctant to meet it. The following cases illustrate this reluctance by contrasting those that failed to meet the threshold and proceeded under tort law with

¹² *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*. [1988] ILRM 629; Binchy (n 4) 340.

¹³ *ibid*.

¹⁴ [2023] IESC 14.

¹⁵ Daniel Gilligan, 'Constitutional Torts as Private Wrongs: *McGee v Governor of Portlaoise Prison*' (2024) 6 ISCR 181.

¹⁶ See Sibò Banda, 'Taking Indirect Horizontality Seriously in Ireland: A Time to Magnify the Nuance' (2009) 31 DULJ 263, Binchy (n 4), and O'Cinneide (n 5).

those warranting a *sui generis* constitutional action. Vertical cases where the doctrine has been discussed are also considered.

In *Hanrahan*, Henchy J's intention that courts strive to assure the protection of a constitutional right through extant common law mechanisms before allowing a *sui generis* constitutional claim to be formulated was made clear. The failure to meet the 'basically ineffective' threshold in the case itself was due to the extensive protections against damage to property afforded by the nominate tort of nuisance. The claim under the constitutional right to property was, therefore, superfluous. This rationale was reinforced in *W v Ireland (No 2)*, where Costello P refused to allow a constitutional claim for bodily integrity, citing existing common law safeguards and the absence of a duty of care.¹⁷ Public policy concerns, particularly the common good, were also invoked to justify limiting constitutional rights.¹⁸

A similar approach was taken in *McDonnell v Ireland*, wherein Barrington J observed that 'constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules.'¹⁹ 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.' This has been described by Hogan as the 'Barringtonian wildcard' approach and reiterates the courts' reluctance to invoke a secondary cause of action without clear evidence of the ineffectiveness of existing causes of action.²⁰ The High Court in *Sweeney v Duggan* saw no need to deviate from this emerging norm. Here the plaintiff argued that the defendant was in breach of his right to bodily integrity protected under Article 40.²¹ Interestingly, the High Court held that Article 40 merely provided the plaintiff with a 'guarantee of a just law of negligence, which in the circumstances exist[ed]' and the provision was therefore of no assistance to him. Furthermore, the High Court (Barron J) did not participate in any judicial assessment of the tort of negligence in light of the constitutional 'framework of rights-protection.'²²

¹⁷ [1997] 2 IR 141

¹⁸ *ibid* 158.

¹⁹ *McDonnell v Ireland* [1998] 1 IR 134.

²⁰ Gerard Hogan, 'The Farthest – December 1972' (2019) 62 *Irish Jurist* 1 14.

²¹ [1997] 2 IR 531.

²² *Binchy* (n 4) 348.

The cases following *Hanrahan* arguably display a judicial inclination to consider existing protection of constitutional rights in a vacuum. The question was whether common law or statutory protection *exists* that overlaps with the constitutional right in question, not whether, in the particular context, the right is being *adequately vindicated* by said laws.

Some cases have satisfied this threshold, although this has tended to occur more commonly in vertical claims against state bodies. Meeting the threshold does not always result in a new constitutional action; courts may instead modify existing torts to incorporate constitutional principles (more of this anon). In *McKinley v Minister for Defence*, the Supreme Court, applying Article 40.1, modernised the loss of consortium tort to extend eligibility to wives.²³ The court split 3-2, with Finlay CJ and Egan J favouring abolition of the tort over its adaptation. The inconsistency between the tort and the Constitution made its reshaping more palatable, satisfying the 'basically ineffective' requirement without creating a *sui generis* constitutional claim.

In *Walsh v Ireland*, a case concerning wrongful arrest and detention, the Supreme Court treated the claim as a breach of the constitutional right to personal liberty, making no reference to potential tortious overlap.²⁴ A similar case is *Shortt v Commissioner of An Garda Síochána*, however, here the court saw no reason to parse out the constitutional action from a myriad of tort actions.²⁵ In addressing the exemplary damages in the case, the Supreme Court was content to treat the constitutional claim in the exact same manner as the traditional torts (as was the case in *Conway v Irish National Teaching Authority*).²⁶

The picture arising from this case law is more of a smattering of judicial indeterminacy than a masterpiece of constitutional and tortious interpretation. Binchy concludes that deciding whether an infringement of constitutional rights comes within the remit of existing torts through partial protection or falls outside of it 'is a matter of intuition (or oversight) rather than jurisprudential analysis.'²⁷ He notes that if a victim were to fall within the former category, the consequences are stark, since they are forced to

²³ [1992] 2 IR 333.

²⁴ *Walsh v Ireland* (HC, 30 November 1994). Some torts would have provided some protection such as negligence and battery.

²⁵ [2007] IESC 9, [2007] 4 IR 587.

²⁶ [1991] 2 IR 305.

²⁷ Binchy (n 4), 353.

prove to the court that 'the particular tort or torts, providing some but less than plenary protection to the constitutional right in question, should be stigmatised as "basically ineffective" in that regard.'²⁸

From the analysis above, three conclusions emerge for the prospective climate litigant. First, courts exhibit a strong deference to private law where it exists, even if its efficacy is questionable. Cases such as *Hanrahan* and *McDonnell* illustrate the judiciary's willingness to uphold private law protections where there is even minimal overlap with constitutional rights.²⁹ Second, direct horizontality is likely to be recognised only in the absence of any relevant private law mechanism, a threshold that remains exceptionally difficult to meet. Third, the concept of 'inadequacy' is still imprecise and subject to judicial discretion. This suggests that a constitutional tort plaintiff must demonstrate not just the insufficiency of existing private law but its outright absence as a means of rights protection.³⁰ The task for a climate litigant, therefore, is to construct a case in which a constitutional cause of action is not perceived as a Barringtonian wildcard but as a necessary judicial step to vindicate constitutional rights.

Climate Change and Constitutional Rights

There is what might be described as a generally relaxed approach to standing in constitutional cases in Ireland in comparison to other jurisdictions; the central requirement being a demonstration of an 'injury of prejudice which the plaintiff has either suffered or is in imminent danger of suffering'.³¹ In *Friends of the Irish Environment CLG v Government of Ireland* the High Court found that the interests of its [FIE's] members and the public at large were or would be adversely affected by the consequences of climate change.³² The reason the constitutional rights aspects of this case failed on standing grounds was due to the action being taken by an NGO that was a body corporate, rather than by a private individual. In fact, in the subsequent Supreme Court decision, Clarke CJ went on to state that 'had standing been established... it would have been necessary for this Court to consider the circumstances in which climate change measures (or the lack of them) might be said

²⁸ *ibid.*

²⁹ *Hanrahan* (n 12); *McDonnell* (n 19).

³⁰ O'Cinneide (n 5).

³¹ *Cahill v Sutton* [1980] IR 269, 284.

³² *Friends of the Irish Environment v The Government of Ireland* [2019] IEHC 747 [132].

to interfere with the right to life or the right to bodily integrity'.³³ The breadth of standing for individuals in constitutional cases was emphasised in *Horgan v An Taoiseach*, wherein the court held that a plaintiff had standing in a constitutional case by virtue of their being a citizen of Ireland, relying on the approach adopted by the Supreme Court in *Crotty v An Taoiseach*, *McKenna v An Taoiseach (No 2)* and *McGimpsey v Ireland*.³⁴

Standing, therefore, would not be an overly onerous hurdle in the case of a constitutional tort. The fundamental purpose of tort law is corrective justice. At its core, it is a 'fault-based compensation system for vindicating individual rights.'³⁵ Despite what some authors have called the 'anti-tort' structure of climate change, in at least this sense, climate change-caused damage is well-suited to a tort action; wherein standing, damage and remedies are easily identifiable.³⁶ The first step in applying a constitutional tort approach would be identifying which constitutional rights are under threat.

One issue worth addressing at this juncture is the judicial practice of constitutional avoidance, whereby courts will, where possible, resolve cases on non-constitutional grounds to avoid unnecessary interference with the legislative domain. This principle was explicitly articulated in *M v Bord Uchtála*, where O'Higgins CJ stated that when multiple avenues for granting relief are available, the court should, as a general rule, 'consider first whether the relief sought can be granted on the ground which does not raise a question of constitutional validity.'³⁷ However, this doctrine only applies in situations where both a constitutional cause of action and an alternative (statutory or common law) cause of action are available. Constitutional tort actions, by their nature, arise only where existing nominate torts or statutory remedies have proven inadequate or unavailable. In such cases, the court is not choosing between alternative grounds for relief but is instead presented with a constitutional claim as a last resort, with no viable non-constitutional alternative.

³³ *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [170].

³⁴ *Horgan v An Taoiseach & ors* [2003] IEHC 64, [2003] 2 IR 468; *Crotty v An Taoiseach* [1987] IR 713; *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10; *McGimpsey v Ireland* [1990] 1 IR 110.

³⁵ Nathan Isaacs, 'Fault and Liability: Two Views of Legal Development' (1918) 31 Harvard Law Review 954, 965.

³⁶ Douglas Kysar, 'What Climate Change Can Do About Tort Law' (2010) 41(1) Environmental Law 1, 8.

³⁷ [1977] IR 287, 293.

Article 40 of the Constitution sets out the personal rights of citizens, a number of which are arguably being infringed and will continue to be infringed in future by environmental harm as a result of climate change; including, *inter alia* the right to life and the right to bodily integrity. This argument was buoyed by Clarke CJ's statement in the *Friends of the Irish Environment* judgment that constitutional rights and obligations could be engaged in an appropriate environmental case in the future.³⁸

The Right to Life

In 2007, the Malé Declaration became the first intergovernmental statement to explicitly recognise that 'climate change has "clear and immediate implications for the full enjoyment of human rights", including the right to life'.³⁹ Years later in Ireland, the High Court in *Friends of the Irish Environment v Fingal County Council* 'agreed that the scientific evidence, including the IPCC's 2014 report, 'can in truth leave no doubt but that climate change poses a real and immediate risk to citizens.'⁴⁰ Moreover, the UN Special Rapporteur on Human Rights and the Environment David Boyd, wrote candidly about the Irish government's responsibility to protect the right to life against climate change-caused threats in a 2018 report. In his consideration of the impact of climate change on the right to life in Ireland he asserted that:

[t]here is no doubt that climate change is already violating the right to life and other human rights today. In the future, these violations will expand in terms of geographic scope, severity, and the number of people affected unless effective measures are implemented in the short term to reduce greenhouse gas emissions and protect natural carbon sinks.⁴¹

The right to life protected under Article 40.3.2° of the Constitution has been interpreted to be further protected by a positive obligation imposed upon the state to vindicate said right.⁴² The Supreme Court has previously stated that 'the nature of the

³⁸ *Friends of the Irish Environment* (n 33).

³⁹ Malé Declaration on the Human Dimension of Global Climate Change (2007).

⁴⁰ [2017] IEHC 695, [244].

⁴¹ David Boyd, 'Mandate of the Special Rapporteur on human rights and the environment: Statement on the human rights obligations related to climate change, with a particular focus on the right to life' (UN, 25 October 2018).

⁴² It is worth caveating this by noting that in *Fleming v Ireland* [2013] IESC 19, the Supreme Court held that an asserted constitutional right cannot be established merely by deriving it from a particular political or moral philosophy and must instead be justified by reference to the text, structure and values

right to life and its importance imposed a strong presumption in favour of taking all steps capable of preserving it, save in exceptional circumstances'.⁴³ Moreover, this appears to have been interpreted in *Ryan v Attorney General* to inhere a right to a minimum standard of living.⁴⁴ This interpretation is due to the High Court's acceptance that water was an indispensable prerequisite for the enjoyment of the right to life and therefore there probably existed a 'right of access to a supply of water.' This has interesting implications for the state, particularly pertaining to a known risk, such as climate change. If this line of reasoning is followed, it seems reasonable to suggest that other 'indispensable prerequisites' to the enjoyment of rights exist. Accepting, as the court did in *Ryan*, that the adequate enjoyment of the right to life is contingent upon the protection of certain indispensable prerequisites, it seems reasonable to suggest that other prerequisites not only exist but are under severe threat by climate change. Take clean and breathable air for example. If this prerequisite were shown to be under threat, it seems a cause of action under the right to life could follow against the party responsible provided such an issue was not adequately protected in tort.

The Irish Supreme Court dealt directly with a constitutional cause of action based on the right to life in the controversial *Attorney General (SPUC) v Open Door Counselling Ltd* case, in which the constitutional right to life of the unborn child was used to 'restrain the private activities of the defendants.'⁴⁵ This case demonstrates the Court's consideration of the fundamental nature of the right to life and the ability to recognise its impingement by private actors. This article does not seek to examine the minutiae of derived protections from the right to life but rather to highlight the Irish courts' recognition that the fundamental nature of the right to life impels the court to consider a number of crucial prerequisites to its full enjoyment. A straightforward argument can then be made that the prerequisites immanent to this right are clearly being violated by climate change.

The Right to Bodily Integrity

The right to bodily integrity is an unenumerated right first recognised in the High Court decision of *Ryan v Attorney General*, wherein Kenny J stated that 'one of the personal

of the Constitution itself. The task of the climate litigant would be to demonstrate that the protection of the right in this instance would overcome this hurdle.

⁴³ *Re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79 82.

⁴⁴ [1965] IR 294, 315 (Ó Dálaigh CJ).

⁴⁵ [1988] IR 593.

rights of the citizen protected by the general guarantee is the right to bodily integrity.⁴⁶ Ó Dálaigh CJ further asserted that the State, 'organised for the common welfare of all its citizens' had 'the duty of protecting' them from 'dangers to health in a manner not incompatible or inconsistent with the rights of those citizens as human persons.'⁴⁷ The right to bodily integrity has been accepted to extend to a more general right to have one's health protected against violations from the State.⁴⁸ A 2019 Department of Health Report on the health impacts of climate change outlined a suite of climate change caused health risks affecting the Irish population.⁴⁹ As bodily integrity has been interpreted to extend to health, in some settings, the infringement of the right by climate damage becomes clearer. Mention should also be made of the *McDonagh v Frawley* case, wherein the right not to have one's health endangered by the state was first recognised. When referring to the right to bodily integrity, Finlay P asserted that there existed 'no reason why the principle should not also operate to prevent an act or omission of the Executive which, without justification, would expose the health of a person to risk or danger.'⁵⁰

The complexity and universality of the damage in this context was examined by Clarke CJ in *Friends of the Irish Environment*, wherein he asserted that 'if an individual with standing to assert personal rights can establish that those rights have been breached [or]...the Constitution is not being complied with in some matter that affects every citizen equally...then the Court can and must act to vindicate such rights and uphold the Constitution'.⁵¹ Moreover, he stated that the complexity of such an issue does not change the court's obligation to vindicate this right.

Though not used in this specific context, Ó Dálaigh CJ's comment in *Ryan* is a unique endorsement of intergenerational health protection and is apt in the context of

⁴⁶ *Ryan* (n 44), 295; It is worth noting that the preferred terminology in more recent case law is 'derived' rights. Following criticism of the unenumerated rights doctrine as insufficiently anchored in the constitutional text, the Supreme Court in *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 endorsed an approach whereby rights are derived from the text and structure of the Constitution rather than identified by reference to external values.

⁴⁷ *ibid*, 348.

⁴⁸ Gerard Hogan et al, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) 1692; In more recent decisions, the right to bodily integrity is increasingly presented as derived from the textual right to the person rather than as an autonomous unenumerated right.

⁴⁹ Department of Health, *Health Impacts of Climate Change and the Health Benefits of Climate Change Action: A Review of the Literature* (Research Paper, Department of Health 2019)

⁵⁰ [1976] IR 365, 372.

⁵¹ *Friends of the Irish Environment* (n 33) [8.16].

environmental damage. 'Dental caries ... has adversely affected generation after generation and will continue to do so if measures are not taken. This constitutes the type of danger from which the State has not merely the right but the duty to protect its citizens.'⁵² Here the former Chief Justice seems to argue that positive state action to vindicate a constitutional right is needed.

The cases discussed thus far have been public in nature, involving the vertical application of constitutional rights; the enforcement of such rights in horizontal actions has proven more difficult. As discussed in the preceding section, *Hanrahan, W v Ireland* and *Sweeney* all concern claims of infringement of the right to bodily integrity. In each instance, the court found it unnecessary to engage in a full debate on the issue, satisfied that this right was adequately protected by such torts as negligence, trespass to the person and nuisance. The case of *Walsh v Family Planning Services Ltd* is worth mentioning.⁵³ Here MacKenzie J explicitly referenced a violation of the plaintiff's right to bodily integrity, noting that the damages awarded were 'of his constitutional rights'.⁵⁴ Bizarrely, the Supreme Court 'treated the award as having been for a technical trespass', and thus tried it on strict liability terms.⁵⁵

This judicial reluctance to extend a direct cause of action to bodily integrity poses a serious threat to the climate litigant. In order to overcome this, the difference between these cases and a climate case must be emphasised. As will be discussed in the following section, the torts of nuisance and trespass do not adequately protect against climate damage and the courts' deference to the use of these torts will not suffice. Furthermore, an assumption needs to be made that the court's finding that bodily integrity may be protected under tort in some contexts does not create a *de facto* rule for *all* cases of infringement of the right to bodily integrity.

Adequacy of Tortious Protection

Constitutional rights do not inhere a right of action in a plaintiff unless the tortious protection provided by the common law is found ineffective. The question we must now turn to is whether existing tort law provides effective protection against the impingement of the constitutional rights discussed above. If such protection exists

⁵² *Ryan* (n 44) 348-349.

⁵³ [1992] 1 IR 496.

⁵⁴ *ibid* 504.

⁵⁵ *Binchy* (n 4), 357.

then there is no need for a *sui generis* constitutional claim. A crucial distinction exists between an action for the breach of a constitutional right that would fail in tort, due to an inability to establish the elements of tort, and an action for a breach of a constitutional right that is not adequately protected by tort law itself. It is still possible to bring a claim for breach of a constitutional right and 'fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence.'⁵⁶ The reasoning in *MC v The Clinical Director of The Central Mental Hospital & Anor* is worth considering.⁵⁷ Here, Baker J delivered a judgment in which she referenced the 'evolution of the principle' established in *Meskeel* in considering 'whether the existing remedies can or are capable of providing a remedy for breach.'⁵⁸ Baker J also paraphrased the language used in *Bleheine v Minister for Health and Children* when noting that 'it is only if an action at common law is not available, or does not provide an adequate vehicle by which to vindicate the antecedent constitutional breach ... and if, as a result, the right may not be effectively, effectually, or adequately vindicated, that a court will fashion a remedy deriving from the breach of constitutional rights.'⁵⁹ What exactly an 'effective remedy' entails was taken to mean 'not tested by reference to whether a plaintiff can establish the case, but whether the elements of the tort or what McKechnie J calls its 'parameters', are present, and would establish a cause of action.'⁶⁰ Echoing this rationale, this section asks whether the alleged infringements of constitutional rights by climate damage contain the 'parameters' of a tort, in order to fit within a traditional cause of action.

Doubtless, a climate-based action under nominate torts in Ireland would face a myriad of hurdles, as has been the case in analogous litigation, such as establishing a duty of care, causation and material damage. There is nothing to suggest that an Irish case on similar grounds would fare differently. However, these hurdles are not enough to justify the use of a *sui generis* constitutional cause of action as an alternative. They merely demonstrate that a nominate tort action would be very difficult to win. For a *sui generis* constitutional tort action to be justified, it must be shown that the issue in

⁵⁶ *Hanrahan* (n 12) 636.

⁵⁷ [2020] IESC 28, [2021] 2 IR 166.

⁵⁸ *ibid* [133].

⁵⁹ *ibid*, [2020] 2 IR 164 [57].

⁶⁰ *MC* (n 57) [134].

question is not protected in any significant manner by a nominate tort, and the necessary tortious parameters are absent.

The statement of Hogan J in *Sullivan v Boylan (No 2)* is prescient; while it is 'far from clear that the existing law of torts sufficiently or adequately protects the constitutional interests' in question, 'it is true that, as might be expected, there are *features* of tort law which to some degree cover some of the interests' which the potential plaintiff seeks to vindicate.⁶¹ To date, private climate litigation in common law jurisdictions has primarily relied on the nominate torts of negligence, trespass, and nuisance. However, this article contends that the doctrinal elements required to ground a tortious claim capable of protecting fundamental rights, such as the rights to life and bodily integrity, are absent in the type of case under consideration. As such, traditional nominate torts appear ill-suited to support such claims. Furthermore, the absence of any climate tort case previously in Irish law suggests a structural inadequacy in the current tort framework to accommodate this form of damage. To substantiate this, it is now worth examining each of the nominate torts available in turn and examining whether they provide a plausible cause of action for the specific harm in question, and whether that harm can be meaningfully situated within their conceptual limits.

Negligence

A climate case premised on the tort of negligence would likely argue that fossil fuel companies have acted negligently by failing to take reasonable care to avoid a foreseeable risk. This argument was trialled in early US climate tort cases, with the majority of cases failing on justiciability grounds.⁶² Such an argument has also featured, in a more limited sense, in some European climate cases such as *Milieudefensie v Royal Dutch Shell*, though merely used as a feature of a broader argument based on statutory authority, inapplicable to Irish law.⁶³ Negligence appears to be much better suited to claims for demonstrable damage to property, as opposed to damage to the right to life or bodily integrity. This is due to the fundamentally different functions performed by constitutional rights and negligence law. Doubtless, it is arguable that tort law in general seeks to uphold and vindicate personal rights in

⁶¹ [2013] IEHC 104, [2013] 1 IR 510 [25].

⁶² For an exploration of early private climate litigation see Geetanjali Ganguly et al, 'If at First You Don't Succeed: Suing Corporations for Climate Change', (2018) 38(4) OJLS 841.

⁶³ District Court of the Hague (DC), 26 May 2021, ECLI:NL: RBDHA:2021:5337.

the same vein as constitutional law; negligence is a straightforward compensatory model, seeking to quantify losses and remedy damage.

A further issue is temporality. Negligence asks for proof of when a duty attaches and when harm becomes reasonably foreseeable. This is not the case in constitutional rights actions. In the case of climate change, identifying these temporal aspects is an extraordinarily difficult task, as this effectively asks the plaintiff to establish 'when a duty to avoid emissions attached and when their particular harm became reasonably foreseeable. Both of these analyses will work to shorten the time period within which defendants' harmful emissions were culpably harmful.'⁶⁴ Fossil-fuel companies have been emitting GHGs into the atmosphere for decades, making pinpointing an exact moment a duty attached and when harm became foreseeable an onerous task. The benefits of a rights-infringement cause of action are therefore strengthened by the ability to avoid this issue of temporality by applying a different form of liability. As we know, in a negligence case it is not enough for the plaintiff to demonstrate that the harm was caused by the defendant, they must also show that this occurred due to the defendant's *negligence*, which would result from breaching these duties.

Furthermore, there exists significant difference between actionable damage in the two fields. All of negligence (with the exception of medical monitoring) is concerned with actual damage that has already occurred. Doubtless, climate change is already causing damage that threatens the effective enjoyment of the rights to life and bodily integrity; however, the most significant damage is yet to come. The sole focus on compensating past damage makes this tort ill-fitting. The form of damage suffered can also vary between negligence and constitutional rights, with the former recognising a much smaller group. Constitutional rights damage, like some other torts, can extend to harms such as distress.⁶⁵ This was outlined by Carroll J who held that '[a] plaintiff who establishes unlawful interference with a constitutional right must be in as strong a position as a plaintiff whose statutory rights have been infringed and is entitled to recover damages for injury suffered by him.'⁶⁶ This followed the precedent set in *Cosgrove v Ireland*, wherein the infringement of a plaintiff's statutory rights led to an award of damages for foreseeable mental distress, anxiety and inconvenience.⁶⁷

⁶⁴ Kysar (n 36) 41.

⁶⁵ The tort of intentional emotional harm can cover the imposition of distress.

⁶⁶ *Hayes v Ireland* [1987] ILRM 651, 655.

⁶⁷ [1982] ILRM 48.

Nuisance

To quote Hogan J, 'it must be recalled that the law of nuisance complements ownership of land and the scope of that tort requires to be understood in that historical context.'⁶⁸ In *Sullivan*, Hogan J quotes a surprisingly apropos article by Professor Newark:

In true cases of nuisance the interest of the plaintiff which is invaded *is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner*. A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens. It is for this reason that the plaintiff in an action for nuisance must show some title to realty.⁶⁹

It is clear that a claim in nuisance, be it public or private, is not ideal to protect the right to life or to bodily integrity as it relates to land use. The tort of private nuisance is a fitting example of a tort which is basically effective in vindicating the right to property and if a claim for damage to the right to property were to arise, this would be the appropriate mechanism under which to try it. An example of a nuisance-based climate case in an analogous jurisdiction is currently playing out in New Zealand's *Smith v Fonterra*.⁷⁰ Here the plaintiff has established a *prima facie* case to bring a public nuisance claim based on 'special damage' he has suffered due to damage to coastal land in which he, and others he represents, claim legal and distinct tikanga interests.⁷¹ The famous case of *Lliuya v RWE* also made arguments under nuisance law, though its cause of action was derived from the German Civil Code.⁷² Furthermore, despite an affirmation that a more direct claim could succeed, the OLG Hamm noted that the damage in question was too unlikely and too mild to form a substantive claim. As yet, there have been no successful nuisance-based private climate cases, and there is little to suggest an Irish nuisance-based case would fare any better.

⁶⁸ *Sullivan* (n 61) [26].

⁶⁹ Francis Newton, 'The Boundaries of Nuisance' [1949] 65 Law Quarterly Review 480, 488.

⁷⁰ [2024] NZSC 5, [2024] 1 NZLR 134.

⁷¹ [2021] NZCA 552.

⁷² *Lliuya v RWE AG* (2015) Case No 2 O 285/15 (Essen Oberlandesgericht).

Trespass Against the Person

Trespass against the person is a tort that protects one:

not only against hurt and violence, but against every kind of bodily interference and restraint not justified or excused by allowed cause, and against the present (immediate) apprehension of any of these things.⁷³

While the traditional torts that form a part of this are battery, assault, intentional or reckless infliction of emotional suffering and false imprisonment, whether 'these torts will continue to be the principal avenues of recovery for such types of interference remains to be seen.'⁷⁴ McMahon and Binchy note the 'real possibility' that these forms of action will be 'supplemented by a jurisprudence of constitutional infringement.' They argued that the court may supplement particular torts 'with a parallel remedy for infringement of a constitutional right.'⁷⁵ They further note the capacity for this approach to allow compensation for non-imminent violence 'under the rubric of infringement of the constitutional rights to health and bodily integrity.'⁷⁶

Despite this promising statement, it is important at this point to note that a crucial element of the tort of trespass is that the interference alleged must be direct, thus the test employed is of directness and not foreseeability. A further element worth bearing in mind is that the onus of proof is shifted onto the defendant to show that he acted neither negligently nor intentionally. Moreover, this tort is actionable *per se* and proof of damage is not needed. It remains clear, however, that the tort of trespass to the person was never intended to regulate a problem as complex as climate change. The directness of causation needed for this tort alongside the focus on negligence/intention on the part of the defendant would cause further issues in the case of the potential climate case under consideration here. Furthermore, the implications of using a tort that is actionable *per se* is unfavourable in this context, as there exists a considerable degree of nuance in understanding which level of emissions ought to be defined as tortious.

⁷³ *Dullaghan v Hillen* [1957] Ir Jur Rep 10.

⁷⁴ Bryan McMahon and William Binchy, *The Law of Torts* (4th edn, Bloomsbury Professional 2013) [22-10].

⁷⁵ *ibid.*

⁷⁶ *ibid.*

Determining Liability

Let us assume that the above arguments were accepted, and the lack of adequate protection of the constitutional rights to life and bodily integrity under traditional tort law were to be established; a discussion of how liability ought to be determined in this instance is now warranted. As aforementioned, under a *sui generis* constitutional cause of action, the determination of liability is broadly contextual and the context of climate change is uncharted territory. Liability in this instance would be premised on the nature of the conduct that led to the infringement of a constitutional right. What behaviour specifically constitutes 'infringing conduct' remains a grey area, however, there is evidence that courts will look to the traditional model of torts in making this decision and in determining the liability attaching to this behaviour. As the infringement of the aforementioned constitutional rights to bodily integrity and life constitutes torts, then it seems reasonable to adopt the traditional 'ingredients of liability' in tort law.⁷⁷ It is worth noting however, if a claim fails due to the particulars of a classic tort case, it does not necessarily follow that a constitutional claim should fail on the same grounds.

A number of cases have sought to import the traditional tort liability steps into constitutional tort claims, though this is not universally lauded.⁷⁸ In *Mulligan v Governor of Portlaoise Prison & Anor*, the court, relying on *W v Ireland* argued that the bringing of a constitutional tort action carries with it other incidents of tort such as foreseeability and contributory negligence.⁷⁹ The court stated that 'a citizen may not precipitate a cause of action for a wrong involving aspects of a duty of care without a defendant being able to rely on the defences that might normally arise with regard to the imputation of such a duty.'⁸⁰ In *An Blascaod Mór Teoranta v Commissioner of Public Works* Budd J expressed doubts about using a test based on negligence or intention, citing the possibility for difficulties in establishing these elements and that this might impede the protection of the constitutional right.⁸¹ Budd J then outlined the three principal approaches to determining the infringement of constitutional rights. The first is '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 put on

⁷⁷ Binchy (n 4) 355.

⁷⁸ T.A.M. Cooney and Tony Kerr, 'Constitutional Aspects of Irish Tort Law' [1981] 3 Dublin University Law Journal 1.

⁷⁹ *Mulligan v Governor of Portlaoise Prison & Anor* [2010] IEHC 269, [2013] 4 IR 1.

⁸⁰ *ibid* [24].

⁸¹ [2000] 3 IR 565, 585.

the question of the carelessness or intention of the infringer of the right.⁸² This right-specific approach stresses the need to understand that the 'detrimental effect on a person's right may have to be balanced against others' rights and the needs of the common good'.⁸³

Under this approach, the common good of protecting the rights to life and bodily integrity is clear, as is the fundamental nature of these rights and their placement above countervailing rights. The second approach is to require proof of intent or negligence on the part of the infringer of the right. Binchy highlights Budd's identification of the difficulty that could arise in 'establishing culpable intent of negligence' and that 'there may be difficulties in deciding whether the infringement was intentional and the need for these ingredients might impede the protection for a constitutional right'.⁸⁴ The adoption of this approach regarding the potential climate case under consideration would pose issues as establishing negligence or intention would perhaps seem unlikely.⁸⁵ The third approach, dubbed the 'pragmatic' approach, stresses the importance of dealing with rights in the factual context of each case.⁸⁶ In considering the same topic, Henchy J deliberately avoided general consideration of broad questions and stated that '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'.⁸⁷

The picture thus emerging is that the courts will loosely follow traditional tort models in determining liability. Binchy has expressed hesitancy in the 'over-reliance on tort law to provide the substantial incarnation' of the *Meskeil* doctrine, citing the simplistic nature of foreseeability when it comes to constitutional rights.⁸⁸ Negligence and intention will of course feature in many applications of the doctrine but they need not form a universal test. Furthermore, what behaviour is defined as infringing constitutional rights remains largely up to judicial discretion, with the most recent cases stressing the need for a pragmatic case by case analysis. The lack of an explicit

⁸² *ibid* 585.

⁸³ *ibid* 586.

⁸⁴ Binchy (n 4) 356, citing Budd J in *An Blascaod Mór* (n 81) 586.

⁸⁵ David Hunter and James Salzman, 'Negligence in the Air: The Duty of Care in Climate Change Litigation' (2007) 155(6) *University of Pennsylvania Law Review* 1741.

⁸⁶ *An Blascaod Mór* (n 81).

⁸⁷ *ibid* 588.

⁸⁸ William Binchy, 'Constitutional Remedies and the Law of Torts' in James O'Reilly (ed), *Human Rights and Constitutional Law* (Round Hall Press 1992).

rule that negligence or intention need be present can only be a benefit to the potential climate constitutional tort litigant. If the seemingly favoured 'pragmatic approach' were to be adopted, the climate litigant would find themselves in a strong position, set against the factual context of the severity of harm posed and the impetus to take action. It was earlier argued that climate change damage does not fit neatly within the repertoire of nominate torts. It seems that the bespoke nature of the determination of liability in this context could even result in less onerous liability hurdles than traditional nominate torts.

Remedies

The next question that arises is whether the remedies available through the constitutional tort mechanism befit a climate case. Case law in this area has made it clear that the award of damages is the most common remedy available to those who suffer an infringement of a personal right, and are the principal manner in which these rights are vindicated. According to Binchy, 'courts appear to proceed on the basis that compensatory principles applicable to torts should govern claims for infringements of constitutional rights.'⁸⁹ Binchy notes that in *Grant v Roche Products (Ireland) Ltd*

the Supreme Court was anxious to emphasise that there was authority for the proposition that the law of tort "is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority whatever for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever."⁹⁰

In *Conway v Irish National Teachers Organisation*, Finlay CJ set out the types of damages awardable for a breach of constitutional rights: Ordinary compensatory damages, Aggravated Damages, Exemplary Damages / Punitive Damages.⁹¹ In this discussion he considered whether exemplary / punitive damages could correctly be awarded for a breach of constitutional rights. He stated

[i]t seems clear to me that the Court could not be availing of powers as ample as the defence of the Constitution and of constitutional rights requires unless, in the case of the breach of those rights, it held itself entitled to avail of one of

⁸⁹ *ibid* 358.

⁹⁰ *ibid* 358 citing Hardiman J in *Grant v Roche Products (Ireland) Ltd* [2008] 4 IR 679, 701.

⁹¹ *Conway* (n 26).

the most effective deterrent powers which a civil court has, the awarding of exemplary or punitive damages.⁹²

He further stressed that exemplary damages should not be awarded if the compensatory damages 'constituted a sufficient public disapproval of and punishment for the particular form of the wrongdoing.'⁹³ This was reiterated in *Shortt v Commissioner of An Garda Síochána*.⁹⁴

Returning to climate litigation, we must now ask which form of damages would be appropriate for the infringement of the constitutional rights to life and bodily integrity. Looking first at ordinary compensatory damages: this form of damages seeks to

recompense a wronged plaintiff for physical injury, mental distress, anxiety, deprivation of convenience, or other harmful effects of a wrongful act and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.⁹⁵

In this instance, compensatory damages may be awarded for almost every one of those criteria. Satisfied that compensatory damages can be awarded, the question that follows is whether there is cause for the additional award of aggravated or exemplary damages. Much of the criteria pertaining to aggravated damages surrounds the behaviour of the defendant and is therefore of little relevance to this article. Exemplary damages, however, are an opportunity for the court to express particular disapproval of the defendant's conduct, arising out of the nature of the wrong. The broad implications and universality of the harm perpetrated by the defendants certainly makes for a strong argument in favour of the award of exemplary damages.

Conclusion

Since its inception, the *Meskeil* doctrine has evolved; having begun life as a bold encapsulation of Walsh J's constitutional rights activism it has grown into a largely peripheral legal afterthought. This article has argued that the doctrine is not moribund, but rather awaiting legal reinvigoration, which may come in the form of climate litigation.

⁹² *ibid* 320.

⁹³ *ibid*.

⁹⁴ [2007] IESC 9; [2007] 4 IR 587.

⁹⁵ *Conway* (n 26) 317.

In many respects, tort and environmental protection are at theoretical odds. The liberal individualist foundations of tort law contrast to the collective, communitarian focus of environmentalism. Tort's reliance on fault and blame, seeing damage as a monetary function make it ill-suited to remedy the diffuse, polycentric issues posed by climate change. Perhaps this is why successful private climate litigation has taken place at the fringes of law, in the reinterpretation of unremarkable heuristics, or anodyne procedures; no better demonstrated than by the Dutch doctrine of *betamelijk* (to act decently) which crested the second wave of climate litigation.⁹⁶ In a similar way, the constitutional tort is at the fringes of Irish law, and represents a potentially powerful bulwark against the rising tide of private emissions.

To conclude, there are many elements immanent to the constitutional tort doctrine that may prove beneficial to the potential climate litigant, such as the straightforward standing requirements, the avoidance of nominate tort hurdles, and the wide array of possible damages. However, it is clear that constitutional tort actions are far from an exact science, and in what Hogan J calls a 'Joycean circular meandering',⁹⁷ one finds the courts returning time and again to the recurring theme of judicial discretion. The climate litigant may yet find strength in this indeterminacy, and a horizontal climate case could prove the harbinger of an entirely new method of litigating rights breaches and climate change.

⁹⁶ For further discussion of *betamelijk* and its use in Dutch climate litigation see Benoit Mayer, 'The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: *Milieudefensie v. Royal Dutch Shell*: District Court of the Hague (The Netherlands)' (2022) 11(2) Transnational Environmental Law 407; Laura Burgers, 'An Apology Leading to Dystopia: Or, Why Fuelling Climate Change is Tortious' (2022) 11(2) Transnational Environmental Law 419.

⁹⁷ Hogan (n 20) 16.