Neutral Citation : [2024] NIMaster 19 | *Ref:*

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **2/9/24**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Margaret Kennedy as Personal Representative of the Estate of Mary Ellen Meehan (Deceased)

Plaintiff

and

The Ministry of Defence

Defendant

Mr McKenna (instructed by KRW Law) for the Plaintiff
Mr Lunny KC and Andrew McGuiness (instructed by The Crown Solicitor) for the Defendant

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Master Bell

Introduction

[1] On 23 October 1971 Mary Ellen Meehan was a rear seat passenger in a car at the junction of Cape Street and Omar Street, Belfast. The vehicle was fired upon by members of the British Army and Mrs Meehan and her sister were stuck by those shots and died as a result of their injuries.

[2] The shootings took place when the current plaintiff, Mrs Meehan's daughter, was aged nine. In February 2017 the plaintiff issued a writ in respect

of the killing of her mother. In October 2018 she served a statement of claim which set out the basis of her action:

(i) As personal representative of her mother (on behalf of her mother's dependents, including herself);
(ii) On her own behalf in respect of the personal injury, loss and damage which she herself suffered;
(iii) In respect of the misfeasance in public office which occurred when her mother was shot;
(iv) In respect of the negligence which occurred when her mother was shot;
(v) In respect of a breach of the substantive obligation under Article 2 of the ECHR; and
(vi) In respect of a breach of the procedural obligation under Article 2 of the ECHR (on behalf of both herself and all other victims named in the statement of claim).

[3] In October 2019 the defendant served a notice for further and better particulars which, inter alia, sought to obtain details in respect of any previous legal action which had occurred in respect of the death of Mrs Meehan. The plaintiff's reply to that particular question was that there had been a claim for damages in relation to Mrs Meehan's death in 1982 which had proceeded to trial and ended with judgment being granted to the plaintiff in that action. However, in her reply, the plaintiff stated that she did not know who the parties to the 1982 action were.

[4] The defendant now makes an application to have the plaintiff's action struck out on three different grounds. Firstly, the defendant submits that, because there has been a previous action (which I shall hereafter refer to as "the 1982 proceedings" or "the 1982 action"), the current action ought to be struck out because it is res judicata and that the plaintiff is estopped from pursuing it and that it constitutes an abuse of process. Secondly, the defendant submits that the plaintiff's claim ought to be struck out under Order 18 Rule 19 of the Rules of the Court of Judicature on the basis that the pleadings do not disclose a reasonable cause of action or because it is scandalous, frivolous or vexatious, or it is otherwise an abuse of process. Thirdly, the defendant submits that the plaintiff's claim ought to be struck out on the basis that it is statute-barred by virtue of the provisions of the Statute of Limitations (Northern Ireland) 1958 and/or the Limitation (Northern Ireland) Order 1989.

The Law on Striking Out Actions

[5] In the decision of the court in *Magill v Chief Constable* [2022] NICA 49, McCloskey LJ summarised the principles to be applied in applications to strike out on the basis that there is no reasonable cause of action:

"[7] In summary, the court (a) must take the plaintiff's case at its zenith and (b) assume that all of the factual allegations pleaded are correct and will be established at trial. As a corollary of these principles, applications under Order 18 rule 19 of the 1980 Rules are determined exclusively on the basis of the plaintiff's statement of claim. It is not appropriate to receive any evidence in this exercise. Based on decisions such as that of this court in *O'Dwyer v Chief Constable of the RUC* [1997] NI 403 the following principles apply:

(i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.

(ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.

(iii) In approaching such applications, the court should be cautious in any developing field of law; thus in *Lonrho plc v Tebbit* (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:

> "In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-by-case basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often

> inappropriate to determine points of law on the assumed and scanty, facts pleaded in the statement of claim'.

(iv) Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted.

(v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.

(vi) So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out." Thus, in *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham stated:

> "This means that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can properly be persuaded that no matter what (within the bounds of the pleading) the actual facts of the claim it is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim in limine."

[6] As I have indicated, in addition to the no reasonable cause of action basis, the defendants also seeks a strike out of the plaintiff's claim on the basis that the proceedings are also an abuse of process In *Ewing (Terence Patrick) v Times Newspapers Ltd* [2010] NIQB 7 Coghlin LJ, delivering the judgment of the court stated:

> "As Lord Phillips, MR, noted in *Jameel v Dow Jones and Company* [2005] QB 946:
>
> > `An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field then to referee any game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.'
>
> Today it is necessary to clearly bear in mind the overriding objective contained in Order 1 rule 1A of the Rules which requires the court to take into account not just the interests of the parties before the court but also the interests of other litigants and the overall administration of justice including the potential for the costs, expense and time to escalate out of all proportion. In my view such an approach is consistent with the proportionate observation of the Article 6 rights of individuals."

[7] Under the inherent jurisdiction and Order 18 Rule 19(1)(b)-(d), evidence by affidavit or otherwise is admissible. The court can explore the facts fully but should do so with caution: *Mulgrew* v *O'Brien* [1953] NI 10, at 14 (Black LJ).

[8] In *McDonald's Corp v Steel* [1995] 3 All ER 615, a defamation action, the Court of Appeal considered the correct approach to an application under Order 18 Rule 19(d) to strike out a pleading for abuse of process and held at (623):

> "The power to strike out is a draconian remedy which is only to be employed in clear and obvious cases…it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of being proved."

Neill LJ further held that unless the defence or the particulars could be described as "incurably bad" because there will be no evidence to support them, the pleadings "should be left until trial."

The Secondary Victim Claim

[9] I will begin by dealing with the secondary victim claim advanced by the plaintiff in her statement of claim. This is a matter on which there is now agreement between the legal teams for the plaintiff and the defendant. The plaintiff's statement of claim, in somewhat unparticularised language, advanced a claim for personal injuries. It stated:

> '' to the extent that the acts or omissions complained of and which led to the death of the deceased caused personal injury … to the plaintiff, the plaintiff brings proceedings in her own name."

[10] The line of authorities on primary and secondary victims includes *McLoughlin v O'Brian* [1983] 1 AC 410, *Alcock v Chief Constable South Yorkshire Police* [1992] 1 AC 310 and *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1. Essentially, in order to be successful, a plaintiff must demonstrate that he or she was close to the incident in time and space, or came upon its immediate aftermath, where the primary victim was killed, injured or imperilled. However, counsel for the defendant noted that, at the time of her mother's death, the plaintiff was aged 9 and was at home.

[11] Subsequent to the service of the plaintiff's statement of claim, her solicitor effectively conceded that a secondary victim claim was not possible on the pleaded facts. His letter dated 14 April 2022, under the heading "Secondary Victim Claim", stated:

> "No claim is advanced on the basis that the plaintiff was a witness to the material events or their aftermath."

Similarly, counsel in his skeleton argument for the hearing before me submitted that any claim on the basis that the plaintiff witnessed her mother's death or its aftermath was abandoned.

[12] In the light of this concession I therefore strike out the related portion of the statement of claim.

The *Res Judicata* Issue

[13] The parties agree that there have been previous proceedings in relation to Mrs Meehan's death. I will deal with the evidence in relation to the nature of these proceedings shortly. However, it is because of the 1982 action that the defendant submits that the current action must be stayed or struck out on the res judicata principle.

[14] The classic statement summarising the principle of res judicata is by Lord Sumption in *Virgin Atlantic Airways v Zodiac Seats UK Ltd* [2013] UKSC 46:

> "Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see *Conquer v Boot* [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see *King v Hoare* (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: *Duchess of Kingston's Case* (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 and adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

[15] The evidence in relation to the existence and nature of previous proceedings is limited. The plaintiff concedes in her replies to the defendant's notice for further and better particulars that in relation to the 1982 proceedings concerning the death of her mother, there was a claim for damages which

proceeded to trial, resulting in judgment for the plaintiff. The plaintiff has also located and served an accountancy report which states:

> "Per information provided by the client, the Meehan family received a compensation payment totalling £1,600 in 1982; £1,500 to Jim Meehan and £100 to Eddie Meehan who was the only dependant child at that time."

[16] In his affidavit sworn on 17 May 2022, Mr Hogg of the Crown Solicitor's Office avers that, beyond what has been said by the plaintiff in her replies, she has provided no further information or discovery concerning the previous litigation in respect of her mother's death. He also observes that the plaintiff would have been an adult and not a child at the time of the 1982 proceedings by making the point that she was then aged 20.

[17] The grounding affidavit from Mr Hogg also avers that the defendant has attempted to obtain more information in respect of the earlier claim regarding Mrs Meehan's death. It appears that the Ministry of Defence hold no records in relation to the earlier action and nor does the Crown Solicitor's Office. The defendant also obtained an order under Order 66 Rule 5 in an attempt to obtain any records in respect of the action held by the Northern Ireland Courts and Tribunals Service. Again, no relevant records were discovered. Finally, the defendant avers that Humpreys J, during case reviews of the current action, directed that enquiries be made of relevant court offices. These enquiries have also proved unfruitful.

[18] However Mr Hogg avers that searches in a number of newspaper archives have led to the discovery of three newspaper reports in respect of the 1982 proceedings from the Belfast Telegraph on 18 February 1982, the Belfast Newsletter on 19 February 1982, and the Belfast Telegraph on 22 June 1982. The first of these articles stated the following:

> "The family of an Andersonstown woman who was shot dead by the Army in a controversial incident on the Falls Road ten years ago, has been awarded £1,500 damages by a jury in the High Court.
>
> James Meehan, a 43-year old lorry driver of Falcarragh Drive, Andersonstown sued the Ministry of Defence for the death of his wife Maura, on October 23, 1971.
>
> Mrs Meehan and her sister both died in the incident when the Army opened fire on a car in which the two women were travelling, claiming that shots had been fired at them from the vehicle.

> Both women were rear seat passengers in the car which was in the vicinity of Omar Street at the time. They died instantly. The Ministry of Defence denied liability.
>
> During the hearing of the action, evidence was given that forensic swabs taken from the hands of the two women showed traces of lead particles.
>
> A forensic expert said that these were consistent with a gun having been fired from the car, but he could not categorically say that the dead women had handled or fired a gun.
>
> The question the jury of six women and one man was asked to decide was – was the firing by the soldiers a use of force which was reasonable in the circumstances prevailing on October 23, 1971? The jury's answer was "No".
>
> Mr Meehan sued the Ministry on his own behalf and that of his three sons, aged 21, 18 and 14 and one daughter aged 20."

[19] It is on the basis of the plaintiff's replies and the newspaper articles that the defendant bases its res judicata application. Mr Hogg avers that the following facts seem clear from the newspaper articles. Firstly, that the matter proceeded to trial over a number of days, with the Ministry of Defence contesting liability. Secondly, that the jury had to decide whether the shooting was lawful or not and that they decided that it was not. Thirdly, that the plaintiff's father appears to have sued on his own behalf and on behalf of his four children, including the plaintiff. Fourthly, that £1,500 was awarded to the plaintiff.

[20] The plaintiff's solicitor in his letter of 14 April 2022 indicates that the plaintiff does not accept the newspaper reports as full and accurate. This position was unsupported either by evidence or argument. In her written submission in respect of this application, the plaintiff submits that the newspapers cannot be an authoritative record of the issues between the parties in the earlier proceedings. However, I take the view that it is not an "authoritative record" which the defendant is required to place before the court. Rather the defendant is simply required to prove on the balance of probabilities that there were previous proceedings on the factual matters concerning the shooting of Mrs Meehan by the soldiers which should lead to the current proceedings being regarded as an abuse of process.

[21] All newspaper readers would probably accept that what appears in newspapers can never be an authoritative record of anything. Readers will have greater or lesser degrees of confidence in different newspapers' coverage of events. Newspapers may contain reporting from their own reporters who

attended events or incidents and who may have been first hand observers of what is being reported. They may include quotations from those who have been interviewed. They may rely extensively on other content providers, such as the Press Association, for their reporting. While some newspaper content may therefore essentially be primary evidence from those who have themselves witnessed events, other content may be second or third hand hearsay, or even uninformed gossip, depending on how the content was gathered and processed into the final published article.

[22] In respect of the 1982 proceedings, the evidence of the plaintiff confirms the accuracy of the newspaper report to a limited degree, namely that there were civil proceedings in relation to Mrs Meehan's death in 1982, that the plaintiff in the 1982 proceedings was successful, and that something in the region of £1,600 was awarded as damages. However, neither party, nor their solicitors, have been able to produce documents of any kind from the proceedings 42 years ago. Nor has the Courts and Tribunals Service. The court is therefore left with the admission of the plaintiff in her replies together with the hearsay evidence of the newspaper reports. In this case, none of the newspaper reports carry a reporter's byline.

[23] Order 6 Rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980 provides that:

> "Before a writ is issued it must be endorsed
> (a) Where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues…"

[24] A number of implications flow from the concept of representative capacity in legal proceedings. Firstly, where a plaintiff sues in a representative capacity, he sues on behalf of other persons who have a similar interest in the proceedings. Secondly, if those persons are adults, they must have given their consent to those proceedings being commenced on their behalf. The observation made by Mr Hogg in his affidavit that the plaintiff was aged 20 at the time of the 1982 proceedings finds its importance at this point. Thirdly, where a court makes a decision in proceedings where a plaintiff is acting as a representative for others, that decision is binding on all persons represented in the action.

[25] Although neither of the parties in the current proceedings, nor the Courts and Tribunals Service itself, can find a copy of the writ from the 1982 proceedings, the fact that the Belfast Telegraph in its article of 18 February 1982 stated:

> "Mr Meehan sued the Ministry on his own behalf and that of his three sons, aged 21, 18 and 14 and one daughter aged 20"

leads me to conclude, on the balance of probabilities, that in the 1982 proceedings Mr Meehan sued both on his own behalf and in a representative capacity on behalf of his children (including that of Margaret Kennedy, the plaintiff in the current proceedings). I find it inherently improbable that the reporter covering the trial would have invented or fabricated such a detail for his or her newspaper article if that had not been the position. The current action is therefore an action which deals with the same incident, the death of Mrs Meehan, as the previous 1982 proceedings, in which Margaret Kennedy was represented by her father.

[26] Even if this had not been my conclusion, it is arguable that the issue over whether Margaret Kennedy was a party to the 1982 action is not the significant legal point which it might once have been. The legal principle of res judicata has moved on in the way that it is applied. Clerk and Lindsell on Torts (24th edition) states at para 29-25:

> "Res judicata may once have been limited to previous decisions between the same parties on the same matter, but it is now regarded as an aspect of a wider doctrine of abuse of process which can be referred to as the "wider principle of *Henderson v Henderson*". Under this, the courts have an inherent jurisdiction to strike out as vexatious and abusive not only a claim or defence which not only has been already decided in previous proceedings between the same parties against the party raising it, but also more generally any allegation which might have been raised in any previous proceedings in which the facts necessary to raise it have been decided against him."

[27] The defendant submits that the currently available evidence indicates that the same claim was brought by the plaintiff's father and prosecuted to a successful conclusion in the 1982 proceedings. Thus, the current proceedings breach Lord Sumption's second and third principles in *Virgin Atlantic Airways v Zodiac Seats UK Ltd* where Lord Sumption said, firstly, "… where the plaintiff succeeded in the first action and does not challenge the outcome, he may not bring a second action to recover further damages" and, secondly, "a cause of action [is] extinguished once judgment has been given upon it…".

[28] I now turn specifically to the inclusion of the torts of negligence and misfeasance in public office in the plaintiff's statement of claim and to the *Henderson v Henderson* argument raised by the defendant. The 1982 proceedings appear to have been limited to claims of assault, battery and trespass to the person. Accordingly, the action did not contain claims for negligence or misfeasance in public office, as the current proceedings do. Hence any claims

for negligence or misfeasance in public office ought to have been raised in the 1982 proceedings.

[29] I agree with the defendant's argument that the current proceedings are rooted in the fatal shooting of Mrs Meehan and, in particular, the core contention that the servants or agents of the defendant acted unlawfully when they opened fire at the vehicle in which she was travelling.

[30] The principles behind the requirement for finality in litigation were explained by Lord Wilberforce in *The Ampthill Peerage* [1977] AC 547:

> "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed on the right of citizens to . . . reopen disputes. . . . Any determination of disputable fact may, the law recognizes, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which might perhaps lead to a different result, but in the interests of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth, . . . and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals [and] . . . allows judgments to be attacked on the ground of fraud . . ."

[31] Lord Goff expressed similar views in *The Indian Grace* [1993] AC 410:

> "Res judicata is founded upon the public interest in the finality of litigation rather than the achievement of justice as between the individual litigants."

[32] Although it appears from the available evidence that the 1982 proceedings concerned torts of assault, battery and trespass to the person, there can be no doubt that the torts of negligence and misfeasance in public office could have been pleaded by the plaintiff's counsel in those proceedings. The modern law of negligence flows from the well-known case of *Donoghue v Stevenson* [1932] AC 562 and could obviously have been included in the 1982 statement of claim. The tort of misfeasance in public office is even older and dates back to the beginning of the 18th century. Its origin lies in the decision of *Ashby v White* (1703) 92 ER 126, and in *Dunlop v Woollahra Municipal Council* [1982] A.C. 158 the Privy Council described the tort as "well

established". While it was not as fashionable in the 1980s as it has now become to sue for misfeasance in public office, it was nonetheless clearly available to the plaintiff to do so. The plaintiff has advanced no explanation as to why these torts were not pleaded by counsel in the 1982 action.

[33] In *Henderson v Henderson* (1843) 3 Hare 100, in a statement described by Lord Sumption in *Virgin Atlantic* as "justly celebrated" and which articulates "probably the commonest form of res judicata to come before the English courts", Wigram VC held as follows:

> "In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time... Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the case out of the operation of the general rule."

[34] In *Johnson v Gore Wood & Co (A Firm)* (2002) AC 1 the House of Lords held that *Henderson v Henderson* should not be rigidly applied. Lord Bingham confirmed that *Henderson* was closely connected with the principle of "abuse of process", that is the power that any court of justice must possess to prevent misuse of its procedure. The bringing of a claim or the raising of a defence in later proceedings might amount to an abuse if the court was satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings, something which would rarely be the case, unless the later proceedings involved an element of unjust harassment. It was thus wrong to hold that merely because a matter could have been raised in earlier proceedings it should have been. The court should instead take a broad, merits-based approach.

[35] In *Johnson v Gore Wood* Lord Bingham observed that the rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. While litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court, this does not, however, mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. Lord Bingham agreed with what Lord Diplock had said in *Hunter v Chief Constable of the West Midlands Police* [1982] A.C. 529, namely that there is an inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. One manifestation of this power was to be found in Order 18 Rule 19 of the Rules of the Court of Judicature which empowered the court, at any stage of the proceedings, to strike out any pleading which disclosed no reasonable cause of action or defence, or which was scandalous, frivolous or vexatious, or which was otherwise an abuse of the process of the court.

[36] After considering the authorities, Lord Bingham concluded:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of

> it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

[37] Recent case law demonstrates that Lord Bingham's speech in *Johnson v Gore Wood* represents the current legal position to be applied. In *Test Claimants in the Franked Investment Income Group Litigation v Commissioners for Inland Revenue* [2020] UKSC 47, Lord Reed and Lord Hodge, with whom Lord Lloyd-Jones and Lord Hamblen agreed, said:

> "It is not sufficient to establish abuse of process for a party to show that a challenge could have been raised in a prior litigation or at an earlier stage in the same proceedings. It must be shown both that the challenge should have been raised on that earlier occasion and that the later raising of the challenge is abusive."

The approach to be adopted is therefore that the court must take a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

[38] One of the significant issues in this case relates to the passage of time since the events in question. Mrs Meehan was shot and died almost 53 years

ago. The 1982 proceedings in which the Ministry of Defence was previously sued in relation to Mrs Meehan's death concluded some 42 years ago. The current action was brought by the plaintiff some 35 years after the conclusion of the previous action. Even if the current proceedings had been brought a few years after the 1982 proceedings, the documentary evidence would almost certainly have been available, including, crucially, the transcript of evidence given by the witnesses at that trial. By delaying some 35 years after the 1982 proceedings before commencing the current proceedings, the defendant is being put in an immensely difficult position. Counsel for the defendant submitted that his client would have much greater difficulty marshalling both human and documentary evidence and in obtaining full discovery from the plaintiff given the substantial passage of time since Mrs Meehan's death. Crucially, the stenographer's transcript of the evidence given during the 1982 proceedings cannot be located by the Courts and Tribunals Service. Neither of the parties has provided me with any information as to whether any of the witnesses to, or participants in, the death of Mrs Meehan are still alive, and if so, whether they still have the physical or mental capacity to give oral evidence.

[39] Counsel for the plaintiff made a number of submissions in his skeleton argument on the res judicata issue. In the 1982 proceedings the scientific evidence apparently before the court was consistent with Mrs Meehan either having discharged a weapon and/or a gun having been fired from the vehicle she was travelling in at the time she was shot. Counsel submitted that this lead residue evidence "necessarily impacted on the terms of the judgment for the plaintiff in the 1982 action." Counsel therefore essentially submits that the current proceedings ought to be allowed to continue so that evidence from Angela Shaw, Forensic Consultant, may be considered. The defendant has served a forensic report from Ann Kiernan, Senior Forensic Scientist, in rebuttal of Angela Shaw's report. The argument is therefore being made that the forensic evidence in the 1982 proceedings was unreliable and, in the light of the plaintiff's new forensic evidence (assuming that it is to be preferred over the defendant's new forensic evidence), should lead to the award of a greater sum of damages than was awarded in the 1982 proceedings.

[40] It is not, of course, for this court to assess the merits of the new forensic evidence. The important point is that seeking to adduce new evidence and to recover a greater award of damages than were awarded in the 1982 proceedings are the improprieties which the principle of res judicata is trying to prevent. The proper remedy where new evidence has been discovered, or an award of damages is considered to be too low, is an appeal against the original verdict. Counsel for the defendant argued that the finality point was of huge importance. The legal system would grind to a halt if the finality principle was abandoned. I agree. The danger to the justice system if new litigation may be initiated in the event of newly discovered evidence in respect of particular

factual circumstances is that litigation never ends. This would be detrimental to the justice system as a whole and cause immense financial burdens to both individual defendants and to the wider public.

[41] The essence of the principles of res judicata is that, once a particular matter has been determined by a court, that may preclude a party from mounting a second attempt. It might be described in vernacular terms as meaning that a litigant is entitled to their day in court, but once they have had it, they are not in general entitled to a second bite of the cherry. In the particular circumstances of this case, to attempt to do so after the passing of multiple decades is not justified. I therefore conclude that, given the plaintiff has already been a party to the 1982 action in which she and other family members sued the Ministry of Defence for trespass to the person, assault and battery, it would be an abuse of process to permit her to continue with this second action for the torts of negligence and misfeasance in public office, particulars of which are set out in her statement of claim. I therefore strike out that portion of her statement of claim.

The Substantive Limb of Article 2 Claim

[42] Article 2 of the European Convention on Human Rights gives rise to two obligations on the part of the State. The first is a substantive obligation regarding the deprivation of life. The plaintiff alleges in her statement of claim that there was a substantive breach of Article 2 because Mrs Meehan was unlawfully injured and killed.

[43] The defendant raised the issue as to whether the plaintiff could maintain an action in the courts under the Human Rights Act 1998 when that legislation was not in force at the time of her mother's death on 23 October 1971 some 29 years before its commencement on 2 October 2000. The defendant submitted that a breach of the substantive obligation under Article 2 could not be claimed because of the gap between the date of Mrs Meehan's death on 23 October 1971 and the date for the coming into force of the Human Rights Act 1988, which was 2 October 2000.

[44] Following filing of the defendant's skeleton argument, counsel for the plaintiff took the position that the argument that there had been a substantive breach of Article 2 would no longer be proceeded with by the plaintiff. I agree that the plaintiff's allegation was not tenable for the following reasons.

[45] The issue of whether Article 2 of the Human Rights Act applied to deaths prior to the date of the coming into force of the Act in October 2000 was considered by the Court of Appeal for Northern Ireland in *In Re McQuillan* [2019] NICA 13 where Stephens LJ gave the judgment of the court and said:

> "[131] In relation to the second issue and in the circumstances of this case there has to be a genuine connection between the

death as the triggering event and the entry into force on 2 October 2000 of the HRA. *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7 Lord Kerr delivering the judgment of the Supreme Court stated at paragraph [111] that the "plain and inescapable fact is that this court in *McCaughey* unequivocally adopted the decision in *Šilih* as indicating the principled approach in domestic law to the question of genuine connection." At paragraph [108] Lord Kerr stated that "nothing in *Janowiec* detracts from the proposition in *Šilih* that the decision as to whether there is a genuine connection involves a multi-factorial exercise and the weight to be attached to each factor will vary according to the circumstances of the case.

[132] One of the factors in the multi-factorial exercise which can be of importance is the lapse of time between the triggering event which is the death and 2 October 2000, which is the date of the entry into force of the HRA. The lapse of time must remain reasonably short if it is to comply with the genuine connection standard. However, the weight to be attached to this factor will vary according to the circumstances of the case so that the issue becomes generally what weight the passage of time should carry in a *Brecknell* case and specifically what weight it should carry on the facts of this particular case. We consider as a matter of principle that generally it should carry little if any weight given that the passage of time is accommodated in a *Brecknell* case when determining the nature of the Article 2 obligation.

[133] Another part of the consideration of this factor is what is meant by reasonably short. We consider that a period of 10 years or less between the triggering event (the death of the applicant's sister) and the critical date (the coming into force of the HRA) is not an immutable requirement, see paragraph [108] of *Finucane*. The guidance that a reasonably short lapse of time should not *normally* exceed 10 years (emphasis added) permits of a longer period. Furthermore we consider that whilst a genuine connection can be met on the basis of time the length of time is not the only factor to be considered and weighed."

[46] When the question reached the Supreme Court, it held in *In Re McQuillan, In Re McQuigan,* and *In Re McKenna* [2021] UKSC 55:

"[164] Under the [Human Rights Act], the substantive right under article 2 has no application before 2 October 2000, by contrast with the substantive right under article 2 of the

> Convention. Under the Convention, the substantive right under article 2 has no relevant application in relation to the United Kingdom before 1966. In both cases the same issue arises, as to when a death which occurred before the inception of the relevant right under article 2 can trigger an investigative obligation under article 2 which is capable of recognition and enforcement by a domestic court or the Strasbourg Court, respectively. For the purposes of application of the genuine connection test, the "critical date" is the date of inception of the relevant right under article 2. In the case of the Convention, so far as concerns the United Kingdom, it is 14 January 1966; and different dates are relevant for other contracting states, depending on the date of inception of the right under article 2 for them. In the case of the HRA, applying the same principle, the critical date is 2 October 2000.
>
> [165] This conclusion is supported by the clear choice made by Parliament as to the non-retrospective effect of the HRA, as emphasised in specific terms by section 22(4) and the absence of any transitional provision to carry forward from 2000 any obligation to investigate to the demanding Convention standards any suspicious deaths going back to 1966. As Lord Rodger observed in Re McCaughey, para 159, "[m]aking the HRA apply to the investigation of violent deaths occurring as far back as 1980 or 1990 would have raised particularly sensitive questions … [which] would have had significant practical effects", especially in relation to Northern Ireland, which Parliament can hardly be thought to have overlooked when it decided that the HRA should not have retrospective effect. We would add that these points apply with even more force when it is recognised that the submission of Mr Southey takes the relevant starting date back to ten years or so before 1966 and that pursuant to it the range of investigative obligations is expanded to cover cases of alleged conduct contrary to the standards in article 3 as well as deaths. Referring to Lord Brown's formulation in Re McCaughey, para 100, quoted above: to construe the HRA by reference to a critical date of 14 January 1966 rather than 2 October 2000 would create major practical difficulties in its application which Parliament cannot have intended should arise."

[47] The consequence of the decision by the Supreme Court in *McQuillan* is that the plaintiff cannot succeed in her claim under the Human Rights Act regarding a substantive breach of Article 2 in respect of the death of her mother which occurred on 23 October 1971. It follows therefore that, as the plaintiff

now appears to accept, I am obliged to strike out that portion of her statement of claim.

The Procedural Limb of Article 2 Claim

[48] The second obligation under Article 2 of the ECHR is a procedural obligation. The plaintiff's statement of claim set out her allegations as to how the procedural obligation under Article 2 has been breached in the following terms:

> "(a) The UK Government has failed to conduct a meaningful investigation into the circumstances of the deceased's death, in breach of the substantive obligation under Article 2 ECHR.
>
> (b) The plaintiff engaged with the Historical Enquiries Team (HET) of the Police Service of Northern Ireland in a review of her mother's death. The HET failed to conduct an independent, prompt and effective investigation into the death of Maura Meehan."

[49] The plaintiff submitted that, at the time of Mrs Meehan's death, there was an unlawful agreement between the police and the Army in relation to the investigation of incidents involving the Army. Mr McKenna informed me that this was the basis of the Article 2 procedural breach claim and referred me to the following section of the ruling by Keegan J in *In The Matter Of A Series Of Deaths That Occurred In August 1971 At Ballymurphy, West Belfast* [2021] NICoroner 6 which set out the position:

> "[88] At the time at which the deaths at Ballymurphy occurred, post-incident investigative procedures were subject to an agreement made in 1970 between the Chief Constable of the RUC and the General Officer Commanding of the British Army in Northern Ireland. There was a Force Order in existence at the time which effectively allowed the Royal Military Police to have command of investigations rather than the RUC. This was superseded by a further Force Order in 1973. I enclose both Force Orders in the schedule attached hereto at Annex 0.5. The applicable Force Order from 1970 was entitled "Instructions regarding Complaints against Military Personnel." The instructions stated:
>
> "Where a Complaint involving Military personnel is received by the police the following instructions will be complied with:
>
> > (1) A report will be made immediately to the Commander of the Division concerned who will

> obtain, or cause to be obtained, statements from the complainant and any civilian or police witness involved and will investigate any criminal aspect of the matter.
>
> (2) On completion of the police investigation, the Divisional Commander will forward the police report to the Royal Corps of Military Police, who will interview and obtain statements from Military personnel involved or who can assist in the investigation …"

[89] In this case the accounts of soldiers following the deaths were gathered by the RMP and not by the RUC. This practice was subsequently criticised by the then Lord Chief Justice Lord Lowry, who said in 1974 (in the Court of Appeal judgment in R v Foxford [1974] NI 171 at 180): "we deprecate this curtailment of the function of the police and hope that the practice will not be revived." This issue of the military personnel investigating other military personnel was also criticised in Re Marie Thompson's Application for Judicial Review [2003] NIQB 80."

[50] The defendant submitted that in the light of the decision of the Supreme Court in *In Re McQuillan, McGuigan and McKenna*, any claim based upon a breach of the procedural limb of Article 2 of the ECHR was untenable, given the lapse of almost 30 years between the triggering event in 1971 and the critical date of the coming into force of the Human Rights Act 1998 in 2000. Nevertheless, the defendant conceded that, even in respect of deaths which had occurred before that critical date, the Article 2 investigative obligation can be revived. In *Brecknell v United Kingdom* (2008) 46 EHRR 42 the Strasbourg Court held:

> "It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further.
>
> …. the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative

measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts (see paragraph 65 above), the authorities are entitled to take into account the prospects of success of any prosecution. The importance of the right under Article 2 does not justify the lodging, willy-nilly, of proceedings. As it has had occasion to hold previously, the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals and they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would not in fact have produced concrete results."

[51] This issue of when the Article 2 investigative obligation should be regarded as revived was considered in *In Re McQuillan, McGuigan and McKenna*. The Supreme Court held that;

> "[the Strasbourg Court] specifically intended to limit the operation of that principle in relation to deaths occurring before the critical date by reference to the "genuine connection" test and the "Convention values" test."

[52] In paras 138 and 139 of their judgment, the Supreme Court explained the two tests to be applied in the following terms:

> "As regards the "genuine connection" test, the Grand Chamber explained (paras 146-148, omitting footnotes):
>
> '146. The Court considers that the time factor is the first and most crucial indicator of the 'genuine' nature of the connection. It notes … that the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the 'genuine connection' standard. Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed ten years. Even if, in exceptional circumstances, it may be justified to extend the time-

> limit further into the past, it should be done on condition that the requirements of the 'Convention values' test have been met.
>
> 147. The duration of the time period between the triggering event and the critical date is however not decisive, in itself, for determining whether the connection was a 'genuine' one. As the second sentence of para 163 of the *Silih* judgment indicates, the connection will be established if much of the investigation into the death took place or ought to have taken place in the period following the entry into force of the Convention. This includes the conduct of proceedings for determining the cause of the death and holding those responsible to account, as well as the undertaking of a significant proportion of the procedural steps that were decisive for the course of the investigation. This is a corollary of the principle that the Court's jurisdiction extends only to the procedural acts and omissions occurring after the entry into force. If, however, a major part of the proceedings or the most important procedural steps took place before the entry into force, this may irretrievably undermine the Court's ability to make a global assessment of the effectiveness of the investigation from the standpoint of the procedural requirements of article 2 of the Convention.
>
> 148. Having regard to the above, the Court finds that, for a 'genuine connection' to be established, both criteria must be satisfied: the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force.'

In relation to the "Convention values" test, the Grand Chamber said this (paras 149-151):

> "149. The Court further accepts that there may be extraordinary situations which do not satisfy the 'genuine connection' standard as outlined above, but where the need to ensure the real and effective

protection of the guarantees and the underlying values of the Convention would constitute a sufficient basis for recognising the existence of a connection. The last sentence of para 163 of the *Silih* judgment does not exclude such an eventuality, which would operate as an exception to the general rule of the 'genuine connection' test. In all the cases outlined above the Court accepted the existence of a 'genuine connection' as the lapse of time between the death and the critical date was reasonably short and a considerable part of the proceedings had taken place after the critical date. Against this background, the present case is the first one which may arguably fall into this other, exceptional, category. Accordingly, the Court must clarify the criteria for the application of the 'Convention values' test.

150. Like the Chamber, the Grand Chamber considers the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.

151. The heinous nature and gravity of such crimes prompted the contracting parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible and not subject to any statutory limitation in the domestic legal order. The Court nonetheless considers that the 'Convention values' clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human-rights treaty. Hence, a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention.

> Although the Court is sensitive to the argument that even today some countries have successfully tried those responsible for war crimes committed during the Second World War, it emphasises the fundamental difference between having the possibility to prosecute an individual for a serious crime under international law where circumstances allow it, and being obliged to do so by the Convention."

[53] The application of the "genuine connection" and "Convention values" tests were considered by Humphreys J in *In re Burns* [2022] NIQB 18 which concerned the death of Thomas Burns who was shot and killed in 1972 by a member of the British Army outside the Glenpark Social Club in North Belfast. Humphreys J, having considered the authorities of *Brecknell v UK* and *In Re McQuillan*, held that the argument that the Article 2 investigative obligation should be regarded as revived was "doomed to fail".

[54] I observe that in the pleadings before me there has been no attempt by the plaintiff to allege that the Article 2 investigative obligation has been revived. Likewise, no attempt has been made to amend the pleadings to make any reference to the genuine connections test or the Convention values test.

[55] In *In the matter of an application by Rosaleen Dalton for Judicial Review* [2023] UKSC 36, the Supreme Court considered a challenge to the Attorney General's decision not to order a further inquest into the death of Ms Dalton's father on the basis that the decision was incompatible with the Article 2 procedural obligation. In that decision Lord Leggatt had cause to comment on the Convention values test:

> "[261] … It is important to appreciate what Stephens J in his judgment at first instance in *Finucane* described as the "larger dimension" of that case. That "larger dimension" was the adoption by members of the police and the Army of a regime of "murder by proxy" whereby loyalist terrorists were used as proxies to murder suspected republican terrorists. Mr Finucane was not connected with terrorism but was allegedly targeted because, as a solicitor, he often acted against the police and government and defended republican suspects in criminal cases. It was this shocking attack on the rule of law by those whose duty was to defend it which led Stephens J to characterise the murder and the state's complicity in it as negating the very foundations of the Convention and of a democratic society such that the "Convention values" test was met: see *Finucane's (Geraldine) Application* [2015] NIQB 57, para 35.

> [262] The Court of Appeal did not regard that finding as "necessarily unreasonable": see [2017] NICA 7, para 167. The Supreme Court saw no need to address this question after concluding that the "genuine connection" test was satisfied: see [2019] UKSC 7, para 113. Given the apparent restriction of the "Convention values" test in *Janowiec* to serious crimes under international law, such as war crimes, genocide and crimes against humanity, I would not feel able to say that the facts of *Finucane* came within this category…."

In paras 335 and 336 their judgment, Lord Burrows and Dame Siobhan Keegan agreed with Lord Leggatt on that issue.

[56] In the light of the authorities I am obliged to agree with the submissions by the defendant that the plaintiff's argument that the Article 2 procedural obligation is revived and is therefore viable as an allegation within the plaintiff's statement of claim, is untenable. I am thus obliged to strike out the Article 2 procedural claim as an abuse of process.

The Limitation Issue

[57] Finally in its summons the defendant also seeks that the action is struck out on the grounds that the plaintiff's claims are statute-barred. This is pleaded in its defence. In her reply to the defence the plaintiff pleads reliance on Articles 50 and 71 of the Limitation (Northern Ireland) Order 1989. The defendant observes, however, that the plaintiff has provided no particulars in her pleadings to justify the exercise of a judicial discretion in her favour on the limitation issue.

[58] The arguments made by the defendant on the limitation issue have already been referred to in connection with the abuse of process application, where they also apply, and so can be briefly mentioned. The defendant argues that its ability to obtain proof in respect of the 1982 proceedings has been greatly undermined by the passage of a vast amount of time. The ability of the defendant to call witnesses of fact has similarly been affected. Likewise, the defendant's ability to test the evidence relating to the plaintiff's alleged financial loss has been grossly impaired.

[59] The plaintiff's skeleton argument was entirely silent on the limitation issue and no oral submissions were made on this point.

[60] In *McClarnon v The Sisters of Nazareth* and *Lindsay O'Neill as Personal Representative of the Estate of John McGuinness, (Deceased) v The Sisters of Nazareth* [2024] NIKB 3 Simpson J considered limitation issues in the context of historical institutional abuse actions where the abuse was alleged to have been committed in the early 1970s. Although the factual circumstances of the cases heard by Simpson J differ completely from the action currently before me, the

similarity in terms of time delay makes those cases useful to consider in general terms. (I do note, however, that the context of a fatal shooting by the Army might be expected to give rise to significant amounts of documentary evidence in terms of statements and reports than would institutional abuse which was, in some instances, carried out either privately or in secret. Hence, I do not draw exact parallels between the actions before Simpson J and the application before this court).

[61] In each of the cases before Simpson J the defendants pleaded that any claim which either plaintiff may have, was statute barred by reason of the lapse of time pursuant to the provisions of the Limitation (Northern Ireland) Order 1989 and the Limitation Acts (Northern Ireland) 1957 to 1989. Each defence also alleged that each plaintiff had been guilty of laches and/or inordinate and inexcusable delay in the commencement of proceedings, and that there had been further delay after the issue of the writs. Each defence also asserted that the maintenance of each claim infringed the defendants' rights to natural justice and its rights under Article 6 of the ECHR.

[62] Simpson J referred to the well known decision of Gillen J in of *McArdle v Marmio*n [2013] NIQB 123 where he said:

> "[8] The principles governing the manner in which this Order is to be applied and in particular the exercise of the discretion under Article 50 are now well-trammelled in this court, for example in *Walker v Stewart* [2009] NIJB 292, *McFarland v Gordon* [2010] NIQB 84 and *Taylor v McConville* [2009] NIQB 22. Accordingly, I need only make brief reference to them in this case. They include:
>
> • The discretion under Article 50 is expressed in the widest terms.
>
> • The trial judge must have regard to all the circumstances of the case and not merely the six matters set out [in sub-paragraph (4) of article 50]. The exercise of the court's discretion to disapply the time limits is unfettered.
>
> • The burden of proof in an application under Article 50 rests on the plaintiff.
>
> • Ordinarily the court should not distinguish between the litigant himself and his advisors. That said, the prejudice the plaintiff may suffer if the limitation is not disapplied may be reduced by his having a cause of action in negligence against his solicitors.

> • Discretion can in an appropriate case be exercised in the plaintiff's favour even where the delay is substantial, but in such cases careful consideration must be given to the ability of the court to hold a fair trial — *Buck v English Electric Company Ltd* [1977] 1 WLR 806. Even 5 or 6 years' delay raises a presumption of prejudice to a defendant but this presumption is rebuttable. As a general rule however the longer the delay after the occurrence of the matters giving rise to the cause of action, the more likely that the balance of prejudice will swing against allowing the action to proceed by disapplying the limitation period.
>
> [9] However, what is at the heart of Article 50 is whether it would be equitable to allow an action to proceed, and in fairness and justice, the obligation of a tortfeasor to pay damages should only be removed if the passage of time has significantly diminished his opportunity to defend himself. The basic question therefore to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits notwithstanding the delay in the commencement. (See *Cain v Francis* [2009] 3 WLR 551)."

[63] Simpson J also referred to the decision of *B & Others v Nugent Care Society* [2009] EWCA Civ 827 where the Court of Appeal approved the following passage from the judgment of Smith LJ in *Cain v Francis* [2008] EWCA Civ 1451:

> "[73] It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet this claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in issue, but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones."

[64] Having referred first to the relative legislative provisions and then to the authorities, including those which I have mentioned, Simpson J then made this important comment:

> "It has to be remembered that in my consideration of the limitation issue in each case I have heard all the evidence given before me and read all the medical reports and other documents in the case."

[65] In my view it is the better practice when mounting a limitation argument not to make it at an interlocutory stage unless much more extensive materials are provided to the court than were provided in this application. There is in this application a poverty of material before me in this regard. I was not told by either party what witnesses were available to give evidence at any trial in respect of the current proceedings. Hence there is insufficient material before this court to grant the defendant's application on the limitation issue.

Conclusion

[66] For the sake of completeness, I observe that the plaintiff's action does not appear to be one where she can improve her statement of claim by amendment, nor one where the final outcome might be determined by the future course of these proceedings which might include discovery of documents and, possibly, interrogatories or admissions.

[67] This is an application where the allegations contained in the plaintiff's statement of claim must be struck out. As will have been understood, the statement of claim falls for a variety of reasons. Firstly, the allegation of a secondary victim claim cannot succeed because in order to be successful, a plaintiff must demonstrate that she was close to the incident in time and space, or came upon its immediate aftermath, where the primary victim was killed, injured or imperilled. The plaintiff did not oppose this part of the defendant's strike out application. Secondly, the allegations of negligence and misfeasance in public office must be struck out as an abuse of process on the application of the res judicata principle. Thirdly, the claim alleging a breach of the substantive obligation under Article 2 of the ECHR must be struck out on the basis that there is no reasonable cause of action given the decision of the Supreme Court in *In Re McQuillan, McGuigan and McKenna*. The plaintiff conceded that this aspect of her claim must also be abandoned. Finally, the claim alleging a breach of the procedural obligation under Article 2 of the ECHR must be struck out on the basis that it is untenable in the light of the decision of *In Re McQuillan, McGuigan and McKenna* unless it can be viably argued that the investigative obligation has been revived. Having considered the authorities such as *Brecknell v United Kingdom* and *In Re Dalton's Application*, I consider that such an argument is untenable.

Costs

[68] I shall hear counsel as to costs at their convenience.