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Judgment: approved by the Court for handing down | *Delivered:* **08/11/2018**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Aine McAteer and Daniel McAteer

Plaintiffs;

and

The Chief Constable of the Police Service of Northern Ireland

and

Cherith Craig

Defendants.

Master Bell

INTRODUCTION

[1] Daniel McAteer is an accountant and company director with a variety of business interests. Aine McAteer is his wife, a businesswoman and company director. Mr McAteer alleges that, as a result of his exposure of a fraud, he has been the target of attempts to destroy his business interests and reputation. Litigation in respect of these business dealings, involving Mr McAteer and a number of other parties, has been commenced in both Northern Ireland and the Republic of Ireland. Allegations and counter-allegations of criminal offences have been made to the police and have been the subject of police investigation. In this context Mr McAteer alleges that threats have been made against him and that these culminated in a bomb being placed under his wife's car.

[2] As part of a complex police investigation into an alleged fraud a number of premises, including Mr McAteer's business premises, were searched in May 2015 under a search warrant obtained after an application was made before His Honour Judge Babington. In April 2018 the Fraud and Departmental Section of the Public Prosecution Service wrote to Mr and Mrs McAteer to inform them that neither of them would be prosecuted for a criminal offence in respect of the evidence submitted by police.

[3] Mr and Mrs McAteer subsequently issued a writ against the Chief Constable for breach of statutory duty, negligence, malfeasance in public office (sic), conspiracy, and breach of human rights. A Statement of Claim was served by them on 6 October 2015 and an amended Statement of Claim was served on 10 April 2016. The writ and amended Statement of Claim name Detective Sergeant Cherith Craig as a second defendant.

[4] On 13 October 2017 the defendants issued a summons seeking an order pursuant to Order 18 Rule 19 striking out portions of the amended Statement of Claim on the grounds that either they disclose no reasonable cause of action against the defendants or that they are scandalous, frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action, or are otherwise an abuse of the process of the court. The portions of the amended Statement of Claim under challenge concern either allegations of negligence by the police or concern allegations which, it is submitted, do not support any cause of action. The challenged portions amount to 21 paragraphs, or parts of paragraphs, in the amended Statement of Claim. These were highlighted in yellow highlighter for the parties and the court in order to identify them.

[5] The defendants were represented at the hearings before me by Mr Aldworth QC and Mr Robinson. Mr McAteer appeared on his own behalf as a personal litigant and I received an affidavit from Mrs McAteer that, as far as her response was concerned, she wished to adopt any submissions made by Mr McAteer. I am grateful to both sides for their oral and written arguments.

THE CHALLENGES TO THE STATEMENT OF CLAIM

[6] The defendants base their application on a number of grounds. Firstly, they submit that in respect of the claim of negligence there is no reasonable cause of action because of a well-known line of decisions which make it very difficult for a private citizen to sue the police for negligence. I shall refer to this portion of the application as "the negligence issue". Secondly, the defendants assert that any cause of action in negligence, even if such existed, is statute barred and must be struck out because there is a strict six year limitation period in respect of cases of economic loss. I shall refer to this portion of the application as "the limitation issue". Thirdly, the defendants assert that significant portions of the Statement of Claim are not material to

any cause of action pleaded and therefore ought to be struck out. I shall refer to this portion of the application as "the pleadings issue". Fourthly, in an argument raised at the hearing the defendants challenged the portion of the amended Statement of Claim alleging a breach of statutory duty. I shall refer to this portion of the application as "the statutory duty issue". Fifthly, the defendants claim that these proceedings have been brought for a collateral purpose, namely to discredit the fraud investigation being carried out by the police and to influence the outcome of the criminal justice process. I shall refer to this portion of the application as "the collateral purpose issue". Sixthly, the defendants argue that there is no reasonable cause of action in respect of the tort of misfeasance in public office. I shall refer to this portion of the application as "the misfeasance in public office issue".

THE LAW: THE TEST FOR STRIKING OUT

[7] Order 18 Rule 19 of the Rules of the Court of Judicature (N.I.) 1980 provides :

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
> (b) it is scandalous, frivolous or vexatious; or
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a)."

[8] The purpose of the striking out provisions is essentially to protect defendants from hopeless litigation. But it may not be invoked to deprive plaintiffs of their right to bring an arguable matter before the courts.

[9] In *Lonrho v Al Fayed* [1992] 1 AC 448 the court held that, on an application to strike out an action on the basis that it discloses no reasonable cause of action, the cause pleaded must be unarguable or almost incontestably bad.

[10] In *O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary* [1997] NI 403 the Court of Appeal for Northern Ireland reviewed the authorities on the test to be applied in such applications. It held that the summary procedure for striking out pleadings was only to be used in "plain and obvious" cases; it should be confined to cases where the cause of action was "obviously and almost incontestably bad"; and that an order striking out should not be made "unless the case is unarguable".

[11] The Court of Appeal in *O'Dwyer* quoted Sir Thomas Bingham in *E (A Minor) v Dorset CC* [1995] 2 AC 633 at 693-694, a passage approved by the House of Lords:

> "I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts but applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean 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 be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim 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."

[12] Where the law in a particular field is not settled but rather is a new and developing field, the court should be appropriately cautious with applications to strike out, particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the Statement of Claim. (*Lonrho plc v Tebbit* (1991) 4 All ER 973 and *Rush v Police Service of Northern Ireland and the secretary of state for Northern Ireland* [2011] NIQB 28.

[13] The application by the defendants requires to be considered in two parts. Firstly, I must consider whether the plaintiff's claim ought to be struck out on the ground that it discloses no reasonable cause of action. In considering this part of the application, the effect of Order 18 Rule 19(2) is that the parties are not entitled to offer any evidence, whether oral or on affidavit. Secondly, I must consider whether the plaintiff's claim ought to be struck out on the ground that it is frivolous and vexatious. In considering this part of the application, the parties are entitled to offer evidence on affidavit.

THE LAW : POLICE AND A DUTY OF CARE

[14] As Lord Bingham expressed it in *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police* (2008) 3 WLR 593 the common law of negligence seeks to define the circumstances in which *A* is held civilly liable for unintended harm suffered by *B*. Liability turns, in the circumstances of the particular case, on the relationship between *A* and *B*. Usually that relationship is a direct one, as where *A* fails to treat or advise *B* with the degree of care reasonably to be expected in the circumstances, or where *A* drives carelessly and collides with *B*. But the relationship may be more indirect, and in some circumstances *A* may be liable to *B* where harm is caused to *B* by a third party *C*, if *A* should have prevented *C* doing such harm and *A* failed to do so.

[15] The most favoured test of liability is the three-fold test laid down by the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, by which it must be shown that :

(i) the harm to *B* was a reasonably foreseeable consequence of what *A* did or failed to do,
(ii) that the relationship of *A* and *B* was one of sufficient proximity, and
(iii) that in all the circumstances it is fair, just and reasonable to impose a duty of care on *A* towards *B*.

[16] The question which is raised by this application concerns whether the Chief Constable, in the course of carrying out his functions of investigating, controlling and preventing the incidence of crime, owes a duty of care to the plaintiffs, as individual members of the public, who claim to have suffered loss through the activities of criminals and the manner in which the criminal investigations were carried out, on the ground of negligence by reason of breach of that duty.

[17] The principles to be applied flow from a series of decisions made by the House of Lords and the Supreme Court : *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Metropolitan Police Commissioner* [2005] 1 WLR 1495; *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police* (2008) 3 WLR 593; *Michael v Chief Constable of South Wales Police* [2015] AC 1732, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 and *Commissioner of the Police of the Metropolis v DSD and another* [2018] UKSC 11. In the light of this series of decisions, the circumstances in which an individual may successfully sue the police for negligence will be rare, given that a duty of care will be imposed upon the police only in very limited circumstances.

Hill

[18] The plaintiff in *Hill v Chief Constable of West Yorkshire* was the mother of a young woman who was attacked and killed by Peter Sutcliffe (often referred to as the "Yorkshire Ripper") who was convicted of her murder. Over some years prior to this murder Sutcliffe had attacked and killed other women in similar circumstances. The plaintiff claimed, on behalf of her deceased daughter's estate, damages for negligence against the Chief Constable of West Yorkshire. She alleged that officers for whom the Chief Constable was responsible had been negligent in the conduct of investigations into the crimes which had been committed previously and that, in consequence, the police had failed to apprehend Sutcliffe and prevent the murder of her daughter. The defendant successfully applied to strike out the action and that decision was subsequently upheld by the Court of Appeal and by the House of Lords.

[19] Lord Keith defined the issue before their Lordships as follows:

> "The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty."

[20] Lord Keith made it clear that there were instances where a police officer may be liable in tort:

> "There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are *Knightley v. Johns* [1982] 1 W.L.R. 349 and *Rigby v. Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242. Further, a police officer may be guilty of a criminal offence if he wilfully fails to perform a duty which he is bound to perform by common law or by statute: see *Reg. v. Dytham* [1979] Q.B. 722, where a constable was convicted of wilful neglect of duty because, being present at the scene of a violent assault resulting in the death of the victim, he had taken no steps to intervene."

[21] Lord Keith then undertook an analysis of the relevant case law including *Anns v Merton London Borough Council* [1978] AC 728 and *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and concluded that the circumstances of the case were not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire police.

[22] Importantly, however, Lord Keith then proceeded to give a public policy justification for reaching the same conclusion. He stated:

> "In my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. In *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 193, I expressed the view that the category of cases where the second stage of Lord Wilberforce's two stage test in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752 might fall to be applied was a limited one, one example of that category being *Rondel v. Worsley* [1969] 1 A.C. 191. Application of that second stage is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure - for example that a police officer negligently

> tripped and fell while pursuing a burglar - others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell L.J., in his judgment in the Court of Appeal [1988] Q.B. 60, 76 in the present case, was right to take the view that the police were immune from an action of this kind on grounds similar to those which in *Rondel v. Worsley* [1969] 1 A.C. 191 were held to render a barrister immune from actions for negligence in his conduct of proceedings in court. My Lords, for these reasons I would dismiss the appeal."

[23] The key point taken from *Hill*, therefore, was that, as a matter of public policy, the police were immune from actions in negligence in respect of the investigation and suppression of crime.

Brooks

[24] The second notable decision in the line of authorities is *Brooks v Metropolitan Police Commissioner*. The plaintiff was a friend of Stephen Lawrence and was present when Stephen Lawrence was murdered in a racist attack. The plaintiff also was abused and attacked and was deeply traumatised by his experience. He was dealt with by the police in a way that was subsequently the subject of severe criticism in an enquiry into the matters arising from Stephen Lawrence's death. The plaintiff then brought an action against the Commissioner of Police and a number of named police officers in which he claimed damages *inter alia* for negligence. His pleaded case was that whilst the attackers remained at large he was frightened for his own safety,

not least because he lived in the same locality. At first instance, the judge struck out the action against five of the named officers and the Commissioner of Police. On appeal, the Court of Appeal allowed the plaintiff's appeal in relation to his claim in negligence against the Commissioner of Police in respect of the three duties of care that he alleged had been owed to him; those were specified to be a duty to take reasonable steps to assess whether he was a victim of crime and, if so, to accord him reasonably appropriate protection, support, assistance and treatment; a duty to take reasonable steps to afford him the protection, assistance and support commonly afforded to a key eye witness to a serious crime of violence and a duty to afford reasonable weight to the account that he had given of events and to act on it accordingly. In the House of Lords their Lordships re-affirmed that as a matter of public policy the police generally owed no duty of care to victims or witnesses in respect of their activities when investigating suspected crimes; they held further that since the duties of care alleged by the plaintiff had been inextricably bound up with the investigation of a crime the claim based on those duties should be struck out.

[25] Describing *Hill* as "an important decision" Lord Steyn went on the consider "the status of *Hill*". He began by observing:

> "Since the decision in *Hill* there have been developments which affect the reasoning of that decision in part. In *Hill* the House relied on the barrister's immunity enunciated in *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993 that immunity no longer exists: *Arthur J S Hall & Co (A Firm) v Simons* [2002] 1 AC 615, [2000] 3 All ER 673. More fundamentally since the decision of the European Court of Human Rights in *Z and others v United Kingdom* 34 EHRR 97, para 100, it would be best for the principle in *Hill* to be reformulated in terms of the absence of a duty of care rather than a blanket immunity.
>
> With hindsight not every observation in *Hill* can now be supported. Lord Keith of Kinkel observed at p63 that "From time to time [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it": Nowadays, a more sceptical approach to the carrying out of all public functions is necessary."

[26] Lord Steyn then returned to the central issue:

> "But the core principle of *Hill* has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in *Hill*,

> arose for decision today I have no doubt that it would be decided in the same way. It is of course desirable that police officers should treat victims and witnesses properly and with respect … but to convert that ethical value into general legal duties of care on the police towards victim and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence. … A retreat from the principle in *Hill* would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public function in the interests of the community fearlessly and with dispatch, would be impeded. It would, as was recognised in *Hill*, be bound to lead to an unduly defensive approach in combating crime.
>
> (31) It is true, of course, that the application of the *Hill* principle will sometimes leave citizens who are entitled to feel aggrieved by negligent conduct of the police, without private law remedy for psychiatric harm. But domestic legal policy and the Human Rights Act 1998, sometimes compel this result."

[27] Crucially, however, their lordships were agreed that there might be exceptions to the core principle in *Hill*.

[28] Lord Nicholls said:

> "Like Lord Bingham and Lord Steyn, in reaching this conclusion I am not to be taken as endorsing the full width of all the observations in *Hill v Chief Constable of West Yorkshire* [1989] AC 53. There may be exceptional cases where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlie the common law. Then the decision in *Hill's* case should not stand in the way of granting an appropriate remedy."

[29] Lord Steyn agreed:

> "It is unnecessary in this case to try to imagine cases of outrageous negligence by the police, unprotected by specific torts, which could fall beyond the reach of the *Hill* principle. It would be unwise to try to predict accurately what unusual cases could conceivably arise. I certainly do not say that they could not arise. But such exceptional cases on the margins of the *Hill* principle will have to be considered and determined if and when they occur. "

Van Colle and Smith

[30] *Van Colle* and *Smith* were two appeals, heard together, which, in the words of Lord Bingham, addressed this problem: if the police are alerted to a threat that *D* may kill or inflict violence on *V*, and the police take no action to prevent that occurrence, and *D* does kill or inflict violence on *V*, may *V* or his relatives obtain civil redress against the police, and if so, how and in what circumstances?

[31] The two appeals arose on different facts and gave rise to different types of claims. In *Van Colle v Chief Constable of the Hertfordshire Police* a threat was made by a man known as Daniel Brougham against Giles Van Colle and culminated in the murder of Van Colle by Brougham. The plaintiff's claim was brought under sections 6 and 7 of the Human Rights Act 1998 ("the 1998 Act"), in reliance on Articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and no claim was made under the common law. In *Smith v Chief Constable of Sussex Police*, the threat was made against the Stephen Paul Smith by his former partner, Gareth Jeffrey, and culminated in the infliction of serious injury on Smith by Jeffrey. In *Smith* the claim was made under the common law alone, and no claim was made under the 1998 Act.

[32] The facts in *Smith* are important in respect of the degree of knowledge the police had of the threat. Smith and Gareth Jeffrey lived together as partners. On 21 December 2000 Jeffrey assaulted Smith, after Smith had asked for a few days' break from their relationship. The assault was reported to the police, who arrested Jeffrey and detained him overnight. No prosecution followed. After a time apart, during which Smith moved to Brighton, Jeffrey renewed contact and stayed with Smith on about two occasions in December 2002. Jeffrey wanted to resume their relationship. Smith did not. From January 2003 onwards Jeffrey sent Smith a stream of violent, abusive and threatening telephone, text and internet messages, including death threats. There were sometimes 10 to 15 text messages in a single day. During February 2003 alone there were some 130 text messages. Some of these messages were

very explicit: 'U are dead'; 'look out for yourself psycho is coming'; 'I am looking to kill you and no compromises'; 'I was in the Bulldog last night with a carving knife. It's a shame I missed you.' On 24 February 2003 Smith contacted Brighton police by dialling 999. He reported his earlier relationship with Jeffrey, the previous history of violence and Jeffrey's recent threats to kill him. Two officers were assigned to the case and they visited Smith that afternoon. He again reported his previous relationship with Jeffrey (including the earlier violence) and the threats. The officers declined to look at the messages (which Smith offered to show them), made no entry in their notebooks, took no statement from Smith and completed no crime form. They told Smith that it would be necessary to trace the calls and that he should attend at Brighton Police Station to fill in the appropriate forms. Later that evening Smith received several more messages from Jeffrey threatening to kill him. Smith filled in the forms the next day. The information he provided to the police included Jeffrey's home address and reference to the death threats he had received. Smith then went to London, since Jeffrey had said he was coming to Brighton. He contacted the Brighton Police from London to check on progress, but was told it would take four weeks for the calls to be traced. The messages continued. One read "I'm close to u now and I am gonna track u down and I'm not gonna stop until I've driven this knife into u repeatedly". Smith went to Saville Row Police Station to report his concern. An officer there contacted the Brighton Police and advised Smith that the case was being dealt with from Brighton and he should speak to an inspector there when he returned home. On return to Brighton on 2 March 2003 Smith told an inspector that he thought his life was in danger and asked about the progress of the investigation. He offered to show the inspector the threatening messages he had received, but the inspector declined to look at them and made no note of the meeting. He told Smith the investigation was progressing well, and he should call 999 if he was concerned about his safety in the interim. On 10 March 2003 Smith replied to a communication he had received from the police that day, giving the telephone numbers from which Jeffrey had been sending the text messages. He received a further text message from Jeffrey saying "Revenge will be mine". Later on 10 March 2003 Jeffrey attacked Smith at his home with a claw hammer. Smith suffered three fractures of the skull and associated brain damage. Jeffrey was arrested at his home address. He was charged and in March 2004 was subsequently convicted of making threats to kill and causing grievous bodily harm with intent. He was sentenced to ten years' imprisonment with an extended period on licence.

[33] Smith issued proceedings against the Chief Constable in the County Court on 2 March 2006. Following service of a defence the Chief Constable applied to strike out the claim as disclosing no reasonable grounds for bringing it or, alternatively, for summary judgment against Smith on the ground that he had no real prospect of succeeding on the claim. The application was successful and the claim was struck out. Smith appealed. The

Court of Appeal allowed his appeal and remitted the case to the county court for hearing. The Chief Constable then appealed the decision of the Court of Appeal to the House of Lords where he was successful and the claim was struck out.

[34] It is clear from the judgments that the majority of their Lordships upheld the core principle of *Hill* as had been confirmed in *Brooks*. Lord Hope observed:

> "The point that [Lord Steyn] was making in *Brooks*'s case, in support of the core principle in *Hill*'s case, was that the principle had been enunciated in the interests of the whole community. Replacing it with a legal principle which focuses on the facts of each case would amount, in Lord Steyn's words, to a retreat from the core principle. We must be careful not to allow ourselves to be persuaded by the shortcomings of the police in individual cases to undermine that principle. That was the very thing that he was warning against because of the risks that this would give rise to. As Ward LJ said in *Swinney v Chief Constable of Northumbria Police Force* [1996] 3 All ER 449 at 467, [1997] QB 464 at 487, the greater public good outweighs any individual hardship. A principle of public policy that applies generally may be seen to operate harshly in some cases, when they are judged by ordinary delictual principles. Those are indeed the cases where, as Lord Steyn put it, the interests of the wider community must prevail over those of the individual."

[35] Lord Carswell observed:

> "I am satisfied nevertheless that the reasons underlying the acceptance of the general rule that a duty of care is not imposed upon police officers in cases such as the present remain valid. Those reasons are summarised in para [76] of Lord Hope's opinion, with which I agree, and I need not set them out again. The factor of paramount importance is to give the police sufficient freedom to exercise their judgment in pursuit of their objects in work in the public interest, without being trammelled by the need to devote excessive time and attention to complaints or being constantly under the shadow of threatened litigation. Over-reaction to complaints, resulting from defensive policing, is to be avoided just as much as failure to react with sufficient speed and effectiveness. That said, one must also express the hope that police officers will make

> good use of this freedom, with wisdom and discretion in judging the risks, investigating complaints and taking appropriate action to minimise or remove the risk of threats being carried out."

[36] However there were clear indications that although the core principle in *Hill* was being maintained, so too was the position that this was not a blanket immunity for the police and that exceptions to the core principle were possible. Cases may therefore come before the courts where a duty of care will be recognised. Lord Hope said:

> "In *Brooks*'s case Lord Nicholls of Birkenhead said, in para [6], that there might be exceptional cases where the circumstances compelled the conclusion that the absence of a remedy sounding in damages would be an affront to the principles that underlie the common law. I respect his approach, which is to guard against the dangers of never saying never. But in my opinion the present case does not fall into that category. That is why, if a civil remedy is to be provided, there needs to be a more fundamental departure from the core principle. I would resist this, in the interests of the wider community."

[37] The possibility of exceptions can also be seen in the speech of Lord Phillips:

> "I do not find it possible to approach *Hill*'s case and *Brooks*' case as cases that turned on their own facts. The fact that Lord Steyn applied the decision in *Hill*'s case to the facts of *Brooks*, which were so very different, underlines the fact that Lord Steyn was indeed applying a 'core principle' that had been 'unchallenged … for many years'. That principle is, so it seems to me, that in the absence of special circumstances the police owe no common law duty of care to protect individuals against harm caused by criminals."

[38] Similarly Lord Carswell allowed for exceptions:

> "I would not dissent from the view expressed by Lord Nicholls of Birkenhead in *Brooks* at [6] that there might be exceptional cases where liability must be imposed. I would have reservations about agreeing with Lord Steyn's adumbration in para [34] of *Brooks* of a category of cases of 'outrageous negligence', for I entertain some doubt whether opprobrious epithets provide a satisfactory and workable definition of a legal concept. I should

> accordingly prefer to leave the ambit of such exceptions undefined at present."

[39] Lord Brown was also clear that there were exceptions to the core principle and gave examples:

> "In what circumstances ought the police to be subject to civil liability at common law for injuries deliberately inflicted by third parties ie for crimes of violence? When, in short, should they in this type of case be held to owe a duty of care to the victim? That there are such cases is not in doubt. *Swinney v Chief Constable of Northumbria Police Force* [1996] 3 All ER 449, [1997] QB 464 provides one example, the facts there suggesting that the police had assumed responsibility for the complainant informer's safety (although his claim in the event failed at trial). Another example (again on the basis of assumption of responsibility) is *Costello v Chief Constable of the Northumbria Police* [1999] 1 All ER 550, [1999] ICR 752 where a police inspector was found liable to a woman police constable for injuries inflicted on her by a woman prisoner in a police station cell."

[40] He went on to say:

> "True it is that in *Brooks* both Lord Nicholls of Birkenhead and Lord Steyn contemplated the possibility of exceptional cases on the margin of the *Hill* principle which might compel a different result. If, say, the police were clearly to have assumed specific responsibility for a threatened person's safety—if, for example, they had assured him that he should leave the matter entirely to them and so could cease employing bodyguards or taking other protective measures himself—then one might readily find a duty of care to arise. That, however, is plainly not this case. There is nothing exceptional here unless it be said that this case appears exceptionally meritorious on its own particular facts—plainly not in itself a sufficient basis upon which to exclude a whole class of cases from the *Hill* principle. That said, the apparent strength of this case might well have brought it within the *Osman* principle so as to make a Human Rights Act claim here irresistible."

Michael

[41] The Supreme Court again considered the issue of the duty of care owed by police in *Michael v Chief Constable of South Wales Police* [2015] 2 All ER

635. This action arose out of the killing of a young woman by her boyfriend, where she had telephoned 999 to report to the police that her boyfriend had threatened to kill her, and there was a delay in responding partly due to the report being passed from one police service to another. In a second call she was heard screaming, but when police arrived they found that she had already been killed. Her parents and children sued in negligence and under Article 2 of 1998 Act. The police applied for the claims to be struck out, or for summary judgment to be entered in their favour. In the High Court the judge refused those applications. The Court of Appeal upheld the decision of the judge that the Article 2 claim should proceed to trial, and gave summary judgment in favour of the police on the issue of negligence. The claimants appealed and the police cross-appealed. The Supreme Court held that there was no basis for allowing the claim in negligence to proceed. It took the view that the duty of the police for the preservation of the peace was owed to members of the public at large and did not involve the kind of close or special relationship necessary for the imposition of a private law duty of care. It did not follow from the setting up of a protective system, such as that for 999 emergency calls, from public resources that if it failed to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state was not responsible. Indeed the imposition of such a burden would be contrary to the ordinary principles of the common law. The Court in *Michael* also rejected a narrow principle of liability proposed by the plaintiff, namely that if a member of the public ('A') furnished a police officer ('B') with apparently credible evidence that a third party whose identity and whereabouts were known presented a specific and imminent threat to his life and physical safety, 'B' would owe to 'A' a duty to take reasonable steps to assess such threat and if appropriate take reasonable steps to prevent it being executed.

[42] Reviewing the earlier case law as to whether or not the police had an immunity from civil action in such cases, that term having been used by Lord Keith in *Hill*, Lord Toulson said:

> "[44] An 'immunity' is generally understood to be an exemption based on a defendant's status from a liability imposed by the law on others, as in the case of sovereign immunity. Lord Keith's use of the phrase was, with hindsight, not only unnecessary but unfortunate. It gave rise to misunderstanding, not least at Strasbourg. In *Osman v UK* (1998) 5 BHRC 293 the Strasbourg court held that the exclusion of liability in negligence in a case concerning acts or omissions of the police in the investigation and prevention of crime amounted to a restriction on access to the court in violation of art 6. This perception caused consternation to English lawyers. In *Z v UK* (2001) 10 BHRC 384 the Grand

Chamber accepted that its reasoning on this issue in Osman was based on a misunderstanding of the law of negligence; and it acknowledged that it is not incompatible with art 6 for a court to determine on a summary application that a duty of care under the substantive law of negligence does not arise on an assumed state of facts."

[43] Lord Toulson further observed :

"[115] The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. Examples at the highest level include *Yuen Kun-yeu v A-G of Hong Kong*[1987] 2 All ER 705, [1988] AC 175 and *Davis v Radcliffe* [1990] 2 All ER 536, [1990] 1 WLR 821 (no duty of care owed by financial regulators towards investors), *Murphy v Brentwood DC* (no duty of care owed to the owner of a house with defective foundations by the local authority which passed the plans), *Stovin v Wise* and *Gorringe v Calderdale Metropolitan BC* (no duty of care owed by a highway authority to take action to prevent accidents from known hazards). The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case."

Lord Toulson explained the difficulties in creating a new category of duty of care when he said :

"[119] If the foundation of a duty of care is the public law duty of the police for the preservation of the Queen's peace, it is hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace. Would a duty of care be owed to a person who reported a credible threat to burn down his house? Would it be owed to a company which reported a credible threat by animal rights extremists to its premises? If not, why not?

[120] It is also hard to see why it should be limited to particular potential victims. If the police fail through lack of care to catch a criminal before he shoots and injures his

> intended victim and also a bystander (or if he misses his intended target and hits someone else), is it right that one should be entitled to compensation but not the other, when the duty of the police is a general duty for the preservation of the Queen's peace? Similarly if the intelligence service fails to respond appropriately to intelligence that a terrorist group is intending to bring down an airliner, is it right that the service should be liable to the dependants of the victims on the plane but not the victims on the ground? Such a distinction would be understandable if the duty is founded on a representation to, and reliance by, a particular individual but that is not the basis of the interveners' liability principle. These questions underline the fact that the duty of the police for the preservation of the peace is owed to members of the public at large, and does not involve the kind of close or special relationship ("proximity" or "neighbourhood") necessary for the imposition of a private law duty of care."

Robinson

[44] Recently, in *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, the Supreme Court revisited the issue of whether the police are under a duty of care when discharging their function of preventing and investigating crime. One commentator has described the decision as "the most important police law case for a generation."

[45] The facts in *Robinson* are simple. A 76 year old woman was walking along a street when she was knocked over by a group of men who were struggling with each other. One man was a suspected drug dealer. The others were police officers attempting to arrest him. As they struggled, the men knocked into Mrs Robinson and they all fell to the ground, with Mrs Robinson underneath. She suffered injuries as a result. The question before the Supreme Court was whether the police officers owed a duty of care to Mrs Robinson and, if so, were they in breach of that duty.

[46] The proposition that there is a *Caparo* test which applies to all claims in the modern law of negligence, and that in consequence the court will only impose a duty of care where it considers it fair, just and reasonable to do so on the particular facts, is mistaken. As Lord Toulson pointed out in his landmark judgment in *Michael v Chief Constable of South Wales Police (Refuge and others intervening)* [2015] UKSC 2; [2015] AC 1732, para 106, that understanding of the case mistakes the whole point of *Caparo,* which was to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on

precedent, and on the development of the law incrementally and by analogy with established authorities.

[47] Public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson stated in *Michael*, "the common law does not generally impose liability for pure omissions". There are certain circumstances in which public authorities, like private individuals and bodies, can come under a duty of care to prevent the occurrence of harm: see, for example, *Barrett v Enfield London Borough Council* and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, as explained in *Gorringe* at paras 39-40. In the absence of such circumstances, however, public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body. In particular, public authorities, like private individuals and bodies, generally owe no duty of care towards individuals to prevent them from being harmed by the conduct of a third party.

[48] There are however circumstances where such a duty may be owed. They include circumstances where the public authority has created a danger of harm which would not otherwise have existed, or has assumed a responsibility for an individual's safety on which the individual has relied.

[49] In *Robinson* Lord Reed, with whom Lady Hale and Lord Hodge agreed, stated that Lord Keith's reasoning in Hill continues to be misunderstood. Lord Reed explained that the most important aspect of Lord Keith's speech in *Hill* is that he recognised that the general law of tort applies as much to the police as to anyone else. What Lord Keith said was this:

> "There is no question that a police officer, *like anyone else*, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, *and also for negligence*."

The words "like anyone else" are important. They indicate that the police are subject to liability for causing personal injury in accordance with the general law of tort. Lord Reed continued :

> "On the other hand, as Lord Toulson noted in *Michael* (para 37), Lord Keith held that the general duty of the police to enforce the law did not carry with it a private law duty towards individual members of the public. In particular,

police officers investigating a series of murders did not owe a duty to the murderer's potential future victims to take reasonable care to apprehend him. That was again in accordance with the general law of negligence. As explained earlier, the common law does not normally impose liability for omissions, or more particularly for a failure to prevent harm caused by the conduct of third parties. Public authorities are not, therefore, generally under a duty of care to provide a benefit to individuals through the performance of their public duties, in the absence of special circumstances such as an assumption of responsibility."

[50] Lord Reed also explained :

" … the decision in *Hill* has now to be understood in the light of the later authorities. In *Michael*, in particular, Lord Toulson (with whom Lord Neuberger, Lord Mance, Lord Hodge and I agreed) reached the same conclusion as in *Hill,* but did so primarily by applying the reasoning in *Stovin v Wise* and *Gorringe.* Policy arguments were considered when addressing the argument that the court should create a new duty of care as an exception to the ordinary application of common law principles (see, in particular, paras 116-118). Lord Toulson concluded that, in the absence of special circumstances, there is no liability in "cases of pure omission by the police to perform their duty for the prevention of violence" (para 130).

The case of *Hill* is not, therefore, authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime. On the contrary, the liability of the police for negligence or other tortious conduct resulting in personal injury, where liability would arise under ordinary principles of the law of tort, was expressly confirmed. Lord Keith spoke of an "immunity", meaning the absence of a duty of care, only in relation to the protection of the public from harm through the performance by the police of their function of investigating crime."

[51] The position established by the Supreme Court in *Robinson* is this :

"I do not suggest that the discussion of policy considerations in cases such as *Hill, Brooks* and *Smith* should be consigned to

history. But it is important to understand that such discussions are not a routine aspect of deciding cases in the law of negligence, and are unnecessary when existing principles provide a clear basis for the decision, as in the present appeal. I would not agree with Lord Hughes's statement that they are the ultimate reason why there is no duty of care towards victims, suspects or witnesses imposed on police officers engaged in the investigation and prevention of crime. The absence of a duty towards victims of crime, for example, does not depend merely on a policy devised by a recent generation of judges in relation to policing: it is based on the application of a general and long-established principle that the common law imposes no liability to protect persons against harm caused by third parties, in the absence of a recognised exception such as a voluntary assumption of responsibility. … Returning, then, to the second of the issues identified in para 20 above, it follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency, as in *Dorset Yacht* and *Attorney General of the British Virgin Islands v Hartwell*. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility."

DSD

[52] The final authority dealing with this area of law to which I was referred is *Commissioner of the Police of the Metropolis v DSD and Another* [2018] UKSC 11, a case which concerns John Worboys, the driver of a black cab in London who committed a legion of sexual offences against women. DSD brought proceedings against the police under sections 7 and 8 of the 1998 Act for the alleged failure of the police to conduct effective investigations into Worboys' crimes. The kernel of DSD's claim was that the police failures constituted a violation of her rights under Article 3 of the ECHR. With DSD having succeeded before the High Court and in the Court of Appeal, the Metropolitan Police Service appealed to the Supreme Court. That appeal was unanimously rejected. In his judgment Lord Hughes addressed the relevance

of the domestic law on the private law duty of care. Lord Hughes concluded by saying :

> "In the briefest of terms, law enforcement and the investigation of alleged crime involve a complex series of judgments and discretionary decisions. They concern, amongst many other things, the choice of lines of inquiry, the weighing of evidence thus far assembled and the allocation of limited resources as between competing claims. To re-visit such matters step by step by way of litigation with a view to private compensation would inhibit the robust operation of police work, and divert resources from current inquiries; it would be detrimental to, not a spur to, law enforcement. It is not carrying out the impugned investigation efficiently which is likely to lead to diversion of resources; on the contrary. It is the re-investigation of past investigations in response to litigation which is likely to do so. Moreover, whilst there may exist a mechanism by way of summary judgment for stopping short such a re-investigation if the litigation be "spurious" in the sense of demonstrably bad on the papers, other claims, and particularly those which turn out to be speculative, cannot thus be halted. In short, the public duty would be inhibited by a private duty of such a kind. A contemporary example can be seen in terrorist activity. It is well known that large numbers of possible activists are, to some extent or other, known to the police or security services. The most delicate and difficult decisions have to be made about whom to concentrate upon, whose movements to watch, who to make the subject of potentially intrusive surveillance and so on. It is in no sense in the public interest that, if a terrorist attack should unfortunately occur, litigation should become the forum for a review of the information held about different suspects and of the decisions made as to how they were to be dealt with."

SUBMISSIONS

[53] I summarise the submissions of the parties as follows. For the defendants, Mr Aldworth submitted that in the light of the principles laid down by the caselaw on negligence, the Chief Constable owed the plaintiffs no duty of care. In the incident involving the bomb there were no circumstances such as the assumption of responsibility which would lead to there being a duty of care towards Mr and Mrs McAteer. Assumption of responsibility required at very least an assurance that the police were taking

responsibility for the safety of an individual. He submitted that the facts pleaded fell well short of the threshold indicated by the authorities.

[54] Mr Aldworth emphasised that the case before me was an "omissions case". He directed my attention in particular to paragraph 19 of the amended Statement of Claim where the plaintiffs allege that the defendants demonstrated four failures :

(i) The failure of the PSNI to properly protect the plaintiff's family from a murder attempt;
(ii) The failure of the PSNI to pursue any grievance against Mr Duffy and Mr Lusby;
(iii) The failure of the PSNI to even broadly set out what allegation is supposed to have been made against Mr McAteer; and
(iv) The failure of the PSNI to engage with Mr McAteer's repeated offers to deal with all queries in a full and transparent way.

For this reason Mr Aldworth submitted that the negligence claim against the Chief Constable ought to be struck out in its entirety.

[55] Mr Aldworth also submitted that the claim against the second defendant, Detective Sergeant Cherith Craig, ought to be struck out. He was content to accept that each and every action performed by Cherith Craig was performed on behalf of the Chief Constable. Hence any action by her which the court at trial might rule created a legal liability in favour of the plaintiffs was a legal liability which should be borne by the Chief Constable who is her employer and on whose behalf she acted.

[56] Mr Aldworth further submitted that other significant portions of the Statement of Claim required to be struck out. The facts alleged concerned the plaintiffs' dealings with third parties and were not material to any cause of action which had been pleaded against the Chief Constable. It was submitted that the inclusion of this material obscured issues between the parties which were properly justiciable in the present proceedings, raised issues which were not properly justiciable in the present proceedings, and had the potential to extend the duration of trial (and hence the costs) unnecessarily.

[57] Mr Aldworth also submitted that the pleading of such a high proportion of non-material facts, and facts which did not disclose any reasonable cause of action against the defendants, suggests that the primary purpose of the present proceedings as set out in the amended Statement of Claim was not to pursue the plaintiffs' civil law rights but to discredit the police investigation into the alleged fraud and thereby influence the outcome of the criminal justice process. Accordingly Mr Aldworth argued that these civil proceedings had been brought for a collateral purpose and they amounted to an abuse of process.

[58] Mr Aldworth submitted in particular that the decision in *Robinson* did not completely rewrite the law in the field of whether the police owed citizens a duty of care. Rather it explained and analysed the basis for the previous decisions in a different way. He emphasised that all the previous decisions had been correct, even though the analysis was not.

[59] Mr Aldworth also submitted that the negligence component of the Statement of Claim ought to be struck out on the ground that it amounted to a claim for pure economic loss.

[60] In his argument before me Mr McAteer rejected absolutely the core principle in *Hill*. He referred to it as "insane". Mr McAteer submitted that the law on negligence was "far from settled" and that it was "a developing area of law". Hence, he argued, I should not strike out the negligence aspect of his amended Statement of Claim because I could not reach a conclusion that this aspect of his amended Statement of Claim was "unarguable" or "almost incontestably bad".

[61] Mr McAteer in both his amended Statement of Claim and in his skeleton arguments points repeatedly to what he alleges are the failure of the PSNI to act on allegations of criminal conduct which he reported to police and their failure to properly protect the lives of his family with regard to a bomb placed under his wife's car. The words "failure" and "failing" appear on multiple occasions. In his submission these numerous failures, when added together, amount to "outrageous negligence".

[62] Mr McAteer submitted that the PSNI had "an outstanding record of poor performance". For example he asserted a Criminal Justice Inspectorate report had found that a third of the criminal investigation files submitted by the PSNI to the Public Prosecution Service were either of an unsatisfactory or poor standard and that the subject of disclosure in criminal cases was dealt with satisfactorily by police in only 23% of cases. He suggested that their performances in court and the criticism by independent bodies supported the plaintiffs' claim of the existence of "at the very least, outrageous negligence".

[63] Mr McAteer submitted that, since *dicta* from the various cases indicated that there could be exceptional cases, cases of outrageous negligence by the police, which could fall beyond the reach of the *Hill* principle, it would therefore be inappropriate at an interlocutory stage to grant this application and to strike out his claim of negligence. Mr McAteer was of the opinion that his claim fell within the "outrageous" category and argued that, whether it did or not was a matter for the trial judge. In support of this argument he cited the authority of *Rush v Police Service of Northern Ireland and Another* [2011] NIQB 28 a decision of Gillen J where Gillen J overturned my decision to

strike out the plaintiff's Statement of Claim on the basis that it disclosed no reasonable cause of action.

[64] The decision in *Rush* concerned the deaths on 15 August 1998 of 29 men, women and children and two unborn babies when a bomb planted by the Real IRA exploded in Main Street, Omagh. Gillen J stated :

> "[32] However I am satisfied that the category of cases which constitute exceptions to the core principle is far from closed. I am conscious of the cautionary note struck in Lonrhos' case (see paragraph 9 of this judgment). Courts at first instance must be wary lest arguable cases are stifled at too early a stage whatever the ultimate fate of that argument may be at the trial itself once there has been a close and protracted examination of the documents and facts of the case. It has proved very difficult for judges even at the highest level to construct with any precision a formula for exceptions which will cover the range of particular circumstances which could arise. Suffice to say that my task at this stage is not to determine the outcome of the plaintiff's assertions but merely to determine if the case on the pleadings is arguable.
>
> [33] Confining my focus to the pleadings, the case made in this instance is that the defendant "had actual knowledge" of the route of the bombers, their target, namely Omagh and the date and timing of the bombing. I consider that this arguably is distinguishable from the facts in Smith where the police had to process and interpret information reported to the police by one party to a so-called domestic case. Contrast the instant case, where the case is made that the police actually knew that the event was to take place i.e. there was no question of treating, processing or judging a report from a member of the public and making a value judgment.
>
> [34] Accordingly is it not at least arguable that the instant case on the pleadings has more in common with the circumstances in Costello where a police officer knew that the plaintiff was being attacked and stood by and did nothing? The analogy in the instant case is that the police, *knowing* an attack was imminent, similarly stood by and did nothing. Did those circumstances involve the police assuming a responsibility to protect the public? If this is the proven state of affairs does not the need to protect persons imminently about to be killed outweigh the public interest

> in protecting from liability police in the performance of their duties?
>
> [35] It seems to me arguable that the precision of the foreknowledge and the exactitude of the information alleged arguably put this plaintiff within the bracket of the outrageous negligence adumbrated by Lord Steyn, the special circumstances described by Lord Phillips, the exceptional circumstances contemplated by Lord Carswell and that category of cases addressed by Lord Keith "where the absence of a remedy would be an affront to the principles underlying the common law".
>
> [36] I make no comment on whether such assertions as are contained in the pleadings will be sustained by the factual evidence or whether even then the argument that they constitute an exception to the Hill core principle is weak or likely to succeed. I observe only that I do not at this stage consider that the case is unarguable. "

[65] Mr Aldworth responded to Mr McAteer's argument by submitting that Gillen J's decision had been made before the decisions of the Supreme Court in three cases : *Michael v Chief Constable of South Wales Police* [2015] AC 1732, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 and *Commissioner of the Police of the Metropolis v DSD and another* [2018] UKSC 11. Mr Aldworth argued that these decisions had brought greater definition to the extremely limited circumstances of when a police service could be sued in negligence.

[66] Mr McAteer submitted that the defendants had breached the plaintiffs' rights to privacy as a result of their conduct. He stated that his experience at the hands of the PSNI had, to his mind, many similarities to the experience Sir Cliff Richard had had at the hands of the South Yorkshire Police which led to litigation which was settled in May 2017. He stated :

> "Whilst I obviously do not profess to have the same public profile or talents as Sir Cliff, my reputation has been seriously damaged in a public manner by the way in which they raided my business premises and the home of my colleagues and tenants and by the way they made unnecessary and damaging enquiries touching on all aspects of the local business community and associating me with a fraud."

[67] Mr McAteer argued that an application to strike out portions of his amended Statement of Claim was not appropriate because of the complex issues in dispute between the parties. He submitted, adopting that language

used by Lord Woolf in the case of *Swain* v *Hillman* [2001] 1 All E.R. 91 that it was inappropriate that I conduct a "mini trial" in this application. He further submitted that the case pleaded by the plaintiffs was neither unarguable nor almost uncontestably bad. He also argued that the defendants had for some considerable time been saying that there would be a Public Interest Immunity claim asserted and such a claim had not been initiated. Accordingly, even if there was to be a strike out application, that should not take place before the discovery process had been concluded.

[68] In support of his various assertions Mr McAteer filed a range of articles and documents. These included : "Thresholds for strike out", Law Society Gazette, 19 October 2008; "Prospects of success and failure", Law Society Gazette, 30 May 2003, "Breach of Statutory Duty" - Chapter 9 of Clerk and Lindsell on Torts; Chapter 12 (Personal Litigants) of Lord Justice Gillen's report on Civil Justice; "Who has first claim on 'The Loyalty of the Law' [2009] Denning Law Journal Vol 21 pp 141-152; Police Service of Northern Ireland Code of Ethics 2008; and "Negligence claims against the police and prosecutorial authorities", a paper by Jude Bunting, Doughty Street Chambers.

CONCLUSIONS

The Issue of the Second Defendant

[69] The plaintiffs' action has been initiated against two defendants, firstly, the Chief Constable of the Police Service of Northern Ireland and, secondly, Cherith Craig, a Detective Sergeant. Detective Sergeant Craig is referred to only five times in the amended Statement of Claim : in paragraphs 2, 8, 19, 21 and 23. The summons served by the defendants does not formally seek the action to be struck out in its entirely as against her. However at the opening of the first day of the hearing I raised with Mr McAteer whether there was a reasonable cause of action against her. He argued that there was. Mr Aldworth disagreed, submitting that the first defendant conceded that at all material times Detective Sergeant Craig acted in the performance of her duties as a police officer. In my view there is no good reason for her to be separately sued by the plaintiff. It is, to use the language of the Rules, an abuse of the process of the court to unnecessarily sue the second defendant when the first defendant accepts that he is legally liable for anything which the second defendant has done on his behalf. For this reason I therefore strike out the action in its entirely as against Detective Sergeant Craig under Order 18 Rule 19(1)(a). However, even if this concession had not been made by the first defendant, I am of the view that the references to the second defendant within the amended Statement of Claim do not provide facts sufficient to disclose a reasonable cause of action against her as an individual and I would have struck out the action against her on that basis also.

The Negligence Issue

[70] Mr McAteer suggested that the fact that a police officer essentially said to him that the matter he reported would be investigated was an assumption of responsibility by the PSNI. Mr Aldworth disagrees and argues that it is not, otherwise anyone attending a police station with any complaint would lead to a legal position where there is a duty of care. In my view Mr Aldworth is correct when he identifies this claim as essentially an omissions case.

[71] There are elements of Mr and Mrs McAteer's amended Statement of Claim where they complain in respect of the way a criminal investigation by the PSNI into Mr McAteer's business activities was conducted. This claim in negligence cannot stand. As Lord Toulson observed in *Michael* :

> "In *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228 …. it was argued that a police officer investigating a suspected crime owes a duty of care to the suspect and that the same principle applied to the investigation of a disciplinary offence. The House of Lords rejected the argument, which Lord Bridge of Harwich described as startling (p 1238). He said that other considerations apart, it would be contrary to public policy to prejudice the fearless and efficient discharge by police officers of their vitally important public duty of investigating crime by requiring them to act under the shadow of a potential action for damages for negligence by the suspect."

[72] I note that although Mr McAteer alleged in his oral submissions that the police had "specific and precise information" regarding the bomb placed under his wife's car, this was not supported either by particular facts alleged within the pleadings or by documentary evidence exhibited to the affidavits in the application. The material in respect of the bomb in the amended Statement of Claim is as follows :

> "Whilst the second named Plaintiff had been making progress in the High Court he received a number of threats that were related to the matters. This culminated on the 10th April 2014 when a viable device was planted under the first named Plaintiff's car which she discovered as she was taking her three children to school " (Paragraph 6)
>
> "In late 2014 the Plaintiffs were contacted by the Police Ombudsman and informed that an internal referral had been made by the Chief Constable regarding the way in which the murder attempt had been handled. The Plaintiffs have recently learnt that as a result of the Ombudsman investigations disciplinary action is being taken against a number of police officers. On the 6th April 2015 the second

> named Defendant met with the superintendent in charge at his request and he issued a formal apology." (sic) (Paragraph 6).
>
> "The failure of the PSNI to properly protect the plaintiffs' family from the murder attempt …. leads the plaintiff to the view …. that they cannot have any trust and confidence in certain members of the PSNI …." (Paragraph 19).

In a portion of the amended Statement of Claim described as "Particulars of breach of statutory duty, negligence, malfeasance in public office, conspiracy and breach of human rights" there is the following :

> "Failing to properly protect life in relation to the handling of information prior to the device being discovered at [the plaintiffs' address]"

[73] In *Rush* the statement of claim alleged that the police "had actual knowledge" of the route of the bombers, their target, namely Omagh, and the date and timing of the bombing. This differs completely from the amended Statement of Claim drafted by Mr and Mrs McAteer

[74] In my view this does not come anywhere near "the precision of the foreknowledge and the exactitude of the information" that Gillen J referred to in *Rush* and which arguably or potentially put that plaintiff's allegations within the bracket of "outrageous negligence" which in Gillen J's view merited a hearing at trial. The mere repetition of the expression "outrageous negligence" on multiple occasions during his oral submissions by Mr McAteer does not create new facts which might arguably fit that description. In my opinion he failed during the hearing to point to any alleged facts which might arguably fall within that category.

[75] The facts alleged by Mr and Mrs McAteer in the amended Statement of Claim clearly allege harm caused by police omissions and not harm caused by positive acts of police. It is clear, using the language of Lord Reed in *Robinson*, that the police did not themselves create a danger of injury to Mr and Mrs McAteer, nor do special circumstances exist such as a police assumption of responsibility for their safety.

[76] Mrs McAteer in her affidavit submits that she has been advised by her husband that the Supreme Court decision of *Commissioner of the Police of the Metropolis v DSD and Another* [2018] UKSC 11 brings to an end the negligence immunity for the police. This is clearly not the position. The justices set out that the principle issue before them was the nature of the duty upon police to investigate ill treatment amounting to an allegation of Article 3 of ECHR. Lord Kerr stated that one of the sub-issues before them was :

> "In this context, is it relevant that UK courts have, so far, refused to recognise a common-law duty of care on the police in relation to the manner in which officers prevent and investigate crime?"

Indeed when it came to a comparison with the absence of a private law duty of care the justices were very clear. Lord Hughes indicated that a convenient summary of the law was provided by the judgment of Lord Phillips in *Smith v Chief Constable of Sussex Police* [2008] UKHL50 :

> "I do not find it possible to approach *Hill* and *Brooks* as cases that turned on their own facts. The fact that Lord Steyn applied the decision in *Hill* to the facts of *Brooks*, which were so very different, underlines the fact that Lord Steyn was indeed applying a 'core principle' that had been 'unchallenged … for many years'. That principle is, so it seems to me, that in the absence of special circumstances the police owe no common law duty of care to protect individuals against harm caused by criminals. The two relevant justifications advanced for the principle are (i) that a private law duty of care in relation to individuals would be calculated to distort, by encouraging defensive action, the manner in which the police would otherwise deploy their limited resources; (ii) resources would be diverted from the performance of the public duties of the police in order to deal with claims advanced for alleged breaches of private law duties owed to individuals."

Lord Hughes then referred to Lord Hope's speech in the same case :

> "The point that he [Lord Steyn] was making in *Brooks*, in support of the core principle in *Hill*, was that the principle had been enunciated in the interests of the whole community. Replacing it with a legal principle which focuses on the facts of each case would amount, in Lord Steyn's words, to a retreat from the core principle. We must be careful not to allow ourselves to be persuaded by the shortcomings of the police in individual cases to undermine that principle. That was the very thing that he was warning against, because of the risks that this would give rise to. As Ward LJ said in *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464, 487, the greater public good outweighs any individual hardship."

In conclusion I reject the plaintiff's argument that the law on the private law duty of care has been changed by the decision in *Commissioner of the Police of the Metropolis v DSD and Another.* Applying the authorities on negligence to which I have referred to the facts pleaded by the plaintiffs, I do not consider that there is a reasonable cause of action and I therefore strike out those portions of the amended Statement of Claim alleging negligence by the Chief Constable under Order 18 Rule 19(1)(a).

The Economic Loss Issue

[77] I also agree with Mr Aldworth's submission that the negligence component of the amended Statement of Claim ought to be struck out on the ground that it amounts to a claim for pure economic loss. The position is summarised in paragraph 1-44 of Clerk and Lindsell on Torts (22nd edition, 2018) :

> " 'Pure economic loss' is the term used to describe an economic loss to the claimant which does not result from any physical damage to or interference with his property. … Pure economic loss will normally take two forms : wasted expenditure or loss of a gain, profits or profitability. … *Hedley Byrne v Heller* [1964] AC 465 allowed recovery of economic loss in negligence within the boundaries of a special relationship of a kind rendering it appropriate to require the defendant to safeguard the economic interests of the claimant. The outer limits of such special relationships, which will generally relate to wasted expenditure, are now set largely by *Caparo Industries PLC v Dickman* [1990] 2 AC 605. Loss of a potential gain, will, unless a consequence of physical damage, normally fall outside the ambit of torts. However in *White v Jones* [1995] 2 AC 207 the House of Lords confirmed that exceptionally the relationship between claimant and defendant can be such that responsibility for protecting the claimant's expectations properly rests with the defendant."

The Limitation Issue

[78] In the light of my decision in respect of the negligence issue I do not require to consider the submissions made by the parties in respect of the limitation issue.

The Pleadings Issue

[79] The defendants also challenge significant portions of the amended Statement of Claim essentially on the basis that it is badly drafted and includes the assertion of facts which are not material to any cause of action relied upon in the action.

[80] Order 18 Rule 7(1) provides :

> "Subject to the provision of this rule, and rules 10,11, 12 and 23, every pleading must contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or his defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case permits."

[81] The "White Book", 1999 edition, states the following at paragraph 18/7/11 in respect of material facts :

> "It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (per Cotton LJ in *Philipps v Philipps* (1878) 4 QBD 127, p 139. "Material" means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim is bad (per Scott LJ in *Bruce v Odhams Press Ltd* [1936] 1 All ER 287 at 294). Each party must plead all the material facts on which he means to rely on at trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (*West Rand Co v Rex* [1905] 2 KB 399; see *Ayers v Hanson* [1912] WN 193)."

[82] In *NEC Semi-Conductors Ltd v IRC* [2006] STC 606 Mummery LJ made the following observations at [131]:

> "While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason—so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate

> and serve a properly pleaded case setting out the material facts in support of the cause of action. If the pleading has to be amended, it is reasonable that the party, who has not complied with well-known pleading requirements, should suffer the consequences with regard to such matters as limitation."

[83] I have borne in mind that Mr and Mrs McAteer are personal litigants. Pleadings drafted by self-represented litigants can suffer from a number of potential defects. Firstly, litigants may draft "blizzards of lengthy, argumentative, and incoherent pleadings" (*Rankine and Another v American Express Services Europe Ltd and others* [2009] EWCA Civ 1539. Secondly, their pleadings may be unclear. The general approach therefore adopted by courts is that personal litigants should be given the benefit of any lack of clarity in a pleaded case and it should be interpreted with appropriate latitude. As the South African Constitutional Court recognised in *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd* [2003] ZACC 7

> "Pleadings prepared by laypersons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance."

[84] However a personal litigant cannot simply pour out his story and ask the court to sort out his legal rights because he himself is ignorant what rights may have been breached or how. Mere inexperience in matters of pleading will not excuse serious non-compliance with the requirements of procedural rules which are, after all, based on notions of justice and fair play to both sides in litigation. There will be occasions when a self-represented litigant's pleadings are so defective that they will be struck out. The style of the plaintiffs' amended Statement of Claim is that of a long narrative. Much of it concerns business dealings with third parties and the subsequent fraud investigation. For that reason I grant the defendants' application to strike out portions of the amended Statement of Claim on the basis that they are not supportive of any allegation contained therein. However one aspect of the challenged material will be allowed to remain. Paragraph 18 of the amended Statement of Claim refers to the offices of Gavin McGill and the home of Dr Winifred Mooney, in respect of which premises police obtained search warrants. That portion, together with subsequent references to Mr McGill or Dr Mooney in paragraphs 20 and 22, will not be struck out. As one reads the amended Statement of Claim, there is no explanation as to why any action lies

against the police on the basis that search warrants were issued against these third parties. However during the hearing Mr McAteer explained that both persons were his business partners and therefore the search of their premises was an action aimed at him. Subject therefore to a future amendment by means of an additional sentence to explain its relevance, I shall allow that material to remain.

The Statutory Duty Issue

[85] Mr Alworth submitted that this aspect of the amended Statement of Claim should be struck out as the plaintiffs had not identified any particular statutory duty which they allege has been breached.

[86] Mr McAteer in his oral submissions stated that the PSNI had breached the Police Service of Northern Ireland Code of Ethics 2008. The contents of that Code are drawn from a variety of sources. Some of these are statutory, for example the Police (Northern Ireland) Act 2000, but others are non-statutory and are derived from sources outside this jurisdiction, for example the European Police Code of Ethics. In my view any alleged breach of the 2008 Code does not necessarily amount to a breach of statutory duty. On the final day of the hearing of this application Mr McAteer referred to the Protection from Harassment (Northern Ireland) Order 1997. However he did not refer to any particular provision in the Order which he suggested had been breached. He also handed in a photocopy of chapter 9 of Clerk and Lindsell on Torts on the subject of breach of statutory duty but made no proposal or application to further amend his amended Statement of Claim in order to rectify the defect of failing to plead which statutory duty had been breached.

[87] I accept the submission on behalf of the defendants that those parts of the amended Statement of Claim which refer to breach of statutory duty must be struck out as they do not identify any particular or specific statutory duty which has been breached. A plaintiff may not allege that a breach of statutory duty has occurred and then fail to allege which duty in which statute he is referring to.

The Collateral Purpose issue

[88] The hearing of this application stretched over a number of days and the parties required time to submit supplementary skeleton arguments to deal with the Supreme Court's decisions in *Robinson* and *DSD*. During one of the later hearings Mr McAteer submitted letters from the Public Prosecution Service which had decided not to prosecute either him or his wife in relation to the fraud investigation carried out by the Chief Constable. This does not in itself, however, render the collateral purpose issue moot.

[89] A summary of the law that a court may strike out an action on the basis that the proceedings have been brought for a collateral purpose and are

therefore an abuse of process can be seen conveniently in the decision in *JSC BTA Bank v Ablyazov & Ors* [2011] EWHC 1136 (Comm). In that case the alleged collateral purpose was that the commercial actions before Teale J had been brought to assist the President of Kazakhstan in his scheme to eliminate Mr Ablyazov as a political opponent. Teale J observed that in modern times at least two Masters of the Rolls have confirmed the principle that the pursuit of a claim for a collateral or ulterior purpose may amount to an abuse of the process of the court. Thus in *In re Majory* [1955] Ch. 600 at pp.623-624 Sir Raymond Evershed MR said:

> "The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused."

Similarly, in *Goldsmith v Sperrings Ltd.* [1977] 1 WLR 478 Lord Denning MR (who dissented on the result of the case) said at p. 489:

> "In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer."

[90] Nevertheless Teale J observed that there are few cases in which proceedings have been stayed on the ground that the action has been brought for a collateral purpose. In my view, while it is possible for the defendants to assert that they *suspect* that the plaintiffs initially commenced these proceedings for the collateral purpose of affecting the outcome of the criminal investigation, there are no facts upon which I can reach a decision that on the balance of probabilities this action has been brought for this collateral purpose. The commencement of these proceedings might be for the purpose which the defendants allege but is also equally consistent with, for example, a

failure to understand the law which applies to when actions can be brought against the police and with the possibility that the action has been brought simply because the plaintiffs reached a conclusion that the Chief Constable might be an easy mark for damages. I therefore decline to strike out the action as a whole on this ground.

The Misfeasance in Public Office issue

[91] The relevant authority on the subject of misconduct in public office is *Three Rivers District Council and Others v Governor and Company of the Bank of England* (No 3) [2003] 2 AC 1. The ingredients of the tort were usefully summarised by Tugendhat J in *Carter and others v Chief Constable of the Cumbria Police* [2008] EWHC 1072 (QB) as follows:

> "(a) The defendant must be a public officer;
>
> (b) The conduct complained of, that is an act and/or an omission (in the sense of a decision not to act) must be in the exercise of public functions;
>
> (c) Malice: The defendant's state of mind must be one of two types, namely either:
>
> i) "Targeted malice" i.e. the conduct is "specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of a public power for an improper or ulterior motive…".
>
> ii) "Untargeted malice": i.e. the public officer acts knowing that he has no power to do the act complained of or with reckless indifference as to the lack of such power and that the act will probably injure the claimant. "… it involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful…"
>
> Thus the unifying element is "…. conduct amounting to an abuse of power accompanied by subjective bad faith…"
>
> (d) The claimant must have a "sufficient interest to found a legal standing to sue" but there is no

> requirement of sufficient proximity between the claimant and the defendant ;
>
> (e) Causation of damages/loss;
>
> (f) Remoteness of damage: Where the malice is of the second type, see (c)(ii) above – The defendant must know that his/her conduct "would probably injure the plaintiff or person of a class of which the plaintiff was a member."

[92] If therefore one was attempting to define the essence of misfeasance in public office, one might usefully define it as a dishonest abuse of public power exercised in a deliberate or reckless manner.

[93] In *Carter*, an action by nine police officers against their Chief Constable in respect of misconduct proceedings which they alleged were taken against them unlawfully, Tugendhat J stated ;

> "[66] In my judgment I should have in mind in this case the words of Judge LJ cited above, as adapted to the tort of misfeasance in public office. It is essential that before this action for misfeasance is allowed to be pursued through the courts, anxious scrutiny should be made of it to ensure that the Defendant's immunity against actions for negligence is not circumvented by the pleading device of converting what is in reality no more than allegations of negligence into claims for misfeasance in public office.
>
> [67] As Chadwick LJ said in *Marsh v Chief Constable of Lancashire* [2003] EWCA Civ 284 para 57, allegations of misfeasance in public office are amongst the most serious – short of conscious dishonesty – that can be made against police officers, or any public official.
>
> [68] An allegation of bad faith must be properly particularised. As Megaw LJ said in *Cannock Chase DC v Kelly* [1978] 1 WLR 1, at p6:
>
> "… bad faith, or, as it is sometimes put, "lack of good faith," means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant. If a charge of bad

> faith is made against a local authority, they are entitled, just as is an individual against whom such a charge is made, to have it properly particularised. If it has not been pleaded, it may not be asserted at the hearing. If it has been pleaded but not properly particularised, the pleading may be struck out."

[94] I note that the Law Commission for England and Wales is currently engaged in a project on the subject of "Reforming Misconduct in Public Office" and is due to report in 2019. Although the Law Commission's focus is on criminal law offences, one of its background papers has considered the related tort of misfeasance in public office. Appendix B to the Commission's background paper states :

> "Pleading bad faith is difficult, because the pleading rules require details, and professional conduct rules forbid practitioners supporting obviously baseless allegations. Proving bad faith is even more difficult. Where they have a choice, the courts are strongly disposed to believing that bureaucratic error was caused by genuine mistake, even incompetence, rather than by bad faith. The result is that of the hundreds of misfeasance claims that are actually filed, very few make it to trial. Most are filtered out for inadequate pleading of bad faith, or because an allegation of bad faith has no real prospect of success. … Misfeasance in public office is an oddity in several respects. Not allowed to trespass on better established torts, it occupies a tiny niche reserved, in essence, for redressing harms caused by public officers who knew or suspected that they were abusing their public power or position to the detriment of the individual."

[95] In the application before me I consider that the plaintiffs, to use the language of Tugendhat J, are converting what is in reality no more than allegations of negligence into claims for misfeasance in public office. It is notable that the amended Statement of Claim merges together the particulars of statutory duty, negligence, misfeasance in public office, conspiracy and breach of human rights into one group of particulars and does not plead each cause of action separately.

[96] The principal portions of the amended Statement of Claim which might be said to deal with the allegation of misfeasance in public office are:

> "The PSNI did nothing at all about the blackmail complaint that the second named plaintiff had made. The investigating officer was an individual called Cherith Craig. On the one hand the PSNI vigorously investigated Mr Lusby's complaint

but completely failed to act in relation to the complaint made by the second named plaintiff.

…

The PSNI obtained search warrants in relation to the premises of the second named plaintiff. …. Documentation and oral submissions were provided to the learned Judge which the plaintiffs claim were incomplete, inaccurate and misleading as a result of the corruption of the process by the PSNI, the learned Judge was misled and granted the warrants and as a result damage was done to the plaintiffs and their business associates.

…

… the heavy handed and devastating way in which they descended on the plaintiffs' business premises leads the plaintiffs to the view that there is another agenda and that they cannot have any trust and confidence in certain members of the PSNI and in particular in Cherith Craig.

…

In the circumstances, the first named defendant and the second named defendant acting on a frolic of her own, have breached their statutory duty, acted negligently, have engaged in malfeasance (sic) in public office, conspired and colluded with others and breached the human rights of the plaintiffs thereby occasioning the plaintiffs loss and damage.

…

Obtaining search warrants against the plaintiffs and their business associates by means of a corrupted process by having failed to make appropriate enquiries, failing to make full disclosure to the learned Judge making inaccurate and incomplete statements to the learned Judge and failing to disclose the complete history regarding the plaintiffs and individuals who made complaints to the PSNI."

[97] It is evident that these pleadings contain no allegation of malice. The closest they come to alleging malice is the use of the terms "corruption" and "corrupted" and the suggestion of "another agenda". However this comes nowhere near a proper particularisation of malice. In *London Borough of Southwark v Dennett* [2007] EWCA Civ 1901, a case which concerned

maladministration by the London Borough in connection with Mr Dennett's right to buy a long lease of the flat in which he was a tenant, May LJ said :

> "In *Society of Lloyds v Henderson [2007] WL 2817792* , Buxton LJ emphasised that for misfeasance in public office the public officer must act dishonestly or in bad faith in relation to the legality of his actions. The whole thrust of the *Three Rivers* case was that knowledge of, or subjective recklessness as to, the lawfulness of the public officer's acts and the consequences of them is necessary to establish the tort. Mere reckless indifference without the addition of subjective recklessness will not do. This element virtually requires the claimant to identify the person or people said to have acted with subjective recklessness and to establish their bad faith. An institution can only be reckless subjectively if one or more individuals acting on its behalf are subjectively reckless, and their subjective state of mind needs to be established. To that end, they need to be identified. As Buxton LJ said at paragraph 49:
>
> > "In this analysis I leave aside the further difficulty that if a case of subjectively reckless failure to act were to be made good, it would have to be demonstrated who took the decisions not to act and with what knowledge. Nothing in those terms has been demonstrated, or sought to be demonstrated, even with the assistance of the proposed fresh evidence. That is no doubt why the case falls back on objective recklessness, which could be demonstrated by inference: but such demonstration is not enough for the tort of Misfeasance in Public Office." "

[98] May LJ then illustrated the difficulties of inferring subjective recklessness :

> "Subjective reckless indifference is a possibility but not a necessary inference. There are other possibilities of which the strain of overwork or incompetence are two."

[99] Aside from dark hints of corruption, the failures alleged by Mr and Mrs McAteer, even if they were proved to be such, could well stem from the other possibilities referred to by May LJ. The allegations of misfeasance in public office therefore fall to be struck out under both Order 19 Rule 19(1)(a) on the basis of no reasonable cause of action and also on the basis that the

pleadings of the tort are not sufficiently particularised. I reach the same view in respect of the allegation of conspiracy.

[100] Having struck out the portions of the amended Statement of Claim alleging negligence, breach of statutory duty, conspiracy and misfeasance in public office, the action by Mr and Mrs McAteer therefore continues only on the basis of their allegations of breach of human rights. That I allow that portion of the action to continue without striking them out should not be misunderstood as indicating any hope that they are likely to be successful at trial. I express no view on that matter.

[101] In the event that the parties have any submissions on the matter of the costs of this application, such submissions should be submitted within 7 days.

[102] Given the complexity of the legal issues which this application has concerned, I extend the time limit for any appeal against this decision from 5 days to 21 days.