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Judgment: approved by the Court for handing down (subject to editorial corrections)	*Delivered: 16/04/25*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between

GERARD DOHERTY

Plaintiff

-and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant

Mr Doherty (instructed by Kearney Law Group) for the plaintiff
Mr Warnock (instructed by Crown Solicitors Office) for the defendant

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MASTER HARVEY

Introduction

[1] The plaintiff's claim is based upon his assertion that he should not have been prosecuted for rape and sexual assault in 2012. His initial trial collapsed and during the re-trial it emerged during the cross examination of a witness that the complainant had previously made separate rape allegations against three other individuals. The Police Service of Northern Ireland ("PSNI") claims it was unaware of the previous allegations until it emerged at the re-trial. The plaintiff will say the investigating officer did know and points to the relevance of this information as at least one of the previous allegations had considerable similarities to the complaint against him. He asserts that if this had been disclosed sooner, the Public Prosecution Service ("PPS") would not have proceeded with the trial.

[2] The plaintiff issued a writ of summons on the 28 November 2018 claiming damages against the PSNI and PPS arising from the arrest, investigation, prosecution, collapsed trial and re-trial. A statement of claim was served on the 24 May 2019. An amended statement of claim was served on 11 September 2024. I will shortly turn to the third iteration of the statement of claim filed on 16 December 2024

which forms the basis of one of the applications before the court. The plaintiff has now discontinued the action against the PPS.

The applications before the court

[4] The defendant has applied by way of summons dated 2 December 2021 relying on Order 18 rule 19 (1) (a) and (b) as well as the inherent jurisdiction of the court, seeking to strike out the claim on the basis it discloses no reasonable cause of action, it is scandalous, frivolous, vexatious or otherwise an abuse of process. It argues that the plaintiff's case as set out in the statement of claim is bound to fail and is clearly unarguable and incontestably bad.

[5] The plaintiff has applied by way of summons dated 16 December 2024 to further amend the statement of claim, seeking to withdraw the claims for negligence, breach of statutory duty, conspiracy, victimisation and intentional infliction of psychiatric harm. That will leave a claim focusing solely on misfeasance in public office and malicious prosecution. The writ had also made a claim for breach of the plaintiff's human rights which is not being pursued.

Legal principles

Strike out applications

[6] Counsel's written and oral submissions made reference to a number of authorities, all of which I have considered. In addition to this, I referred the parties to a recent decision of this court in *McAuley v Chief* Constable [2025] NIMaster 4, dealing with a similar strike out application in a claim against the police for misfeasance in public office. There is no disagreement between the parties on the legal principles, therefore, I do not intend to rehearse them save as to some key points.

[7] At hearing, I referred to a recent Northern Ireland Court of Appeal decision in the context of an interlocutory order striking out aspects of a defence, in *The Governor & Company of the Bank of Ireland and John Conway* [2024] NICA 80. The court warned of the dangers of forming conclusions at a preliminary stage, stating:

> "[18] It is not for this court in the exercise of its circumscribed function to make any judgement about any of the foregoing assertions. Rather, it suffices to recognize that the defendant's evidence at trial could include the foregoing and, further, could be accepted by the trial judge, in whole or in part, giving rise to findings of fact in his favour which, in turn, could establish or contribute to establishing one or more of his causes of action as pleading."

[7] In line with *Rush v Police Service of Northern Ireland and the Secretary of State* [2011] NIQB 28, for the purposes of the application, all the averments in the statement of claim must be assumed to be true. In the Court of Appeal decision in *Magill v Chief Constable* [2022] NICA 49 the principles were set out at para 7:

"(i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.
(ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.
(iii) In approaching such applications, the court should be cautious in any developing field of law…
(iv) Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted.
(v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.
(vi) So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out…
We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim in limine."

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

Amendment to pleadings

[9] The plaintiff has applied pursuant to Order 20 rule 5 of the Rules to amend the statement of claim. In *Loughran v Century Newspapers Ltd [*2014] NIQB 26 Gillen J set out the principles to be applied in amendment applications at paras 35-37:

"[35] A pleading may be amended by leave at any time. The guiding principle is that it will be allowed in order to raise or clarify the real issues in the case or to correct a defect of error, provided that it is bona fide and there is no injustice to the other party which cannot be compensated in costs (see *Beoco v Alfa Labil* [1995] QB 137 and Valentine (Civil Proceedings, The Supreme Court) at 11.18). However, as a general rule, the later the application to amend, the more likely it is to be enquired into, and the greater risk is that it will be refused."

Misfeasance in public office

[10] In the oft cited case of *Three Rivers v Bank of England* [2000] UKHL 33 Lord Steyn set out the ingredients a plaintiff must prove to establish this tort. Firstly, the defendant (or their servant/agent) must be a public officer. Secondly, they must have been exercising powers in their capacity as a public officer. Thirdly, misfeasance in public office is an intentional tort and the plaintiff must prove malice in that the defendant deliberately acted in bad faith by exercising public powers for an improper or ulterior motive to cause injury or prove an absence of an honest

belief that the public officer's own actions are lawful and that they will probably result in injury.

Malicious prosecution

[11] This is similar to misfeasance as there is a need to show malice and loss but crucially the defendant must be a prosecutor. Counsel referred me to *Daly v Independent Office for Police Conduct* [2023] EWHC 2236 (KB) at para 16 where the court stated:

> "I take the point that a complainant or third party might become so wrapped up in a prosecution (for example by providing deliberately false evidence) that the complainant or third party may be regarded as a prosecutor; see *Martin v. Watson* [1996] 1 A.C.74."

[12] In *Daly*, although the case was referred to the prosecuting authority, the Crown Prosecution Service ("CPS") by the defendant, it was the CPS which independently decided to proceed with prosecution. It was determined the defendant was not a prosecutor and so the claim was doomed to fail and struck out. There were various failures identified such as the lack of a formal identification procedure and a failure to appoint a sufficiently experienced investigative officer. The court stated at para 31 that:

> "In my judgment these alleged failures and the matters pleaded under the various sub-headings, even if proved, do not establish malice. These failures, if made out, may equally show incompetence or want of care. That is no basis for a claim in malicious prosecution."

[13] In *Martin v Watson* [1996] 1 A.C.74, a charge of indecent exposure was brought against the plaintiff by the police at the instigation of the alleged victim. It is the plaintiff's case that the officer in this case acted in the same manner as envisaged in *Martin*. In that case there was a false and misleading complaint to secure a prosecution meaning the prosecuting authority could not exercise independence in its decision making.

[14] In *Rees and Others v Commissioner of Police for the Metropolis* [2018] EWCA Civ 1587, the investigating officer acted maliciously and was found to be a prosecutor as he manipulated the CPS into taking a course of action it would not otherwise have taken meaning they were deprived of their ability to exercise independent judgment.

Defence submissions

[15] The defendant asserts this is a pure omission case and the facts as pleaded and taken at their height could not give rise to a conclusion that there was malice or bad faith. The defendant argues there is no factual foundation for bad faith or why the officer's actions in this case must be more than ignorance, negligence or want of care. It states that it is not clear based on the pleaded case why the officer set out to

deliberately withhold information in order to cause intended harm to the plaintiff meaning there is a huge gap in the pleaded case.

[16] The defendant distinguishes this from the case of *Rees* where the police officer deliberately manipulated the CPS into taking a course of action that they would otherwise not have taken. In the present case the officer was not disciplined or found guilty of any criminality. The defendant submits that whilst the continuance of the trial in this case is not conclusive of the question as to whether the prosecution would have started in any event had the information been available, it is relevant. Further, unlike in *Rees*, in this case there was direct evidence from the complainant who gave evidence of her alleged rape and sexual assault. The defendant claims there was therefore a case worthy of prosecution and worthy of putting to the jury meaning the plaintiff does not have a reasonable prosect of establishing the prosecution would not have taken place had the previous complaint been made available to the PPS. The defendant further asserts in all the circumstances it cannot be held to be a prosecutor.

Plaintiff submissions

[17] The plaintiff asserts that malice should be inferred from the conduct of the investigating officer and the further amendments to the statement of claim properly particularise the plaintiff's case and cure the deficiencies in the initial versions. The plaintiff contends it is plainly arguable that the experienced and high-ranking investigating officer knew of the complainant's previous allegations, suppressed that knowledge and withheld it from the PPS, intending that the plaintiff be prosecuted. The plaintiff argues that the withholding of key information from the PPS made it virtually impossible for them to exercise independent judgment and therefore asserts the investigating officer could be considered the prosecutor for the purposes of the tort of malicious prosecution, for whom the defendant would be vicariously liable.

[18] The plaintiff states that similar to the *Rees* case, the prosecution continued and pointed to para 67 which stated:

> "The decision to continue a prosecution already in course does not, however, dictate the question of whether such prosecution would have been started based on the same slender material."

Therefore, in response to the defendant's assertion that the fact the trial continued after the relevant information was put in evidence to the jury negates the possibility that the outcome for the plaintiff would have been different, the plaintiff argues this is not determinative of that issue.

The interrogatories

[19] The investigating officer ("IO") has sworn an affidavit in response to the plaintiff's interrogatories. The replies state that prior to the trial of the plaintiff in February 2013, she was not aware of any previous allegations of rape or sexual

assault. On 9 July 2012, she had discussed with the complainant whether or not any previous allegations had been made by the complainant whilst discussing special measures. The IO was purportedly told by the complainant that approximately eight years prior, whilst living in England, she had reported a suspected drink spiking incident. The complainant however indicated that there had been no assault allegation made by her. Following on from this assertion, the IO phoned police in Devon and Cornwall but was told that the complainant was not on their system. As a result of this, no further enquiries were made until the matter was raised in court in February 2013. In the course of the retrial, the Forensic Medical Officer ("FMO") was cross-examined by senior counsel for the plaintiff on 18 February 2013 in relation to the making of any previous complaints of rape and or sexual assault. As a result of the questioning and the answers from the FMO, the IO again contacted Devon and Cornwall Police. It was confirmed that a previous complaint had in fact been made. The specific results of the enquiries were passed to the plaintiff's legal advisors, and to the PPS, on 19 February 2013. Following consideration of the results of the enquiries, the PPS decided to continue the prosecution against the plaintiff.

Consideration

[20] There are a number of factors the court must consider when being asked to deploy such a draconian measure striking out a claim. The starting point in these applications is the pleadings. Firstly, I will turn to the application by the plaintiffs to amend their statement of claim.

Amendment application

[21] In the proposed draft amended amended statement of claim the pleaded case has been expanded with new paras inserted at 3B, 3C, 3D and 3E. Several of the original heads of claim are abandoned. There is additional information at paras two and five and amendments to the particulars of misfeasance in public office. As is often the case in such applications, the defendant argues this late proposed amendment is a response to their strike out application.

[22] On balance, I consider the amendments do not introduce a new cause of action and arise from the same facts. The pleadings have been refined in light of further discovery obtained by the plaintiff. They elaborate upon what has already been pleaded and do not alter the core basis of the plaintiff's claim which has been obvious to the defendant from the outset. The defendant has had the opportunity to consider the draft amendments well in advance of this application. At hearing, I granted leave to the plaintiff in respect of the amendments and proceeded to hear from counsel in relation to the strike out application on the basis of this further amended pleading.

The amended amended statement of claim

[23] The further amended statement of claim pleads that the complainant disclosed previous allegations involving rape/sexual abuse during the course of the FMO's examination and the investigating officer was present at the time thus becoming aware of the previous allegations. One of these allegations bore considerable similarities to the sequence of events outlined in the complainant's witness statement to the PSNI. The complainant confirmed there had been police involvement in the previous complaint. The investigating officer was experienced and high ranking and would have been aware that a failure to disclose this information constituted a perversion of the course of justice and in breach of the Police and Criminal Evidence (NI) Order 1989. She failed to disclose this knowledge to the plaintiff or the PPS at any point, thus acting with malice. The PPS made a decision to prosecute the plaintiff in the absence of this key information. It was entirely foreseeable that in withholding the relevant information from the PPS, their ability to make an informed decision as to whether to prosecute the plaintiff was compromised. Had the relevant information been disclosed, the plaintiff would not have been prosecuted and suffered the personal injuries, loss and damage claimed. The plaintiff submits that it is plainly arguable that malice can be inferred from the above facts.

The strike out application

[24] As was stated by the Court of Appeal in *Conway*, at this stage of these proceedings, there is no evidence, no findings of fact or agreed material facts. The onus rests on the defendant to establish that the contentious aspects of the plaintiffs pleading "could not conceivably in any realistically foreseeable trial circumstances succeed and are incurably vitiated in consequence." Delivering the judgment in that case, McCloskey LJ stated "this entails a hurdle of formidable dimensions."

[25] In *Young v Chief Constable of Warwickshire* [2020] EWHC 308 (QB) also involving a claim against the police for misfeasance in public office, the court set out the significant challenge for plaintiffs in relation to what is required to demonstrate malice and damage at para 26:

> "The requirements at (c) (malice) and (d) (damage) above are onerous. In line with the heavy burden thus imposed, the claimant must specifically plead and properly particularise the bad faith or reckless indifference relied upon. It may be possible to infer malice. But if what is pleaded as giving rise to an inference is equally consistent with mistake or negligence, then such a pleading will be insufficient and will be liable to be struck out."

[26] As stated in authorities such as *Marsh v Chief Constable of Lancashire Constabulary* [2003] EWCA Civ 284, misfeasance in public office is amongst the most serious of accusations that can be made against a public official. I have carefully considered the amended pleadings but find it difficult to come to any other conclusion that they are replete with bald assertions which do not support the

allegations. In the *McAuley* case I noted (and defence counsel in that case accepted) that the plaintiff's case might have survived a strike out application in a negligence claim but "as is clear from the authorities, misfeasance sets the bar much higher" (para 35). That applies equally here.

[27] I consider this case distinguishable from *Rees* where the investigating officer seriously compromised the de-briefing of a witness who suffered from a personality disorder, through direct contact with him prior to making his statement. In that case, the investigating officer improperly and deliberately prompted the key witness, and the officer was found guilty of perverting the course of justice. He was deemed a prosecutor as he deliberately manipulated the CPS into taking a course they would not otherwise have taken depriving them of their ability to exercise independent judgment. The malice in that case was clear given his criminal actions in the investigation. In the present case, there is force in the defendant's assertion there has been no finding that the investigating officer acted criminally or with bad faith and therefore any failings could just as easily be due to negligence or incompetence.

[28] Moreover, I consider this case distinguishable from the cited case of *Martin v. Watson* as I do not consider the facts as pleaded could give rise to a finding the prosecuting authority was unable to exercise independence in its decision making.

[29] The plaintiff relies on bad faith, but the pleaded facts do not demonstrate any alleged hostility on the part of the officer against the plaintiff or any history pointing to a motive or cause to act in bad faith. The defendant credibly asserts there is a huge gap in the pleaded case.

[30] At its height, I consider this is akin to a case of alleged negligence, however, such a cause of action is not open to the plaintiff and that claim has been withdrawn. In line with *Bank of Ireland v Conway,* I consider the case as pleaded has no reasonable prospects of success and could not conceivably in any realistically foreseeable trial circumstances succeed. The pleadings contain bare assertions which are inadequate to support the grave allegations made by the plaintiff.

[31] In this case the court is being asked to take a significant leap of faith based on the pleadings arising from nothing more than speculation when the facts pleaded would equally support a case of negligence or a conclusion the officer acted incompetently. In *McAuley*, I struck out the claim of misfeasance despite the fact there was a long list of alleged failings identified in an Ombudsman's report and the officers involved were disciplined. In that case, I determined at its height "the pleadings fall far short of the requirements to plead such grave allegations as are alleged here and I am not persuaded that further time, or the provision of discovery, will change this." (para 42).

[32] In this case, the officer was not disciplined, there was no criminal action against her, the plaintiff has obtained discovery and has the benefit of sworn

interrogatories from the officer concerned. Ultimately the trial of the plaintiff continued even after the information came to light and was put to the jury. At its height, the officer in this case may have heard information being disclosed at an examination of the complainant and may have failed to note that, be aware of its significance and pass that information on to a superior or prosecutor. The plaintiff asserts that could only be due to malice and that is the only conclusion a court could reach. I consider the matters pleaded are insufficient to seek to establish malice as they could clearly be equally indicative of incompetence, carelessness or negligence. Similarly, I consider the facts as pleaded cannot form the basis of a claim for malicious prosecution. As pleaded, therefore, I consider this is a plain and obvious case for striking out.

Conclusion

[33] I grant the defendant's application striking out the claim pursuant to Order 18 Rule 19 (1) (a). I will hear from the parties in relation to costs.