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Judgment: approved by the Court for handing down | *Delivered:* **13/01/2020**

(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

C (A PERSON UNDER A DISABILITY)
BY D, HER MOTHER AND NEXT FRIEND

Plaintiff

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE
OF NORTHERN IRELAND

Defendant

McAlinden J

Anonymity

The plaintiff and a number of other individuals referred to in this judgment have been anonymised so as to protect the identity of the plaintiff. Nothing must be disclosed or published without the permission of the court which might lead to the plaintiff's identification.

Introduction

[1] The plaintiff is a vulnerable young woman who was born in 1987. She has a diagnosis of Asperger's Syndrome which was made when she was 12 years old and, more recently, she has required a number of inpatient admissions for a psychotic illness. She brings the present action by her mother and Next Friend as it is claimed that she presently lacks the capacity to continue these proceedings in her own right. The plaintiff claims that she was raped on 16 June 2007. She now sues the PSNI for personal injuries, upset and distress allegedly suffered by her on account of the breach of her Article 3 and Article 8 rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms by reason of the failures on the part of the PSNI to conduct a proper investigation into the plaintiff's allegation of rape.

[2] The letter of claim in this case is dated 23 July 2009. The Writ of Summons alleging negligence and breach of the plaintiff's Article 8 rights was issued on 23 November 2009. The Statement of Claim was served on 4 July 2013. The defendant brought an application before Master McCorry for an Order pursuant to Order 18 Rule 19 of the Rules of the Court of Judicature (Northern Ireland) 1980 to strike out the plaintiff's claim on the basis that the pleadings disclosed no reasonable cause of action. This application was dismissed and the defendant appealed. The appeal came before Gillen J in February 2014. A few days after Gillen J had heard the appeal, and whilst he was in the course of writing his judgment, he became aware of a judgment which had just been delivered by Green J in the High Court in England and Wales in *DSD and NVB v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) ("*DSD*") which was clearly relevant to the matters in dispute in the present action. Gillen J, therefore, afforded counsel a further opportunity to address him on the impact of the *DSD and NVB* decision on the instant case.

[3] At a subsequent hearing, and in the wake of *DSD and NVB*, upon consent of the parties, Gillen J granted leave to the plaintiff to amend the Writ of Summons and Statement of Claim to include a claim for breach of Article 3 of the Convention in addition to the claims for negligence and breach of Article 8 of the Convention already pleaded. It was agreed between counsel that the defendant would not oppose such an amendment on the basis that the defendant would have the right to argue any limitation point that could have been argued at the time of the original Writ and in particular to maintain the right to argue that the primary limitation period set out at section 7(5)(a) of the Human Rights Act 1998 had expired by the time the original Writ was issued. Before Gillen J, the plaintiff specifically acknowledged that the defendant was entitled to make this argument. The Order granting leave to amend the Writ of Summons and the Statement of Claim was made on 14 April 2014 and Gillen J delivered his reserved judgment, *C (a person under disability) v Chief Constable of the Police Service of Northern Ireland* [2014] NIQB 63 on 7 May 2014, in which he affirmed the Order of Master McCorry and refused to strike out the plaintiff's claim. The pleadings were subsequently amended on 18 August 2014 to plead breach of Article 3. The Defence in this case was subsequently served on 27 August, 2014 and this specifically raised the limitation issue. This matter came on for hearing before me on various dates between 10 December 2019 and 20 December 2019. During the hearing on 17 December 2019, I granted the plaintiff leave to further amend the Writ and the Statement of Claim in order to reflect the abandonment of any claim based in negligence and to further particularise her claim for breach of Article 3.

Pleaded basis of the Plaintiff's claim

[4] At paragraphs 2 to 6, 9 and 12, of the amended amended Statement of Claim (amendments underlined) the following allegations are made:

> "2. The plaintiff was raped on 16 June 2007. A complaint was made to the defendant. As a result of

the manner in which the defendant carried out their (sic) investigation no prosecution was brought against the perpetrator of the rape. The plaintiff and her family were extremely upset and distressed by the manner in which the defendant carried out the investigation, she made a complaint to the Police Ombudsman for Northern Ireland. The Police Ombudsman found the following within the Report published to the plaintiff's mother dated 8 June 2009 and the Internal Report published to the defendant's Professional Standards Department with cover correspondence dated 24 October 2008:

(i) While police officers initially visited the location where it was believed the rape had taken place, they did not seek to seize any possible CCTV footage and did not conduct house to house inquiries to seek further witnesses.

(ii) The plaintiff had advised that she believed that she had left personal belongings at the locus where she was raped, however, no attempt was made by the defendant, its servants or agents, to follow this up;

(iii) The plaintiff's mother advised the defendant that her daughter's diary may contain relevant information in relation to the rape; however, again, no attempt was made by the defendant to retrieve this book;

(iv) The plaintiff's mother advised the defendant that she believed that her daughter had received text messages asking her not to proceed with her allegation of rape. The defendant did not follow this up.

(v) The defendant did not initially take any statements from the people who were with the plaintiff on the night of the rape, from anyone at the complex where the rape was said to have taken place or from anyone in the taxi firm the plaintiff used to get home;

(vi) The plaintiff was not interviewed until 6 months after she had been raped – this is … an unacceptable period of time.

(vii) The defendant failed to submit relevant forensic evidence for analysis for over 5 months.

(viii) The Police Ombudsman identified specific failings present in both force instructions, training and development of officers and levels of supervision for the investigation of rape which the Police Ombudsman considered as being potentially critical in the provision of service for victims of very serious crime and the provision of a sustainable quality professional service to them including:

(a) That the officers concerned in the investigation had not received adequate training in respect of the investigation of a rape relating to a vulnerable injured party/complainant.

(b) That the officers concerned in the investigation were not aware of Achieving Best Evidence Guidelines, in particular paragraph 3.61 of the same with regard to the competency of vulnerable witnesses.

2A. In relation to the failings identified by the Police Ombudsman as specified above at paragraph 2, the plaintiff relies upon the following operational failure of the defendant's investigation identified during the currency of the Police Ombudsman's investigation:

(i) The defendant failed to promptly obtain and/or record relevant information from Dr Amanda Burns and Officers McGregor and McCabe detailing the plaintiff's first accounts of the rape.

3. As a result of the failings of the defendant's investigation, a number of significant policy recommendations for the improvement of the Police

investigation of allegations of rape and other serious sexual assault were made by the Police Ombudsman. New guidelines have been produced on the investigation of rape and the introduction of a specialist Rape Investigator's Course.

4. The conclusion of the Police Ombudsman was that '… the PSNI investigation of C's rape was neither full nor proper. It did not meet the basic principles of investigation … The Police Ombudsman has recommended that four police officers be subject to disciplinary sanctions in relation to the investigation of C's rape.' In April, 2009, the Professional Standards Department of the defendant proceeded to discipline two officers by way of Superintendent's Written Warning and to provide advice and guidance to two other officers.

5. Sir Hugh Orde, Chief Constable of the defendant stated in a letter to the plaintiff and her family dated 25 August 2009:

> `In this case I believe it is only right that I offer an apology, not only to C, but also to the wider family for any distress which may have been caused.'

5A. The recommendations referred to by the Chief Constable were specified within the Internal Report published to the defendant's Professional Standards Department with cover correspondence dated 24 October 2008 and included:

(i) That all victims of rape and serious sexual assault to be given advice by way of bespoke leaflet.
(ii) That all front-line officers receive refresher training in the usage of Early Evidence Kits.
(iii) That police officers receive local training with regard to the Aims of an Investigation in relation to Rape.
(iv) That a training course be established in relation to the investigation of rapes and serious sexual assaults.
(v) That on-call staff must complete a log of all calls received.

(vi) That supervising officers should be reminded of their responsibility to conduct proactive assessments of all investigations under their guidance. A Detective Sergeant should supervise rape investigations within 24 hours of the complaint being made. A Detective Inspector should review the investigation after 72 hours, one week and then every 28 days. The reviews must be recorded.

(vii) That a Senior Investigating Officer open a Decision Log in every rape investigation.

6. …. The defendant, its servants and agents, neglected to investigate the rape either in line with its own guidelines or at all, causing the plaintiff considerable distress, anxiety and psychiatric injury.

…….

9. The plaintiff claims against the defendant, its servants and agents, in relation to their failure to investigate the rape of the plaintiff. In particular the plaintiff has suffered loss and damage on account of the defendant's:

(i) Breach of the Human Rights Act 1998 and Articles 3 and 8 of the European Convention on Human Rights.

PARTICULARS OF BREACH OF HUMAN RIGHTS

(i) Failure to undertake and or adequate investigation of the rape of the Plaintiff. Paragraph 2(i) to 2(viii), 2A and 4 above are repeated.

(ii) Failing to meet the basic standards of investigation in relation to the investigation of the plaintiff's rape. Paragraph 2(i) to 2(viii), 2A and 4 above are repeated.

(iii) Causing or permitting the plaintiff to suffer harassment during the investigation of the plaintiff's rape.

(iv) Failing to take any or adequate account of the disability and mental capacity of the plaintiff.

…

(vi) Failure to provide any or adequate counselling and support to the plaintiff.

…

12. As a result of the matters set out above, the plaintiff has suffered loss and damage.

PARTICULARS OF INJURY

The plaintiff has suffered extreme upset, distress and psychiatric injury including self-harming, acute depression, psychotic symptoms and an eating disorder. The plaintiff has been prescribed significant dosages of strong medications including anti-depressants and antipsychotics. The plaintiff has been admitted to Gransha Hospital on a number of occasions."

[5] In summary, the plaintiff seeks damages on account of the defendant's breach of the Human Rights Act 1998 and Articles 3 and 8 of the Convention by reason of the failure to properly investigate the rape of the plaintiff. It is alleged that she has suffered extreme upset, distress and psychiatric injury including self-harming, acute depression, psychotic symptoms and an eating disorder.

[6] Article 3 of the Convention provides that no-one shall be subjected to inhuman or degrading treatment or punishment. Article 8 of the Convention provides for the right to respect for private and family life except such as is in accordance with the law and is necessary in a democratic society in the interests of … the prevention of disorder or crime or for the protection of the rights and freedoms of others.

[7] Under section 6 of the Human Rights Act 1998 ("HRA") it is unlawful for a public authority to "act in a way which is incompatible with a Convention Right." Clearly the defendant in this case is a public authority. It follows that it is unlawful for the defendant to act in a way that is incompatible with Articles 3 and 8 of the Convention.

[8] Section 7 of the HRA empowers victims of violations of these Convention rights to bring proceedings before the courts and section 8 confers upon the courts the power to grant appropriate relief including damages. Under section 7(5)

proceedings must be brought before the end of "(a) the period of one year beginning with the date on which the act complained of took place or (b) such longer period as the court … considers equitable having regard to all the circumstances …"

[9] Under section 8(3) of the HRA no award of damages is to be made unless, taking account of all the circumstances of the case, the court is satisfied that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made and in determining whether to make an award of damages and, if so, the amount of any such award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

Evidence adduced on behalf of the parties

[10] At the hearing of this matter, neither the plaintiff nor her mother gave evidence. The plaintiff relied heavily on the findings and recommendations of the Police Ombudsman. The plaintiff relied on the letter written by Sir Hugh Orde, the then Chief Constable, dated 25 August 2009, which it was submitted constituted both a written acceptance of the Ombudsman's findings and recommendations and an apology for the shortcomings in the PSNI investigation. The plaintiff relied upon the records relating to the disciplinary actions taken in respect of two PSNI officers primarily involved in the investigation and two more senior supervising officers.

[11] The plaintiff also relied upon early accounts of the incident provided by the plaintiff to two police officers, Constables McGregor and McCabe and to Dr Amanda Burns, a Forensic Medical Officer, in order to demonstrate that there were a number of investigative leads contained in these accounts which were not followed up at an early stage because these accounts were not formally obtained until a late stage of the investigation. The only witness called on behalf of the plaintiff was Dr Maria O'Kane, Consultant Psychiatrist, who examined the plaintiff on two occasions on 20 February 2010 and 26 March 2015. Dr O'Kane produced two reports dated 4 April 2011 and 1 July 2015.

[12] Two witnesses were called on behalf of the defendant. The first witness called was Dr N Chada, who examined the plaintiff on 2 December 2014 and who provided two reports dated 19 December 2014 and 29 August 2015. The second report is, in effect, a very comprehensive analysis of all the plaintiff's relevant medical notes and records. The second witness called on behalf of the defendant was Detective Constable Sharkie who was the detective initially tasked with investigating the allegation of rape made by the plaintiff.

[13] Prior to dealing with the evidence which was adduced in this case, it is important to note that no argument was raised at the hearing of this matter as to the admissibility in evidence of any aspect of the Ombudsman's report in light of the decision of McCloskey J in *Re Hazel Siberry* [2008] NIQB 147. Without in any sense disavowing or seeking to undermine the findings and recommendations of the

Ombudsman or to gloss over the unreserved apology offered by the former Chief Constable or to minimise the significance of the disciplinary proceedings conducted in this matter, Mr McMillen QC who appeared on behalf of the defendant along with Ms Leona Gillen, in addition to raising a limitation argument, sought to argue that any failings in the investigation were not of such seriousness or significance as to give rise to a breach of Article 3 and by implication Article 8 of the Convention. This, in essence, was the substantive basis upon which the case was contested and, therefore, the court is not required to perform any in-depth analysis of the applicability of the *Siberry* decision to this case. However, as will be demonstrated below, the court must exercise care in its consideration of the conclusions of the Ombudsman and it is appropriate for this court to pay due regard to the principles set out in the *Siberry* decision, particularly when it comes to the assessment of what weight, if any, to attach to the Ombudsman's investigator's expression of an opinion on the mental capacity and competence of the alleged victim in this case in relation to her ability to engage in an ABE interview process in 2007 and early 2008. This specific issue will be addressed below.

[14] It is also important to note that in the absence of oral evidence from the plaintiff, the only evidence as to what occurred (from the plaintiff's perspective) on the night of 15/16 June 2007 after the plaintiff encountered her alleged assailant is contained in the accounts obtained from the plaintiff on 17 June 2007 by Constable McGregor, Constable McCabe and Dr Amanda Burns, the account given by the plaintiff during her ABE interview which was eventually carried out on 8 January 2008 and the accounts contained in the history sections of the various medical reports which were adduced in evidence. In summary form, the plaintiff had been out with a group of friends in a bar in Londonderry. A certain amount of alcohol was consumed during the course of the night. The plaintiff and her friends left the bar at 2.00 a.m. in the company of two males who were known to one of the plaintiff's friends. They all went to a flat where these males lived. More alcohol was consumed. At around 3.00 a.m. the plaintiff left the flat with one of her female friends in order to go back to her other friend's accommodation. The two females encountered an unknown male after leaving this flat and the plaintiff's female friend asked this unknown male to take the plaintiff to her friend's flat. He agreed. It would seem that the plaintiff did go to her friend's flat but was not able to gain admittance and instead finished up with this unknown male in his flat.

[15] The plaintiff remembers chatting to the unknown male in one of the bedrooms of this flat and that consensual kissing took place. Thereafter, it is the plaintiff's case that non-consensual sexual intercourse occurred on two occasions. Thereafter, the plaintiff fell asleep and when she woke at around 6.00 a.m., the unknown male was still asleep in bed beside her. She got up and left the flat and got a taxi to her friend's flat and informed her friend what had happened. The plaintiff attended the health centre in order to obtain emergency contraception. Her mother was informed about what had happened and the police were notified. The plaintiff was taken to the Maydown CARE Centre by police officers where she was examined by Dr Amanda Burns, a Forensic Medical Officer. The plaintiff became aware of the

identity of the alleged assailant through information subsequently received from her friends and by reason of the fact that the alleged assailant contacted her using social media.

[16] Following the plaintiff's ABE interview in January 2008, the alleged assailant was eventually formally interviewed by the PSNI. During his interviews, he made out the case that sexual intercourse did occur, but it was consensual. A file was submitted by the PSNI to the PPS and a decision was taken that there would be no prosecution. This decision was explained to the plaintiff and her mother at a meeting in Londonderry Court House on 3 July 2008 which was attended by D/C Cherith Craig, then the investigating officer who had taken over from D/C Sharkie and Ms Paula Jack, a Senior Prosecutor in the PPS. It is clear that the issue which was of concern to the PPS was the issue of consent and the minutes of the meeting record that C acknowledged that there was a problem with consent. She agreed that she had asked the alleged assailant to stop on the second occasion and he did so. On the first occasion, "she was laughing re underwear etc." The minute continues: "She could see the problem with establishing that the defendant either knew or was reckless as to consent for purposes of trial." The minute of the meeting gives the clear impression that the plaintiff acknowledged the difficulties and accepted the reasoning why there would be no prosecution, whereas her mother did not. Indeed, the minute of this meeting specifically records that "C was clearly distressed by her mother's conduct and made it clear that she knew why the case was not going to court and that her mother should leave the matter."

[17] There was no prosecution in this case. It is accepted on behalf of the plaintiff that the alleged deficiencies in the PSNI investigation were probably not pivotal in terms of whether or not the test for prosecution was met in this case or whether or not any prosecution would have been successful. The plaintiff argues that it is unnecessary for her to establish any such causal association. It is argued that the plaintiff made an allegation of rape and it was incumbent upon the PSNI to properly investigate that allegation, irrespective of whether that allegation was or was not subsequently made out in a criminal trial. That may well be the case but that does not mean that the issue of whether the plaintiff was or was not raped is irrelevant. It would be difficult to envisage a situation in which a plaintiff could succeed in an action against the police for breach of Article 3 arising out of alleged failings in the investigation of an allegation of rape when the act of sexual intercourse was in fact consensual.

[18] In this case, the plaintiff alleges that she did not consent on the two occasions on which sexual intercourse took place. It is clear that the Ombudsman's Report to the PSNI and the subsequent correspondence from the Ombudsman to the plaintiff's mother are couched in terms that the plaintiff was subjected to a serious sexual assault (rape) in a flat in Londonderry. The letter from the Chief Constable dated 25 August 2009 refers to "the horrendous attack" on C. The judgment of Gillen J commences with a summary paragraph which contains the following sentence: "The plaintiff is a vulnerable young woman who was raped on 16 June 2007." The

plaintiff made an application for compensation under the Criminal Injuries Compensation Scheme and her application was accepted and the full tariff amount of compensation payable under the scheme for the injury of rape amounting to £22,500 was paid to the plaintiff in 2011. For the purposes of the present proceedings, insofar as it is necessary for the plaintiff to establish that she was the victim of a serious sexual assault in order to ground a claim for breach of article 3 arising out of the alleged failures of the PSNI to properly investigate her complaint of rape, I find that she was the victim of a serious sexual assault and that she did not consent to either episode of sexual intercourse.

[19] Turning then to the evidence relied upon by the plaintiff in the present proceedings; the first substantial piece of evidence which the plaintiff relied upon was the contents of the Police Ombudsman's Report submitted to the defendant's Professional Standards Department under cover of correspondence dated 24 October 2008. I do not propose to set out in detail the contents of this report other than the "Conclusion" section which contains various criticisms of the investigation carried out by the PSNI into the plaintiff's allegations of rape and makes a number of recommendations.

[20] The Police Ombudsman concluded that it was clear that the officers directly involved in the investigation were not aware of Achieving Best Evidence "ABE" guidelines then in existence. The Ombudsman highlighted the presumption of competence referred to in section 3.61 of the guidelines and concluded that it was wrong to delay conducting an ABE interview until an expert assessment of C's competence could be performed. Such an assessment was unnecessary. There was an unreasonable and unnecessary delay in carrying out an ABE interview of the alleged victim, which was belatedly conducted without any assessment of competence being carried out in January 2008, over six months after the incident. The Ombudsman was critical of the decision not to proceed with and complete other lines of enquiry until the ABE interview had taken place. In particular, the Ombudsman found that witnesses were named but no enquiries were conducted in order to establish their whereabouts. No house to house enquiries were conducted in the area identified as the scene of the incident. No attempts were made to seek the services of a social worker in order to speak to an important witness who was also a vulnerable young adult who suffered from Asperger's Syndrome. No CCTV was viewed or seized.

[21] The Ombudsman noted that D, C's mother, had informed D/C Sharkie that her daughter had information contained in a diary in relation to the rape and that she had received text messages on her mobile asking her not to proceed with her complaint. The Ombudsman was critical of the failure to make any meaningful attempts to obtain access to C's diary or her mobile. The Ombudsman conclusions were to the effect that D/S McSharry and D/C Sharkie did not conduct a full and proper investigation into this rape, their investigation of a very serious matter was flawed in the preliminary stages, and that D/C Sharkie, as the investigating officer, failed to abide by best practice guidelines in gathering all the available evidence.

The Ombudsman also concluded that Sergeant Cooper, Inspector Holland and Detective Chief Inspector McKernan failed in their responsibilities to properly supervise the investigation. The Ombudsman recommended that D/S McSharry and D/C Sharkie be the subject of Misconduct Boards and that Sergeant Cooper, Inspector Holland and Detective Chief Inspector McKernan be the subject of Superintendent's warnings, having failed to conduct their supervisory responsibilities in the correct and proper manner.

[22] The Ombudsman also made a number of linked policy recommendations including the production of a leaflet entitled "Advice for victims of sexual assault" in order to comply with chapter 16 of the PSNI manual which deals with sexual offences. The Ombudsman also recommended that the contents of chapter 16 of the PSNI manual should be "communicated effectively to all staff in all area commands and that local training should be given to all officers and relevant Police staff." The Ombudsman noted that no relevant member of staff had been nominated to oversee the usage and replenishment of Early Evidence Kits. It was recommended that all front-line officers need to receive refresher training in the usage of Early Evidence Kits.

[23] The Ombudsman recommended that a training course should be established in relation to the investigation of rapes and serious sexual assaults. This training course should include training in relation to the provision of a service by officers dealing with the victims of sexual offences which would be similar to the service provided by Family Liaison Officers. It was recommended that on call staff must complete a log of all calls received. In relation to the duties and responsibilities of officers supervising the investigation of sexual offences, the Ombudsman recommended that supervising officers should be reminded of their responsibility to conduct proactive assessments of all investigations under their guidance. A Detective Sergeant should supervise rape investigations within twenty-four hours of the complaint being made. A Detective Inspector should further review the investigation after seventy-two hours, one week and then every twenty-eight days and a record should be kept of each review.

[24] The Ombudsman also recommended that supervising officers should provide direction and guidance, where appropriate. They should collect and scrutinise performance management data relating to rape and serious sexual assault. They should identify breaches of General Orders and Force Orders by officers under their supervision and should effectively manage such breaches and take necessary action, where appropriate. It was specifically recommended that a Senior Investigating Officer should open a decision log in each rape investigation.

[25] The Senior Investigating Officer in the Ombudsman's Office endorsed the recommendations of the Investigating Officer and stated that the Ombudsman appreciated that there were a number of difficulties in interviewing C because of her Asperger's Syndrome, but there were a number of lines of enquiries which could have been pursued at the early stages of the investigation. Witnesses were

named but they were not approached at the initial stages of the investigation. They may have assisted with identifying the movements of C, the scene of the incident, the suspect and the potential for CCTV. No house to house enquiries were conducted. In order to maintain public confidence in the police service, it is essential that investigations be conducted professionally and expeditiously. The timely investigation of an allegation ensures that the best evidence is secured and provides integrity and accountability for the investigation in line with best practice. The PSNI was criticised for failing to keep a policy log in relation to the progress of the investigation in line with PSNI policy and criticism was also levelled at the supervising officer for failing to ensure that the investigation was progressed in a professional and expeditious manner to ensure that the best evidence was secured.

[26] Following the submission of this report to the PSNI, the Ombudsman's investigator furnished a summary of her conclusions to the plaintiff's mother dated 8 June 2009. This letter referred to the plaintiff's mother's letter of complaint dated 14 November 2007. The complaint made at that time was *inter alia* that the investigation performed by the PSNI was not thorough and was not progressed as quickly as it should have been. In response to these complaints, the Ombudsman stated:

> "The key police officers involved in the investigation of the attack on your daughter have cited the particular difficulties they faced in this investigation. Not least of these was the need to have the appropriate mechanisms in place to deal with and assist C who has Asperger's Syndrome. They have also cited what they saw as a lack of co-operation by some of the members of the public involved in the case and cited a lack of resources available to them.
>
> Despite these issues, we have concluded that the PSNI investigation of C's rape was neither full nor proper. It did not meet the basic principles of investigation.
>
> Prior to you making a complaint to this Office, many issues had not been dealt with. In particular, while officers initially visited the location where it was believed the rape had taken place, they did not seek to seize any CCTV footage and did not conduct house-to-house inquiries to seek further witnesses. When your daughter at one stage said that she believed she had left some personal items at the scene, no attempt was made to follow this up. When you told police that you believed that C's diary may have contained relevant information, police did not attempt to retrieve the book. When you told them that you believed your daughter had received

text messages asking her not to proceed with her allegation of rape, police did not follow this up. We also established that police did not initially take any statements from the people who were with your daughter on the night in question, from anyone at the complex where the rape was said to have taken place or from anyone at the taxi firm she used to get home.

C was not interviewed until six months after she had been raped. This was an unacceptable period of time. The police officers were right to identify that given C's condition she needed to be interviewed under special conditions and by specialist police officers. They were right to place C's interests at the forefront of their thoughts. However, the manner in which they set about trying to arrange this interview was ineffective and led to this lengthy delay.

……

As a result of the failings I have found in this investigation, I have made a number of recommendations for the improvement of police allegations of rape and other serious sexual assault. These recommendations have been the subject of discussion at a senior level between the Police Ombudsman's Office and the PSNI to ensure that the necessary changes are brought about.

The PSNI have advised us of a number of revisions to their procedures which will come into operation this year. They include new guidelines on the investigation of rape and the introduction of a specialist Rape Investigator's Course. They have said all undetected rapes will be overseen by a Detective Sergeant and reviewed by a Detective Inspector at 12 hours. A Detective Inspector will review the case if still undetected at 7 days. It will be referred to the Serious Crime Review Team at 14 days.

In addition, since your complaint, the PSNI have introduced specialised Rape Crime Units whose primary role is to investigate allegations of rape and serious sexual assaults."

[27] It is important to note that the Police Ombudsman specifically rejected the plaintiff's mother's complaint that the PSNI had failed to keep the keep the plaintiff and her family informed and updated about the progress of the investigation. Indeed, the Ombudsman specifically noted that there was ample evidence of regular communication with the plaintiff's mother. The Ombudsman also informed

the plaintiff's mother that there was no evidence to suggest that the alleged assailant in this case was in some way protected by the police because he was a police informer. Neither of these claims were pursued during the hearing of this action.

[28] The third piece of evidence relied upon by the plaintiff was the letter written by Sir Hugh Orde to the plaintiff's mother on 25 August 2009. The then Chief Constable stated that:

> "It has always been my position that the Police Service must be willing to apologise if mistakes are made and indeed learn from those mistakes. In this case I believe that it is only right that I offer such an apology, not only to C, but also to the wider family for any distress which may have been caused.
>
> Following his inquiries into this matter, the Police Ombudsman found a number of areas of concern with the Police investigation. He has subsequently made several recommendations, all of which are being taken forward by my Crime Operations Department and whilst I am now satisfied that the systems and procedures now in place offer an improvement over previous operating practices…I do appreciate that this will be of little comfort to you and your family."

[29] The fourth piece of evidence relied upon by the plaintiff was the documentation relating to the disciplinary and associated proceedings initiated against a number of officers involved in the investigation of the allegations of rape made by the plaintiff. The internal PSNI correspondence dated 7 April 2009 indicates that in relation to D/C Sharkie, the first investigating officer, a Police Ombudsman's investigation had highlighted failings in the investigation in a number of areas. These included the failure to make contact with/or record statements from relevant witnesses and the failure to seize CCTV from the public house where the plaintiff had been present in the earlier part of the night. Reference was also specifically made to the finding that D/C Sharkie had received information about two addresses in the area where the attack took place but failed to take any action and failed to conduct house to house enquiries. The documentation also highlighted D/C Sharkie's failure to pursue a line of enquiry in relation to the victim's handbag and coat and his failure to submit some material for forensic science analysis for approximately 5 months. On the basis of these matters, it was recommended that a Superintendent's written warning be administered to D/C Sharkie for failing to conduct a thorough investigation in accordance with Article 2.1 of the Code of Ethics and this sanction was accepted.

[30] In relation to D/S McSharry, he also received a Superintendent's written warning on account of the fact that he had been the initial officer assigned to investigate the plaintiff's complaints of rape when first reported and the Police Ombudsman had found that he failed to make contact with/or record statements from relevant witnesses. He failed to seize CCTV from the public house where the plaintiff had been present in the earlier part of the night. He received two addresses in the area where the attack took place but failed to take any action. He failed to conduct house to house enquiries. D/S Cooper and D/I Holland were both administered Advice and Guidance in relation to the failings identified in the supervision of this investigation. In particular, it was recommended that the Advice and Guidance should be based on recording advice given to officers under their supervision and recording the decision-making process for investigations.

[31] The only oral evidence adduced on behalf of the plaintiff at the hearing of this matter was the evidence of Dr Maria O'Kane, Consultant Psychiatrist, who began by adopting the contents of her reports which were prepared on 4 April 2011 and 1 July 2015, following on from her examination and interview of the plaintiff on 20 February 2010 and 26 March 2015. Dr O'Kane obtained a detailed history of the incident from the plaintiff and I note that in addition to the mental trauma of the incident itself, the plaintiff specifically referred to the adverse impact on her state of mental health occasioned by her attacker's derogatory comments about her on social media after the incident.

[32] In summary, Dr O'Kane's evidence was to the effect that prior to the incident in question, the plaintiff was coping and functioning quite well. She had a diagnosis of Asperger's Syndrome from the age of 12. Although her adolescence had not been free from upset, she had not required any significant treatment or medication and she had not suffered from any form of psychosis. She had not self-harmed and she had not been suicidal. Following this incident and its aftermath, she developed a significant eating disorder. She developed a significant depressive illness in the form of psychotic depression. She started self-harming and required a number of detained and voluntary psychiatric admissions. She continues to require significant psychotropic medication. In relation to what had caused this significant deterioration in the plaintiff's state of mental health, Dr O'Kane was of the opinion that Asperger's Syndrome rendered the plaintiff vulnerable to the development of psychosis and depression in response to severe distress. She was of the opinion that the primary insult to the plaintiff's mental wellbeing was occasioned by the sexual assault itself and the issues associated with that assault such as the comments made by the alleged assailant on social media, the feelings that he had gotten away with it whereas her life was ruined, the feelings that she wasn't believed, her mother's reaction to the incident and the very difficult relationship with her mother in the aftermath of the incident. However, Dr O'Kane was adamant that the failings which the plaintiff became aware of in respect of the police investigation into her complaint of rape would have also contributed to the deterioration in the plaintiff's state of mental health. The precise contribution to the overall picture could not be precisely identified or quantified. All that could be stated is that this last-mentioned factor

would have contributed materially to the overall deterioration in the plaintiff's mental health.

[33] Dr Chada, Consultant Psychiatrist, was retained on behalf of the Defendant in this case and produced and adopted the contents of two reports dated 19 December 2014 and 29 August 2015. Dr Chada examined the Plaintiff for the purpose of preparing her first report on 2 December 2014. Dr Chada's evidence was to the effect that the plaintiff was exhibiting a significant range of problems prior to the index incident. She was having difficulties adjusting to her diagnosis of Asperger's Syndrome. There was evidence of anxiety, depression, eating difficulties, low confidence, low self-esteem and threats to self-harm. There was also evidence of maternal over involvement. Prior to the incident, the plaintiff had been enrolled in a business administration course in a further education college. She was in her third year but withdrew for a time before completing her final year successfully. No long-term employment opportunities emerged following the completion of this course.

[34] As a result of her painstaking analysis of the plaintiff's notes and records, Dr Chada felt confident to opine that following the incident, the same mental health issues as had been demonstrated as being present before the incident were evident thereafter. However, as long as the plaintiff had her independence and had structure and routine in her life which was at that stage was provided by her course at college and her work placement, she was able to cope with the distress caused by this incident. It was really only when she was at home all the time with her family after her course and work placement finished that the significant deterioration in her mental health manifested itself. There was a loss of independence, routine and structure and at the same time there was constant exposure to the mother's very severe reaction to the index incident. Whereas there is evidence that the plaintiff regularly expressed ambivalence about the nature of the incident which Dr Chada did not consider could be explained by the plaintiff's subconscious attempts to reframe the incident to make it less emotionally painful and whereas she regularly expressed a desire to put the incident behind her and try to move on with her life; her mother in a sense prevented her from doing so by insisting that her daughter should pursue the matter, if at all possible.

[35] In summary, Dr Chada was of the opinion that the cause of the marked deterioration in the plaintiff's mental health was due to the stress to which the plaintiff was subjected as a result of the incident itself, coupled with the stress resulting from some limited social media interaction with the alleged assailant following the incident. However, another material contributory factor to this significant deterioration was the plaintiff's fraught relationship with her mother and her presence in an environment of high expressed emotion following the incident. Dr Chada, having conducted a careful and painstaking analysis of all the available notes and records, did not consider that the deterioration in the plaintiff's mental health was in any way linked to her perception of any deficits in the police investigation of her complaints of rape.

[36] The other witness called on behalf of the defendant was D/C Sharkie, the original investigating officer in this case. The incident had occurred during the course of a weekend and had been reported to the police during the weekend and D/C Sharkie had taken charge of the file when he came on duty on the Monday following the incident. In his evidence, D/C Sharkie did not address or attempt to counter the criticisms levelled by the Police Ombudsman against D/S McSharry in respect of that officer's actions/omissions in the period prior to D/C Sharkie taking over the file or the criticisms levelled against any of the more senior supervising officers. The significance of this will be addressed later in this judgment.

[37] D/C Sharkie was taken through his evidence by Mr McMillen QC and his evidence in chief consisted of a very detailed account of all the various investigative steps and actions taken by him and the various interactions he had with other police officers including senior supervising officers, the plaintiff's mother, the plaintiff, social services personnel, Dr Lavery a clinical psychologist, forensic science personnel, Dr Burns, the forensic medical officer and members of the public during the period when he was involved in the investigation of the plaintiff's complaints of rape. I do not propose to unduly lengthen this judgment by setting out every detail of the evidence given by D/C Sharkie. Instead, I shall summarise the important matters elicited in examination in chief by Mr McMillen QC and in cross-examination by Mr Kelly QC who led Mr Girvan for the plaintiff. The first matter to note is that at the relevant time, as a matter of policy, "stranger rapes" where the alleged victim did not know the alleged assailant were investigated by a detective. For some time prior to this incident, D/C Sharkie had been acting up as a Detective Sergeant. Although D/C Sharkie had received some training in conducting Achieving Best Evidence interviews in respect of victims of other types of crime where the victim was regarded as vulnerable by reason of intimidation, he had not been trained in and was not authorised to conduct ABE interviews of victims of sexual offences where the victims were regarded as vulnerable individuals.

[38] D/C Sharkie was aware from an early stage that as the plaintiff had a diagnosis of Asperger's Syndrome, she was properly regarded as a vulnerable adult and as a result it would be necessary to set up a joint protocol ABE interview of the plaintiff, probably in the local CARE unit in Maydown police station and that it would be necessary to ensure that a trained CARE police officer and a trained CARE social worker were available to conduct the ABE interview of the plaintiff. D/C Sharkie candidly admitted that at the time of this incident, he would not have had any particular familiarity with the contents of General Order 17 of 2007 which dealt with the investigation of sexual offences where the alleged victim was a vulnerable individual. Similarly, he would have had little or no familiarity with the detailed policy documentation which the PSNI had issued on Child Abuse and Rape Enquiry (CARE) units and the arrangements for close liaison between the PSNI and Social Services in the operation of these units. This policy documentation which had been issued in March 2007 outlined the locations, command and control and principal functions of CARE units which included the investigation of serious sexual assaults and the interviewing of vulnerable victims of and witnesses to serious

sexual offences by trained CARE officers and trained CARE social workers (joint protocol interviews).

[39] D/C Sharkie's experience of investigating serious sexual offences was limited at that time and he had received no specific training in respect of the investigation of serious sexual offences. At the time of this incident he had not conducted any ABE interviews in relation to any types of offences but since that time he has conducted either three or four such interviews which were conducted during the investigation of punishment shootings.

[40] D/C Sharkie outlined the difficulties experienced in getting a trained CARE police officer to conduct the proposed ABE interview and in identifying and securing the availability of a trained CARE social worker who had some experience in dealing with individuals diagnosed as suffering from Asperger's Syndrome. Arrangements were made to carry out an ABE interview on 10 July 2007 and to bring the plaintiff to the CARE unit on 9 July 2007 to familiarise her with the layout of the unit. However, the planned ABE interview had to be cancelled because of difficulties in obtaining an appropriately trained police officer and an appropriately trained and experienced social worker. In any event, the plaintiff's planned visit to the CARE unit on 9 July 2007 was cancelled because it was reported that the plaintiff was very upset.

[41] Prior to this, on 4 July 2007, a social worker with some knowledge of autistic spectrum disorder attended Strand Road police station to give D/C Sharkie and others involved in the investigation an overview talk on autism and Asperger's Syndrome. However, this social worker did not have the appropriate CARE training. Following the aborted ABE interview, a strategy meeting was arranged for 19 July 2007 which was attended by police officers including a police officer who was involved with the plaintiff's friend who also suffered from Asperger's Syndrome and who had been in the plaintiff's company on the night in question, representatives from social services, the plaintiff's mother and a volunteer helper from the organisation Autism Initiatives. In addition to the need to conduct an ABE interview with the plaintiff, it was made clear at that meeting that an ABE interview would have to be conducted with the plaintiff's friend who was with her that night and who also suffered from Asperger's Syndrome. D/C Sharkie used this meeting as an opportunity to discuss the progress of the investigation with the plaintiff's mother and to update her on the various lines of enquiry. Proposals for conducting the various ABE interviews were firmed up. The social workers present at the meeting advised the plaintiff's mother of the supports that were available from social services and also advised her of the role which the trained CARE social worker would perform during the ABE interview.

[42] Crucially, it was D/C Sharkie's evidence that during this meeting, the plaintiff's mother indicated to those present that the plaintiff might not wish to pursue her complaint because she was friends with a number of individuals who were also friends with the alleged offender and she did not want to lose their

friendship. His evidence was that the plaintiff's mother then emphatically indicated to D/C Sharkie that she wanted the complaint to be pursued and investigated irrespective of her daughter's stated wishes. D/C Sharkie stated in evidence that he explained to the plaintiff's mother that it was the plaintiff's decision and not hers as to whether the complaint was pursued and it was at that stage that the plaintiff's mother raised the issue of her daughter's mental capacity and, in effect, cast significant doubt over whether her daughter had the capacity to make the decision to pursue her complaint or not. He indicated that he was informed by the plaintiff's mother that: "C can't even go to the shop on her own. I have to do everything for C. C can't go anywhere on her own."

[43] As a result of this issue being raised by the plaintiff's mother, those present at the meeting, including the social workers, had a discussion on how best to progress matters and it was agreed by all present including the plaintiff's mother that in light of the information provided by the plaintiff's mother, it would be appropriate to have the plaintiff assessed by an expert in order to ascertain whether she had capacity to make the decision to pursue the complaint and if she did have the capacity to make this decision and did not wish to pursue her complaint then both the PSNI and the plaintiff's mother would have to respect that decision, although the plaintiff's mother again emphasised that she wished to have the complaint investigated irrespective of her daughter's wishes. Following this meeting D/C Sharkie updated D/C/I McKernan and D/C/I McKernan approved of the instruction of an expert to carry out the necessary assessment and did not consider it necessary to seek advice from the PPS about this matter. D/C Sharkie informed the Court that as he was an acting Detective Sergeant at the time of this incident he would not have formally reported to D/S Cooper but would have reported to D/I Holland and D/C/I McKernan. No formal decision log was kept, and no formal briefing reports were prepared. However, informal discussions with his superior officers would have taken place regularly.

[44] D/C Sharkie gave evidence that he requested social services to organise the appropriate assessment of the plaintiff. He gave evidence concerning the difficulties encountered in firstly identifying an appropriate expert and then retaining that expert in order to examine the plaintiff and provide a report within a reasonable timescale. Dr Lavery, a Clinical Psychologist, was identified as an appropriate expert. It ultimately transpired that in order to ensure that the assessment was carried out as soon as possible, the PSNI agreed to pay for the cost of a private assessment.

[45] Importantly, the plaintiff's mother contacted the PSNI by telephone on 9 September 2007 and during the course of a conversation with a female police officer, the plaintiff's mother specifically stated that the delay in this process was taking its toll on her health and that if she was admitted to Gransha there would be no one able to look after her daughter and that her daughter was suicidal. It is to be noted that Dr Chada gave evidence that the plaintiff's notes and records relating to this period did not contain any references to thoughts of suicide. Be that as it may,

D/C Sharkie gave evidence that both he and his superiors including D/C/I McKernan were very unhappy about the delay in proceeding with an ABE interview in this case and that D/C/I McKernan decided in late September 2007 that the ABE interview should proceed even in advance of any such assessment, with the assessment being conducted as soon as it could be arranged thereafter.

[46] D/C Sharkie then gave evidence that arrangements were put in place for the ABE interview to be conducted on 10 October 2007, with a clarification interview being performed in advance of this on 5 October 2007. The clarification interview was intended to provide an opportunity for the plaintiff to ask questions about what the ABE interview would entail and what would happen thereafter. This interview was the first occasion on which D/C Sharkie actually met the plaintiff face to face. His evidence was that he made a deliberate decision not to meet the plaintiff before this time to avoid giving the defence any opportunity to suggest at any subsequent trial that he had in some way, shape or form schooled the victim in advance of the ABE interview. During the clarification interview, the whole process of a prosecution for rape was explained to the plaintiff and she requested that she be given one week to enable her to consider her decision as to whether she wished to proceed with her complaint. D/C Anne Young, the specially trained CARE officer who was scheduled to conduct the ABE interview informed the plaintiff that she would contact her by 3.00 p.m. on 12 October 2007 to ascertain what the plaintiff's decision was. As a result, the ABE interview which was scheduled for 10 October 2007 was postponed. It is worthy of note that as a result of meeting the plaintiff in person on 5 October 2007, D/C Sharkie gained the impression that the functional capabilities and abilities of the plaintiff were better than the description of her capabilities and abilities offered by the plaintiff's mother at the meeting on 19 July 2007.

[47] D/C Sharkie gave evidence that following the clarification interview, the plaintiff's mother telephoned the PSNI to inform them that her daughter had been told that she would have to go to court and that she wouldn't be going to court. The plaintiff's mother also stated that she wanted a social worker (XY) removed from the ABE process because he had stated that it was the plaintiff's decision as to whether she proceeded with the complaint or not. The plaintiff's mother again stated that it was her decision and not her daughter's. The plaintiff's mother telephoned the police again on 8 October 2007 and informed them that she had contacted the PPS and had been told that a prosecution could take place without her daughter's consent. During this conversation, the plaintiff's mother also stated that her brother had advised her to put C's interests first and that C was not eating at that stage.

[48] The plaintiff's mother first raised the issue of the contents of the plaintiff's diary with the PSNI on 8 October 2007. D/C Sharkie's evidence was to the effect that it would have been inappropriate to take steps to obtain this diary when there was uncertainty as to whether the plaintiff wished to proceed with her complaint. The plaintiff's mother contacted the PSNI about her daughter attending the police station to discuss the forensic results that had been provided by that stage. Reference

was made to C going into Gransha Hospital at this stage. During this conversation the plaintiff's mother was informed that D/C Anne Young would be contacting the plaintiff on 12 October 2007 to ascertain whether the plaintiff wished to proceed with her complaint. D/C Sharkie gave evidence that he was also contacted by social services to say that the plaintiff's mother had been in contact with them to inform them that her daughter was being admitted to Gransha Hospital. Social services recommended that in light of this information, D/C Anne Young should put off contacting the plaintiff until her condition had improved. In passing, Dr Chada, through her analysis of the records had given evidence that the medical appointment arranged at this time was an emergency out-patient appointment in Limavady in relation to the plaintiff's eating disorder and not an admission to Gransha Hospital.

[49] D/C Sharkie gave evidence that D/C Anne Young did contact the plaintiff on 12 October 2007 and was informed by the plaintiff that she had gone through a bad week and she wished to put off the decision for a further week. One week later, on 17 October 2007, the plaintiff's mother telephoned social services and informed them that her daughter was not well, that she hadn't made up her mind yet and that the PSNI should not contact her. She would contact the police when she had made up her mind. This information was relayed by social services to D/C Sharkie. There was then a discussion as to whether some form of medical report should be obtained on the plaintiff's current mental state before any attempt was made by the PSNI to contact the plaintiff. It is clear that D/C Sharkie and social services were at somewhat of a loss as to how to proceed at this stage. In the meantime, D/C/I McKernan was contacted on 5 November 2007 and was informed that the plaintiff had seen the alleged perpetrator in public the previous Saturday and this had caused great distress.

[50] Following the plaintiff's mother's complaint to the Police Ombudsman in November 2007, Ms Mary Toland, the Investigating Officer within the Ombudsman's office contacted D/C Sharkie and informed him that she had spoken to the plaintiff and that in her opinion, the plaintiff was fit and capable of undergoing an ABE interview. D/C Sharkie then contacted the plaintiff's mother to be informed that her daughter was not well enough to undergo an interview and that she was going to consult with her doctor. D/C Sharkie then telephoned Mary Toland to advise her of his telephone call with the plaintiff's mother and was advised by Mary Toland that he should set up another ABE interview in any event and see if the plaintiff would attend. This evidence creates in my mind a deep sense of unease as to whether Ms Toland was in any way qualified to opine as to the fitness of the plaintiff to undergo an ABE interview at that time.

[51] D/C Sharkie's evidence was to the effect that on 15 November 2007, steps were taken to hurriedly arrange an ABE interview for the afternoon of 16 November 2007. D/C Anne Young contacted the plaintiff's mother on 15 November 2007 about the ABE interview and was informed that the plaintiff wished to talk about the incident but did not wish to go to court. D/C Young explained that it might be possible to avail of special measures in relation to the giving of her evidence.

Following this conversation, it would seem that the plaintiff's mother made contact with Mary Toland because Ms Toland subsequently contacted D/C Sharkie and told him not to discuss the need to go to court with the plaintiff. D/C Sharkie gave evidence that he specifically sought advice in relation to this issue and was informed that there was a requirement for an investigating officer to candidly discuss the prosecution process with any complainant. The senior officer who provided this advice then contacted Ms Toland to remind her of this requirement. I find it utterly extraordinary that an investigator from the Police Ombudsman's office could have regarded it as appropriate for her to provide such an instruction to an officer under investigation.

[52] Following this series of telephone calls, D/C Anne Young contacted the plaintiff's mother about the ABE interview, only to be informed that the plaintiff wished to have two more weeks to consider whether she wished to pursue her complaint. On 20 November 2007 D/C/I McKernan discussed the matter with D/C Sharkie and it was decided that an ABE interview could not be arranged at that stage due to the plaintiff's state of health. D/C Sharkie gave evidence that he was advised that he should seek advice from the PPS as to how to manage what was clearly a difficult case. He gave evidence that he subsequently contacted Ms Paula Jack and was informed that the plaintiff's mother had also been in contact with her and had informed her that she had been told by the police that they would not be submitting a file to the PPS in respect of this matter. D/C Sharkie stated that he was very surprised by this claim and strongly denied that this was the case. Thereafter, on 23 November 2007 D/C Anne Young contacted the plaintiff again by telephone and then relayed the content of this conversation to D/C Sharkie. In essence, D/C Sharkie was informed that the plaintiff was taking a lot of medication and was suicidal. She was not attending college. She was not fit for interview. There was no timescale as to when she would be fit and she would contact the police when she considered herself fit for interview.

[53] D/C Sharkie gave evidence that he had a telephone conversation with the plaintiff's mother on 26 November 2007 during which she stated that her daughter was mentally ill and not fit to be interviewed. She hoped that she would be well enough to be interviewed before Christmas. A further call from the plaintiff's mother confirmed that the position remained the same on 5 December 2007.

[54] D/C Sharkie gave evidence that he was then made aware that a meeting had been arranged between Chief Inspector Yates and the plaintiff's mother for 11 December 2007. He was informed that Ms Martina Anderson, a local MLA, would also be present at the meeting. Following this meeting a decision was taken to replace D/C Sharkie as the investigating officer and D/C Cherith Craig was appointed in his place. It was agreed that the new investigating officer would accompany the plaintiff's mother on a familiarisation visit to the ABE interview suite. It was recommended that the ABE interview process should proceed by way of a short notice booking as this had the best chance of securing the co-operation of the plaintiff. Early in the New Year, D/S Cooper was informed by the plaintiff's

mother that the plaintiff was well enough to be interviewed and an ABE interview was provisionally arranged for 4 January 2008. However, this had to be put back until 8 January 2008 as D/C Anne Young was on annual leave until that date.

[55] On 3 January 2008, the plaintiff's mother repeated her demand for the social worker XY to be removed from engaging in the ABE interview process. She stated that her daughter was less likely to be comfortable discussing the incident in the presence of a man. As a result, the decision was taken to replace XY with a female social worker with some knowledge of Asperger's Syndrome and, at short notice, an appropriately experienced female CARE social worker was identified and engaged. The ABE interview then took place on 8 January 2008.

[56] During the course of his evidence, D/C Sharkie informed the court that at no stage prior to this case coming on for hearing had he been shown a copy of the Police Ombudsman's report. He certainly was not provided with a copy of the report either prior to or during the disciplinary process which resulted in him being given a Superintendent's warning. In cross-examination by Mr Kelly QC, he candidly accepted that there were shortcomings in the investigation, that a number of lines of enquiry could have been followed up sooner than they had been but he was adamant that no material evidence or material investigative leads were lost. D/C Sharkie was taken through the transcript of the interview which was conducted by the Police Ombudsman's investigators and was brought to various passages which deal with the various shortcomings in the investigation identified by the Police Ombudsman. D/C Sharkie accepted that he had made a decision to park other lines of inquiry until the ABE interview had been carried out and with hindsight this was a mistake but it was a decision which had been discussed with and sanctioned by his supervising officers.

[57] This is illustrated by the following extracts of the interview which were accepted by D/C Sharkie in cross examination:

> "…rightly or wrongly I put the witnesses on hold until the ABE interview was done that was my strategy that we would hold back or I would hold back until the ABE interview was done not knowing that it would be x number of months for the ABE interview to be done…."

One of the interviewers then asked:

> "I think it's the ABE interview that's caused the problems. Hasn't it really?"

D/C Sharkie replied:

> "Yes."

The other interviewer then commented:

> "And because of that it's caused all these"

D/C Sharkie replied:

> "It's just messed everything else up. I accept that."

[58] The evidence of D/C Sharkie highlights the difficulties in arranging and carrying out a joint protocol ABE interview of the plaintiff in this case. The Police Ombudsman was critical of the approach adopted by D/C Sharkie and endorsed by his superior officers. In essence, the Ombudsman was of the view that the ABE interview should have been conducted without delay and that there was no justification of putting it off until an assessment of capacity was performed. The Ombudsman's investigator, having spoken to the plaintiff following a complaint being made to the Ombudsman by the plaintiff's mother in November 2007, formed the view that the plaintiff had capacity and that D/C Sharkie's concerns about this issue were unjustified and certainly did not justify delaying the ABE interview process. In relation to this issue, there is not one shred of evidence to suggest that Ms Toland, the Ombudsman's investigator, was any better qualified to comment on the plaintiff's capacity than D/C Sharkie. The Ombudsman's report refers to the presumption of competence to give evidence in court. With respect to the Ombudsman, this is missing the point which was raised by the plaintiff's mother in this case as early as 19 July 2007. The issue was not whether the plaintiff was competent to give evidence at a hearing, the issue was whether the plaintiff had the capacity to make her own decision in relation to whether or not to pursue a complaint of rape in the first place.

[59] At the meeting on 19 July 2007, it was the plaintiff's mother who raised the issue of the plaintiff not wishing to pursue the complaint. It was the plaintiff's mother who emphatically stated that as a result of her condition, her daughter was incapable of making that decision and that the decision as to whether the complaint should be pursued should be taken by her and not by her daughter. The assessment of capacity was arranged to resolve this issue and not the issue of whether the plaintiff was competent to give evidence at a subsequent trial. In so far as the Ombudsman's report is relied upon as evidence of wrongdoing on the part of D/C Sharkie based on the Ombudsman's investigator's assessment of the competence of the plaintiff, I reject that evidence, as the Ombudsman's investigator had no expertise in such matters and in any event the Ombudsman's investigator appears to have misunderstood the rationale for such an assessment. It would clearly not have been appropriate for police to push ahead with an investigation into an allegation of rape against the express wishes of the complainant, if that complainant was a competent adult.

[60] My concerns about the validity of the criticisms levelled by the Ombudsman in relation to the delay in conducting an ABE interview are magnified by the

evidence which clearly demonstrates that a significant portion of the period of delay in this case was due to actual or stated illness/incapacity and/or unwillingness of the plaintiff to engage in this process. These concerns are further amplified when I remind myself of the unchallenged evidence of D/C Sharkie that Ms Toland, the Ombudsman's investigator told him not to discuss the need to go to court with the plaintiff. I do not consider that this was an appropriate instruction to give in this case.

[61] I do accept that there was a delay in conducting a joint protocol ABE interview in this case and that the initial period of delay was due to the inability of the PSNI to assemble an appropriately accredited and experienced team to carry out that interview. I also accept that when the issue of the plaintiff's wishes regarding the continuance of the complaint was first raised by the plaintiff's mother at the meeting on 19 July 2007, the very least that could and should have been done was for the officer in charge of the case to go and speak to the plaintiff in order to ascertain, first hand, whether she did want to proceed with her complaint. This face to face communication would have also allowed him to gauge whether the plaintiff's mother's description of the functional impairment suffered by the plaintiff was accurate or not. In summary, I accept that there was a delay in conducting a joint protocol ABE interview in this case. It should have been performed at a much earlier stage but the whole period of delay cannot be attributed to fault on the part of the defendant and its servants and agents. The question is whether the culpable delay in this instance, either by itself or in combination with other matters, gives rise to a breach of Article 3 and/or Article 8 and I shall address this question later in this judgment.

[62] The Ombudsman also made a number of recommendations which are set out in paragraphs [22] to [24] of this judgment. In broad terms, these recommendations were accepted by the PSNI and were implemented. The evidence of D/C Sharkie was to the effect that he did not have any specific training in the investigation of serious sexual offences, particularly those involving vulnerable victims. He also candidly accepted that he would not have had any particular familiarity with the contents of General Order 17 of 2007 which dealt with the investigation of sexual offences where the alleged victim was a vulnerable individual. Similarly, he would have had little or no familiarity with the detailed policy documentation which the PSNI had issued on Child Abuse and Rape Enquiry (CARE) units and the arrangements for close liaison between the PSNI and Social Services in the operation of these units. This clearly raises an issue about the nature, extent and quality of the training provided by the defendant at the relevant time. The question which the court must consider is whether these various matters are properly viewed as being matters of learning and evolutionary improvements in the service provided by the PSNI or whether they represent systemic failings which have the potential in certain circumstances to give rise to a breach of Article 3. Having given the matter careful consideration, I am inclined to view the absence of training in this case as a systemic failing and I will in due course give consideration as to whether this systemic failing,

whether in isolation or in combination with other identified failings, gives rise to a breach of Article 3 and/or Article 8.

[63] In relation to what could be described as operational matters, having given these matters careful consideration, I am satisfied that the criticisms of the PSNI investigation levelled by the Police Ombudsman in respect of: (a) the failure to obtain statements; (b) the delay in obtaining statements; (c) the failure to follow up investigate leads; (d) the delay in following up investigative leads; (e) the failure to secure and process evidence; (f) the delay in securing and processing evidence; (g) the failure to reassess the overall strategy adopted in the investigation when it became clear that the ABE interview process was going to be delayed; and (h) the failure of supervising officers to direct a change in strategy; are all justified criticisms which to a large extent remained unchallenged by the defendant during the hearing of this case. Prior to considering whether these failings either by themselves or in combination with any culpable delay in organising the ABE interview or any systemic failings give rise a breach of Article 3 and/or Article 8, I must turn to address the limitation issue which was raised in the defendant's pleadings and which was the subject of closing submissions by Mr McMillen QC.

Limitation issue

[64] The provisions of section 7(5) of the HRA are set out above. I need not repeat them at this stage. The first matter raised by Mr McMillen QC in his submissions on the limitation issue was the matter of the plaintiff's capacity. He submitted that insofar as the plaintiff's capacity was a relevant consideration to which regard should be had when considering the limitation issue in this case, there was little or no evidence about the plaintiff's condition to substantiate the claim that she lacked capacity to bring proceedings in her own name. It was pointed out that neither Dr O'Kane nor Dr Chada specifically commented on the issue of capacity. Be that as it may, if the defendant was intent on mounting a serious challenge to the plaintiff's lack of capacity in respect of these proceedings, I would have expected the defendant to have specifically raised this matter before closing submissions.

[65] The Writ of Summons in this case was issued on 23 November 2009. The plaintiff is described as a person under a disability in the Writ of Summons. The medical notes and records referred to in Dr O'Kane's and Dr Chada's reports indicate that the plaintiff was a psychiatric inpatient in Gransha Hospital between 3 December 2009 and 27 August 2010. Prior to this admission there is a reference to her self-harming by cutting her stomach on 30 November 2009. Prior to this, she was an inpatient in Gransha Hospital between September 2008 and January 2009 and again between March 2009 and August 2009. Dr Chada also refers to a Compensation Agency Medical Certificate completed by Dr Gonzales, Consultant Psychiatrist in Gransha Hospital, dated June 2010 in which she stated that the plaintiff was incapable of managing or administering her property or affairs. In any event, I note that on 13 February 2012 an Order was made by Master Wells appointing the plaintiff's parents as "Controllers for the Patient", namely their

daughter, "having considered medical evidence and other documents filed in this matter, and being satisfied that the matter may properly be dealt with, without a hearing". Having regard to the various matters set out in this paragraph, I consider that proceedings were properly commenced and continued on the basis that the plaintiff was a person under disability.

[66] In relation to the limitation issue, Mr McMillen QC argued that the proceedings in this case were clearly issued beyond the period of one year from the act complained of. Both parties were invited by the court to state when the period of a year began to run and both agreed that time would have started to run from some point from the date on which the final item of evidence was submitted to Forensic Science Northern Ireland in March 2008 and the date when the file was submitted by the PSNI to the PPS, sometime before 3 July 2008, which was the date of the meeting between the plaintiff, her mother, Ms Jack and D/C Craig in Londonderry Court House. It was agreed that as proceedings were not brought within the period of one year from this date, the plaintiff would have to satisfy the Court that it was equitable in all the circumstances to extend the period for bringing proceedings beyond a year. Reference was made to the decision of King J in *AP v Tameside* [2017] EWHC 65 at paragraph [36] onwards to illustrate that in considering a limitation argument raised in a HRA case, the Court had to adopt a different approach from that which would be followed under Article 50 of the Limitation (Northern Ireland) Order 1989. It was argued by Mr McMillen QC that it is clear from this decision that although the question of disability is a relevant consideration, time still runs during any period of incapacity. In other words, Article 48 of the 1989 Order does not apply to claims brought under the HRA. Further, Mr McMillen QC argued that there is no presumption in favour of exercising the discretion in aid of the claimant by reason only of incapacity.

[67] Mr McMillen QC accepted that in light of the UKSC decision of *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, the court has a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case. It will often be appropriate to take into account factors of the type listed in Article 50 of the Limitation (Northern Ireland) Order 1989, the provision which relates to the discretion to extend time for a domestic law action in respect of personal injury or death. These factors would include the length of and reasons for the delay in issuing the proceedings; the extent to which, having regard to the delay, the evidence in the case is or is likely to be less cogent than it would have been if the proceedings had been issued within the one year period; the conduct of the public authority after the right of claim arose, including the extent (if any) to which it responded to requests reasonably made by the claimant for information for the purpose of ascertaining facts which are or might be relevant; the competing degree of prejudice as between the parties if an extension is or is not granted; the extent to which the claimant acted promptly and reasonably once he knew the defendant's acts or omissions might be capable of giving rise to an action for damages; and the steps, if any, taken by the claimant to obtain legal or other expert advice and the nature of the advice received.

[68] A court when exercising its discretion under section 7(5) of the HRA can have regard to the Article 50 factors if it considers it proper to do so in the circumstances of the particular case. However, section 7(5), given its broad wording, is not to be interpreted as if it contained the language of Article 50 of the 1989 Order. It is for the court to examine all the relevant factors in the particular circumstances of the case and then decide whether it is equitable to extend time. There is no predetermined list of relevant factors although proportionality will generally be taken into account. The weight to be given to any particular factor is a matter for the particular court having regard to the facts and circumstances of the particular case. There is no pre-ordained principle as to the weight to be given to any particular factor.

[69] Mr McMillen QC argued that the disability of a claimant should not be regarded as anything other than a factor to be taken into account when deciding whether an extension of time is equitable under section 7(5). When deciding what weight to attach to this factor it will be appropriate for the court to consider "when the claimant first had someone acting on his behalf and looking after his human rights interests, and when that person came into, or was in a position to come into, possession of knowledge of the essential facts, and the expertise held by that person in identifying human rights claims." See paragraph [73] of *AP v Tameside*.

[70] Other important factors referred to in the *AP v Tameside* decision are the length of the delay since the expiry of the limitation period and the public policy behind the section 7(5) primary limitation period. Mr McMillen QC argued that the court must take into account the fact that the primary limitation period under the HRA is one year, not three years, and it is clearly the policy of the legislature that HRA claims should be dealt with both swiftly and economically. All such claims are by definition brought against public authorities and there is no public interest in public authorities being burdened by expensive, time consuming and tardy claims brought years after the event.

[71] It was argued that *AP v Tameside* is also authority for the proposition that in considering how to exercise its discretion under section 7(5) the court can have regard to the broad merits and value of the underlying claim. It could be regarded as being both disproportionate and undesirable to extend time in favour of a claimant in order to pursue a case which even if successful, would resolve no issue of principle and would be unlikely to sound in significant damages. Mr McMillen QC also relied upon the decision of Eady J in *D v Metropolitan Commissioner of Police* [2012] EWHC 309 in support of his contention that in order for the court to exercise its discretion in favour of a claimant under section 7(5) there must be some evidence adduced by or on behalf of the plaintiff to satisfy the court that it would be equitable to do so, having regard to all the circumstances. In essence, he argued that there must be a rational basis for the exercise of the court's discretion. In this case, the plaintiff did not adduce any evidence on the limitation issue. There is no evidence to explain why the delay occurred and, therefore, there is no rational basis upon which the court can exercise its discretion in favour of the plaintiff.

[72] Mr Kelly QC on behalf of the plaintiff, referred the court to paragraph [75] of the *Rabone* decision and then went on to list the factors which Lord Dyson had specifically referred to in paragraphs [77] and [79] of his judgment. Just as in the *Rabone* case, Mr Kelly QC argued that the extension sought in this case was limited to a number of months. Further, there was no suggestion that the evidence had become less cogent as a result of the delay in issuing the proceedings or that the defendant has been prejudiced in any other way by the delay. The plaintiff acted reasonably in awaiting the publication of the Ombudsman's findings and the public response of the Chief Constable to those findings before initiating proceedings and, most importantly, the plaintiff has a good case. Mr Kelly QC specifically reminded the Court of the following passage contained in paragraph [79] of Lord Dyson's judgment:

> "In summary, the points which strongly militate in favour of granting the extension of time are that the required extension is short; the trust have suffered no prejudice by the delay in the issue of the proceedings; Mr and Mrs Rabone acted reasonably in holding off proceedings in the hope that the report might obviate the need for them; and (most important of all) they have a good claim for breach of Article 2. I would, therefore, grant the necessary extension of time."

[73] Mr Kelly QC referred to the Legal Aid Certificate in this case which, it would appear, was issued on 30 July 2009, one week after the date of the letter of claim. Mr Kelly QC highlighted the fact that the plaintiff's mother had complained to the Police Ombudsman on 14 November 2007. The Ombudsman completed his report and provided this to the PSNI on 24 October 2008. The contents of the report were made known to the plaintiff's mother on 8 June 2009, some seven months after it had been provided to the PSNI. This was followed up by the letter from Sir Hugh Orde dated 25 August 2009. Proceedings were then issued on 23 November 2009. There was a period of over seven months during which the Ombudsman's report was in the possession of the defendant but remained undisclosed to the plaintiff. There was a further period of two months before the defendant wrote to the plaintiff's mother, accepting the findings of the Ombudsman. One does not have to take off the whole of this nine-month period to bring the date of issue of the Writ of Summons within the twelve-month period of the earliest date (March 2008) on which the period of one year commenced to run. In the circumstances of this case, I have no hesitation in concluding that I should exercise my discretion to extend time to 24 November 2009 under section 7(5) of the HRA and I therefore find that the plaintiff's claims are not statute barred by reason of the efflux of time.

Commissioner of Police of the Metropolis (Appellant) ***v*** **DSD and another (Respondents) [2018] UKSC 18**

[74] I now turn to consider whether the investigatory failings and shortcomings identified in paragraphs [61], [62] and [63] of this judgment give rise to a breach of Article 3 and Article 8 and, if so, whether a declaration to this effect constitutes just satisfaction or whether in order to provide the plaintiff with just satisfaction under section 8 (3) of the HRA, it is necessary to make an award of damages to the plaintiff. These questions require some consideration of the judgment of Lord Kerr in the case of *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 18 and the judgments of Green J at first instance, *DSD and NBV v the Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB) and [2014] EWHC 2493 (QB).

[75] The plaintiffs *DSD and MBV* sought declarations and damages against the defendant Commissioner for the failure to conduct effective investigations into their allegations of sexual assault. The plaintiffs were among the victims of John Worboys who over a six-year period between 2002 and 2008 committed more than 100 drug and alcohol assisted rapes and sexual assaults on women whom he had been carrying as passengers in his black taxicab. *DSD* was one of his first victims. She was attacked in 2003. *MBV* was attacked in July 2007. Both women brought claims under sections 7 and 8 of the HRA. They alleged that the failures of the police in the investigation of the crimes committed by Worboys constituted a violation of their rights under Article 3 of ECHR. They succeeded in that claim before Green J, who delivered judgment on the liability issues in February 2014 in [2014] EWHC 436 (QB). In his second judgment delivered in July 2014, Green J made an award of damages to both claimants in [2014] EWHC 2493 (QB). The Metropolitan Police Commissioner appealed to the Court of Appeal and this appeal was dismissed and he then appealed to the Supreme Court. Before the Supreme Court the Commissioner accepted that both *DSD and MBV* were subjected to serious sexual assault by John Worboys. He also accepted that significant errors had been made by the police in each of the investigations into the crimes committed against them. Both *DSD and MBV* in separate proceedings recovered compensation from John Worboys and also received awards of compensation from the Criminal Injuries Compensation Authority. Before the Supreme Court, the Commissioner made the specific concession that irrespective of the outcome of the appeal, he would not seek to recoup any of the compensation and consequential costs which have been paid following the judgment of Green J.

[76] Before the Supreme Court, the Commissioner also accepted that the HRA imposed a general duty to investigate ill treatment amounting to a violation of Article 3 of ECHR. The main area of dispute before the Supreme Court was the nature of that duty. Lord Kerr gave the lead judgment with which Lady Hale and Lord Neuberger agreed. Lord Hughes and Lord Mance gave partly dissenting judgments.

[77] The majority concluded that the state has a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions, effectively punishing rape and to apply them in practice through effective investigation and

prosecution. In general terms, in order to be an effective deterrent, laws which prohibit conduct constituting a breach of Article 3 and Article 8 must be rigorously enforced and complaints of such conduct must be properly investigated. See paragraph [24] of Lord Kerr's judgment. The binary nature of the positive obligation arising under these articles can give rise to an examination of whether the domestic legal provisions relating to rape are so flawed as to amount to a breach of the state's positive obligation under Articles 3 and 8 (the systemic failings) or whether the investigation into an allegation of rape was so flawed as also to amount to a breach of the state's obligations under the same articles (the operational failings). The majority also concluded that if the relevant circumstances are present, there is a duty on the part of state authorities to investigate where non state agents are responsible for the infliction of the harm. That cannot be characterised as other than an operational duty. "The debate must focus, therefore, not on the existence of such a duty but on the circumstances in which it is animated." See paragraph [20] of Lord Kerr's judgment.

[78] In relation to the circumstances in which this duty is animated, the majority held that in order to give rise to a breach of Article 3 and Article 8, it is unnecessary for the deficiencies in the investigation to be part and parcel of a flawed approach of the system generally. However, simple errors or isolated omissions will not give rise to a violation of Article 3 or Article 8. Only conspicuous or substantial errors in the investigation will qualify. It would be wrong to suggest that minor errors in investigation will give rise to a breach of the Convention rights on the national plane. To the contrary, errors in investigation, to give rise to a breach of Article 3 and Article 8, must be egregious and significant. There may be difficulty in defining those errors which give rise to a breach of the Convention rights but that does not mean that there has to be some form of structural deficiency before egregious errors in the investigation of the offences can amount to a breach of Article 3 and Article 8.

[79] A review of the judgments of the ECtHR reveals the existence of certain minimum standards in respect of the duty to investigate which were endorsed by the majority. The investigation must be independent, impartial and subject to public scrutiny. The authorities must act with diligence and promptness. For an investigation to be considered effective, it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, a detailed statement concerning the allegations from the alleged victim, eyewitness testimony, forensic evidence and, where appropriate, additional medical evidence. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. Failure to adhere to these standards renders the state liable to the individual affected by that failure. In essence, the state is obliged under Article 3 to conduct an effective investigation into crimes which involve serious violence to persons, whether that has been carried out

by state agents or individual criminals. Further, in order that the protective right should be practical and effective, an individual who has suffered ill treatment contrary to Article 3 has a right to claim compensation against the state where there has been a failure by state authorities to conduct a sufficient investigation into the crime. "The recognition that really serious operational failures by police in the investigation of offences can give rise to a breach of Article 3 cannot realistically be said to herald an avalanche of claims for every retrospectively detected error in police investigations of minor crime." See paragraphs [38], [39], [41], [48] and [53] of Lord Kerr's judgment.

[80] Lord Kerr went on to consider whether there is a right to compensation for breach of the investigative duty where state agents are not actually involved in the infliction of harm alleged to constitute a breach of Article 3 and whether the fact that a victim can obtain redress against an offender or make a claim under the Criminal Injuries Compensation Scheme should affect the availability of a right to compensation under the HRA. He concluded that "compensation is by no means automatically payable for breaches of the Article 3 duty to investigate and prosecute crime….and in many cases the Strasbourg court has treated the finding of the violation as, in itself, just satisfaction under Article 41 (although that was said in the context of Article 6 breaches)." See paragraph [63] of Lord Kerr's judgment.

[81] Lord Kerr went on to state that an award of compensation for breach of a Convention right serves a purpose which is distinctly different from that of an order for the payment of damages in civil actions which is designed essentially to compensate claimants for their losses. On the other hand, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights. The inquiry into compliance with the Article 3 duty is not primarily concerned with the effect on the claimant, but with the overall nature of the investigative steps to be taken by the State. The award of compensation is geared principally to the upholding of standards concerning the discharge of the state's duty to conduct proper investigations into criminal conduct which falls foul of Article 3. The establishment of systemic and operational failings in the investigation may warrant the award of compensation irrespective of the fact that the claimant has received compensation from the perpetrator of the crime and under a Criminal Injuries compensation scheme. See paragraphs [63] to [65] of Lord Kerr's judgment.

[82] As to when the duty to investigate is effectively triggered, this issue was specifically addressed by Green J in paragraph [212] of his first instance liability judgment [2014] EWHC 436 (QB) when he stated:

> "…the duty is triggered where there is a credible or arguable claim by the victim that a person has been subjected to treatment at the hands of a private party which meets the description of torture or degrading or inhuman treatment in Article 3…allegations of crime that are grave or serious will amount to torture or degrading

> or inhuman treatment. Rape and serious sexual assault will fall within this category."

[83] The relationship between Article 3 and Article 8 was considered by Gillen J in the earlier judgment in this case, [2014] NIQB 63, at paragraph [21] where he stated as follows:

> "It is difficult to conceive of any circumstances in the instant case in which article 8 of the Convention would provide a broader level of protection that is accorded by Article 3. I respectfully agree with Green J when he said at paragraph [242]:
>
> > "In none of the Strasbourg Authorities has the Court treated Article 8 as having an effect extending beyond Article 3. This is logical. Article 8 is a circumscribed obligation which is subject to competing interests. It has, by its very nature, a more limited ambit than Article 3 which is clear, unequivocal and brooks of no exception."

[84] The issue of whether and what circumstances an award of damages should be made in cases of this nature was exhaustively addressed by Green J in his quantum judgment [2014] EWHC 2493 (QB). At paragraph [24] he stated that:

> "…the present case is precisely the sort or type of case where damages are appropriate. The invariable practice of the Strasbourg Court in cases such as the present has been to recognise that a financial award is necessary…It has not held that declarations suffice and, by the very nature of these proceedings, other public law remedies are simply not apt. This is not, for instance, a case where a decision can be retaken or proceedings repeated. The wrong committed in this case by the defendant cannot be put right by any more habitual public law order."

[85] In relation to the issue of damages and causation, Green J stated at paragraph [25] of his quantum judgment:

> "…In this quantum stage the causal issue is quite different and focuses upon the nexus between the failures in the police investigation and the physical and mental harm suffered by the claimants, *DSD and NBV*…There is no real doubt but that the violation of Article 3 did cause harm to *DSD and NBV* which is quite discrete from the harm caused by the assaults perpetrated by Worboys. In

> any event, precision in establishing causation is not an identifiable hallmark of Strasbourg case law. As the analysis of the jurisprudence…below clearly shows, the Court, without recourse to any expert or medical evidence, quite regularly simply assumes that a claimant must have suffered some form of generalised anxiety, stress, distress or anguish warranting compensation which falls short of any recognised medical condition. Even in pecuniary loss cases, precision in quantification is unnecessary and the Court not infrequently pleads as a justification for its process of juridical gestimation the "*inherently uncertain character of the damage flowing from the violation*": *Young, James & Webster v UK* (18 October 1982) §A No 55 paragraph 11; *Vasiliyev* (see paragraph [93] below) at paragraph [166] – an award may be made "*…notwithstanding a large number of imponderables involved in the assessment of future losses*"."

[86] When it comes to considering the level of damages to be awarded in a breach of Convention rights case, it is clear from the decision of *Greenfield v SSHD* [2005] UKHL 14 that when determining whether to award damages and, if so, at what level, the domestic courts should look to Strasbourg and not to precedents in the field of domestic tort law. Lord Bingham at paragraph [19] of *Greenfield* stated:

> "…section 8(4) requires a domestic court to take into account the principles applied by the European Court under Article 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not domestic precedents…The Court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the Court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the Court might be expected to be, in a case where it was willing to make an award at all".

[87] At paragraph [84] of *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, Lord Dyson observed that in the absence of guideline cases in which the range of compensation was specified and the relevant considerations were articulated, it was necessary for the domestic courts to do their best in the light of such guidance as could be gleaned from the Strasbourg decisions on the facts of individual cases.

Green J in his quantum judgment at paragraph [32] observed that over time, the domestic courts, applying Strasbourg guidance, will evolve their own *corpus* of jurisprudence in relation to HRA damages claims and this reflects the views of Lord Reed at paragraph [29] of his judgment in *Faulkner v Secretary of State for Justice* [2013] UKSC 23 where he stated:

> "While it will remain necessary to ensure that our law does not fall short of Convention standards, we should have confidence in our own case law under section 8 once it has developed sufficiently, and not be perpetually looking to the case law of an international court as our primary source".

[88] However, in the absence of a well-developed corpus of domestic jurisprudence in this jurisdiction, in addition to looking for comparators in Strasbourg cases, it is important to always have regard to the general approach of the ECtHR to the awarding of damages for breach of Convention rights as is exemplified in the Grand Chamber decision of *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 at paragraph [114]:

> "The Court recalls that it is not its role under Article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage".

[89] On a more mundane point, is clear that the Strasbourg Court seeks to take account of the purchasing power of an award in the specific country of the applicant's residence. The Practice Direction published by the Strasbourg Court on "Just Satisfaction Claims" in March 2007 states at paragraph [2] that when making an award "…the Court will normally take into account the local economic circumstances". It also states at paragraph [3] that "…the Court may decide to take guidance from domestic standards" though "it is…never bound by them". This position is reflected in the guidance given by Lord Reed at paragraph [38] of *Faulkner* where he stated:

> "In order to obtain guidance as to the appropriate level of awards under section 8 of the 1998 Act, it is therefore necessary to focus upon awards made to applicants from

> the UK or from other countries with a comparable cost of living."

[90] However, as Green J pointed out in paragraph [34] of his quantum judgment, it may be appropriate to have regard to awards made by the Strasbourg Court in relation to applicants resident in countries with a different standard of living than the UK provided one applies to the quantum of the award an appropriate adjustment factor to take account of differences in the cost of living. Naturally, when considering awards made by the Strasbourg Court in cases of some vintage, an appropriate adjustment must be factored in for inflationary increases.

[91] In his detailed quantum judgment, Green J provided a summary of his conclusions reached as a result of his painstaking analysis of the ECtHR case law on the awards of damages in cases where there were established breaches of Article 3. The awards made by Green J to *DSD and MBV* were based on this analysis. These awards were not disturbed when the matter was considered first by the Court of Appeal and then by the Supreme Court. I, therefore, propose to adopt this analysis and do not intend to conduct my own review of all the relevant ECtHR decisions. Green J at paragraph [68] of his quantum judgment stated:

> "(vii) the following identifies the range of awards for relevant Article 3 violations. The range (taking into account adjustment factors for cost of living and inflation) of awards for psychological/mental harm or other harm in Article 3 cases is:
>
> (a) €1,000 – €8,000 where the Court wishes to make a nominal or low award.
>
> (b) €8,000 – €20,000 for a routine violation of Article 3 with no serious long-term mental health issues and no unusual aggravating factors.
>
> (c) €20,000-€100,000+ for cases where there are aggravating factors such as: (i) medical evidence of material psychological harm; (ii) mental harm amounting to a recognised medical condition; (iii) where the victim has also been the victim of physical harm or a crime caused in part by the State; (iv) long-term systemic or endemic failings by the State; (v) morally reprehensible conduct by the State. This list is by no means exhaustive."

Conclusions on liability

[92] The failings described in paragraphs [61], [62] and [63] above encompass both operational and systemic failings. The operational failings in this case cannot be described as minor or insignificant. They were such that an investigation by the Ombudsman resulted in a recommendation for the commencement of misconduct proceedings in respect of two officers. The PSNI, having considered the matter, decided to proceed by way of the administration of a Superintendent's warning in the case of these two officers. The officers concerned accepted these disciplinary sanctions. They accepted that they had failed to conduct a thorough investigation into an allegation of stranger rape in breach of article 2 of the PSNI Code of Ethics. As a result, the failings giving rise to this disciplinary action can and should be categorised as serious failings. In addition to this, two more senior officers received advice and guidance in relation to failings in their responsibilities as supervising officers. These failings occurred against a background of systemic shortcomings in relation to training. The adverse impact on the effectiveness of the investigation into the allegation of stranger rape directly resulting from these matters was compounded significantly by the inability of the PSNI to arrange for a joint protocol ABE interview of a vulnerable victim to be promptly carried out. This combination of failings cannot be regarded as anything other than a failure to carry out an effective investigation in the sense described in paragraph [79] above. In short, these failings undoubtedly constitute a breach by the state of its obligations under Article 3 of the Convention. I make no separate finding in respect of the plaintiff's Article 8 claim.

Conclusions as to remedy

[93] Having regard to the above, I have no hesitation in making a declaration that the plaintiff's Article 3 rights were breached by reason of the failings in the defendant's investigation into her complaint of rape. Having regard to the matters set out in paragraphs above I have no hesitation in concluding that an award of damages in this case is necessary to afford the plaintiff just satisfaction. The steps taken by the PSNI to address and remedy the initial failings in the investigation and to ensure that such failings did not occur again, the prompt and effective actions of the Police Ombudsman, the taking of disciplinary action by the PSNI, the apology offered by the Chief Constable, the award of compensation under the Criminal Injuries compensation scheme and the declaration made by this court are all relevant matters but they do not provide the plaintiff with just satisfaction for the wrongs suffered.

[94] The assessment of the amount of damages to be awarded in this case is to a significant extent dependent on the court's assessment of the nature and extent of the harm occasioned to the plaintiff by the failings which have been identified in this case. Having carefully considered the medical evidence in this case, including the oral evidence given by Dr O'Kane and Dr Chada, I am satisfied that although the plaintiff would have experienced some upset, distress and frustration by reason of the failings in the investigation which have been established in this case, the significant and severe psychiatric and psychological deterioration which occurred

following this incident would have occurred at the same time, in the same manner and to the same extent even if the police investigation into her complaint of rape had been conducted in a flawless manner. The plaintiff's pre-existing vulnerabilities combined with the major trauma of the incident itself and the synergistic stresses resulting from the conflicting and extreme reactions of the plaintiff and her mother to this incident all combined to overwhelm the plaintiff and to give rise to the significant psychiatric episode which she suffered sometime after this incident. Having regard to the matters set out in paragraph [91] above, I consider that the appropriate award of damages in this case is the sum of £15,000 and I make a decree in the sum of £15,000. I will hear submissions from the parties in respect of the wording of the final order in this case, the issue of interest and the issue of costs.

Neutral Citation No: [2020] NIQB 3 | *Ref:* **McA11155**

Judgment: approved by the Court for handing down | *Delivered:* **20/01/2020**

(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

C (A PERSON UNDER A DISABILITY)
BY D, HER MOTHER AND NEXT FRIEND

Plaintiff

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE
OF NORTHERN IRELAND

Defendant

McAlinden J

[1] Further to my judgment delivered on 13 January 2020, I requested the parties to provide the Court with further written submissions on the following issues:

(a) the wording of the final declaration to be made in this case;

(b) the plaintiff's entitlement to interest on damages, and if so entitled the amount of same;

(c) the appropriate order in respect of costs.

[2] Following the submission by the parties of an agreed position paper dated 17 January 2020, the Court makes the following declaration:

> "The Court declares that, on the facts found, the Defendant acted in a manner that was incompatible with a Convention right contrary to Section 6 of the Human Rights Act 1998 in that it failed to act with diligence and promptness in order to conduct an effective investigation as required by Article 3 of the European Convention on Human Rights following C's complaint of serious sexual assault and rape."

[3] The parties have agreed that there should be an award of interest at 2% per annum on the sum of £15,000 being the award of compensation by way of just satisfaction made in this case and that the plaintiff should be entitled to claim interest over a period of five years. Therefore, the agreed calculation of interest is £15,000 x 2% = £300 per annum for five years, giving a total of £1,500. The final decree in this case shall be in the sum of £16,500 inclusive of interest with the usual three weeks' stay.

[4] It is further agreed by the parties that the Court should make an order for costs in the following terms:

> "The plaintiff shall be entitled to an order for costs against the defendant, being High Court costs to include two Counsel. As the plaintiff is legally aided, her costs shall be taxed in accordance with Schedule 2 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981."