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No. 14/052216

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

MARTHA ELIZABETH PHILOMENA LEONARD

Plaintiff;

AND

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND and MINISTRY OF DEFENCE

Defendants.

Master McCorry

[1] By summons issued 29th February 2016 the Defendants apply pursuant to Order 18, rule 19 for orders striking out the plaintiff's action on the grounds that:

(a) the pleadings disclose no reasonable cause of action and the plaintiff's claim is frivolous and vexatious;

(b) by reason of principles established in relevant caselaw the circumstances on which the case is based do not give rise to a duty of care in negligence between the plaintiff and either defendant;

(c) The plaintiff was not a primary or secondary victim of any negligence for the purposes of any claim for damages in respect of psychiatric injury.

The summons also included applications for remittal and trial of a limitation question as a preliminary issue, but those matters are not addressed in this judgment.

[2] On the night of Friday 15th and early morning of Saturday 16th December 1972, the plaintiff's 26 year old husband Louis Leonard was murdered by persons who have never been identified or charged, in his butcher's shop at Main Street, Derrylin, County Fermanagh. He had been working preparing meat in the busy run-up to Christmas and his wife, the plaintiff, had left to deliver orders returning to the shop at 11.00 pm to find it locked and unlit. She was unable to gain entry even with the assistance of family members and was unable to locate her husband. She eventually gave up at 3.30am with the intention of notifying the police at daylight, which she did by notifying police at Kinawley Police Station at 9.15am. At 11.40am her brother and brother in law were able to gain entry to the shop through a skylight and found Louis lying dead on the floor of the walk-in refrigerator. The police were notified and an Inspector Walmsley attended promptly. He was a uniformed officer but following the not uncommon practice at the time led the enquiry in the absence of any experienced detectives in the area. It was quickly established that two men had been seen by a number of witnesses in the locality, and at the shop, the previous night and had been associated with a large black car, a Ford Cortina or Zephyr. It appears that Louis was either shot inside the shop and fell back into the refrigerator or had been taken from the scene, murdered and his body subsequently returned there. He had been shot 10 times to head and torso by two different revolvers although only one bang was reported as having been heard by passers-by. A car fitting the description of the one seen by witnesses had been hired at Aldergrove Airport, with a mileage usage consistent with a journey to Fermanagh and back, in which bullets were found. Two prominent loyalists were spoken to by Inspector Walmsley but were never formally interviewed and no-one was ever charged in relation to the murder. One of those loyalists, "Suspect A" was identified as the hirer of the car and subsequently charged along with a "Suspect B" with various firearms and robbery offences, however, no steps were taken to investigate further their possible involvement in Louis Leonard's murder and both were subsequently acquitted. Whilst there is nothing to suggest that Louis had been involved in militant republican activity, his family had known republican sympathies. This along with police and army activity in the area on the night of the murder, and the absence of any outcome from a flawed investigation, caused the family to suspect possible

police or army collusion with loyalist terrorists, including the protection of the killers.

[3] In 2008 the Historical Inquiries Team issued a report into its review of the investigation, in which the family had co-operated. It concluded that Louis Leonard had been murdered by members of the Ulster Defence Association in his shop on 15/16 December 1972 by at least two gun men using two weapons neither of which were linked to any other offences. The motive was that he was a catholic and a republican sympathiser. The report identified numerous missed investigative opportunities and mistakes by Inspector Walmsley, which it concluded were due to a lack of support and guidance from senior officers. In particular there was loss of opportunities to link two key suspects to the investigation and supporting intelligence was overlooked. The HET found no evidence of collusion between the police or the army and loyalist terrorists in the case.

[4] Order 18, rule 19 provides:

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

[5] The approach to applications under Order 18, rule 19 was considered by Gillen J in Rush v Police Service of Northern Ireland and Secretary of State for Northern Ireland [2011] NIQB 28. He summarised the principles as follows:

"[7] For the purposes of the application, all the averments in the Statement of Claim must be assumed to be true. (See O'Dwyer v Chief Constable of the RUC (1997) NI 403 at p. 406C).

[8] O'Dwyer's case is authority also for the proposition that it is a "well settled principle that the summary procedure for striking out pleadings is to be used in plain and obvious cases." The matter must be unarguable or almost incontestably bad (see Lonrho plc v Fayed (1990) 2 QBD 479).

[9] In approaching such applications, the court should be appropriately cautious in any developing field of law particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the Statement of Claim. Thus in Lonrho plc v Tebbit (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that it raised matters of State policy and where the defendants allegedly owed no duty of care to the plaintiff regarding exercise of their powers, Sir Nicholas Brown-Wilkinson V-C said:

> *"In considering whether or not to decide the difficult question of law, the judge can and should take into account whether the point of law is of such a kind that it can properly be determined on the bare facts pleaded or whether it would not be better determined at the trial in the light of the actual facts of the case. The methodology of English law is to decide cases not by a process of a priori reasoning from general principle but by deciding each case on a case-by-case basis from which, in due course, principles may emerge. Therefore, in a new and developing field of law it is often inappropriate to determine points of law on the assumed and scanty, facts pleaded in the Statement of Claim."*
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> *(See also E (A Minor) v Dorset CC (1995) 2 AC 633 at 693-694).*
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> *[10] Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action,*

or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."

[6] This means that so far as the application pursuant to Order 18, rule 19 (1) (a), to strike out pleadings as disclosing no reasonable cause of action is concerned, the court must deal with it on the face of the pleadings alone and without any reference to affidavit or other evidence. Such evidence can however be considered in dealing with applications pursuant to the remaining provisions of Order 18 rule (1) including that the claim is frivolous and vexatious as is alleged in this instance. The defendant's solicitor Mr Ellis did file a grounding affidavit on 29th February 2016 with a further affidavit on 1st June 2016 exhibiting some correspondence and the report by the defendant's psychiatrist Dr Chada. The plaintiff did not file an affidavit but at hearing referred to the HET report without objection from the defendants. Be that as it may, it seems to me that whatever ground is referred to, this application is largely an assertion by the defendants that the plaintiff enjoys no reasonable cause of action, because based on the principles established in relevant caselaw the circumstances on which the case is based do not give rise to a duty of care in negligence between the plaintiff and either defendant, and/or in any event no actionable psychiatric injury was sustained.

[7] The starting point in such applications is the pleadings, which in this case consist of a statement of claim, a defence and a reply to defence which clarifies the precise case made by the plaintiff. Paragraph 3 of the statement of claim sets out the basic facts surrounding the killing and at Paragraph 4 pleads: "The said personal injuries loss and damage were caused by the negligence, misfeasance in public office of the Defendants, their servants and agents." As the only injury referred to was the killing of Louis Leonard the defendants interpreted this to mean that his death had been caused by the negligence and misfeasance of the defendants, and pleaded their defence accordingly. This prompted clarification by the plaintiff at paragraph 2 of the reply to defence which states:

> "For the avoidance of doubt, it is not the plaintiff's case that the death of her husband was in any way due to the negligence or misfeasance in a public office of the Defendant's servants and agents. Rather her claim relates to the misfeasance in a public office and negligence of the servants and agents of the Defendants who had responsibility for **the investigation into the murder** (my emphasis) of the Plaintiff's husband after his death."

The particulars of misfeasance (repeated as particulars of negligence) then set out various allegations in respect of the investigation including protecting suspects from investigation and collusion with terrorists in and about that investigation.

[8] As the plaintiff does not link her husband's death to any act or omission by the defendants' servants and agents, and there is no dependency loss claim under the Fatal Accidents Act or on behalf of the estate, the plaintiff's claim is therefore limited to her own personal injuries, which are psychiatric in nature. This again opens some issues as to precisely what the plaintiff attributes those injuries. The particulars of personal injuries in the statement of claim state:

> "The evidence now in the possession of the plaintiff following the report by the Historic Enquiries Team has caused her significant psychological upset and distress as it confirms her suspicions about the circumstances of her husband's death…"

The defendants interpret this to mean that the plaintiff alleges that her psychiatric injuries were caused by the communication to the plaintiff of facts relating to the investigation of her husband's death forty years after the event. The plaintiff however contends that she has already made clear that her claim relates to the negligence and misfeasance of the servants and agents who were responsible for investigating the murder and the HET Report is simply the conduit or means by which the plaintiff became aware of the full extent of their delict which constitutes negligence and misfeasance in public office, the torts themselves going back to the aftermath of the murder and long before publication of the Report. The injuries were

therefore not inflicted by the Report but were present already due to the clear inadequacies in the investigation and failure to bring anyone to account for the murder. In short she seems to say that concentration on the Report is, as it were, a 'red herring' (my words) taking away the proper focus on the original investigations and its flaws, the Report being simply the first occasion on which the failings had been collated in a coherent written form. That may well be the case but then one wonders why the plaintiff refers to the HET Report in the particulars of personal injuries because it was that reference which directed the defendants' attention to the Report as an apparent cause of injury.

[9] Turning then to the main thrust of the defendants' application, namely that the circumstances pleaded do not give rise to a duty of care in negligence. The extent and limitations on such a duty of care has been the subject of numerous judgments by the superior courts in the United Kingdom including most notably Hill v Chief Constable of West Yorkshire [1989] A.C. 53, Van Colle v Chief Constable of Hertfordshire; Smith v Chief Constable of Sussex Police [2008] 2 Al ER 977, and in this jurisdiction by Gillen J in Rush v Police Service of Northern Ireland [2011] NIQB 28 and again in C v Chief Constable of the PSNI [2014] NIQB 63, a judgment upon which the plaintiff places much weight. The general principle as set out in Hill (the "Yorkshire Ripper Case") is that the police owed no duty of care in negligence (a) unless the relationship between the claimant and police demonstrated the special ingredients and characteristics which would create such a duty of care, and it was contrary to public policy that police should owe a duty of care in negligence for the manner in which it conducted a criminal investigation. Lord Keith explained this at 243/244 of his judgment, a follows:

> *"Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to*

time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further, it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward types of failure, for example that a police officer negligently tripped and fell while pursuing a burglar, others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell LJ, in his judgment in the Court of Appeal in the present case, was right to take the view that the police were immune from an action of this kind on grounds similar to those which in Rondel v Worsley were held to render a barrister immune from actions for negligence in his conduct of proceedings in court"

[10] Gillen J in C v Chief constable of the PSNI reviewing the cases which came after Hill concluded that it was well established that there were exceptional cases on the margin of the area covered by the principle in Hill. In particular where the

complaint related to an operational decision made by police that could be the subject of civil liability without compromising the public interest in the investigation and suppression of crime. He also concluded that the categories of exceptions to the general principle were not closed.

> *"[16] This is not to say there is immunity from liability in negligence for police officers in all circumstances. Whilst the shortcomings of the police in individual cases cannot undermine the core principle nonetheless that principle has some ragged edges. It is well established that there are exceptional cases on the margins which will have to be considered if and when circumstances appropriately arise."*

In C the plaintiff was a vulnerable young woman who was raped on 16 June 2007. She has sued the PSNI for personal injuries suffered by her on account of the negligence of, and breach of her rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, by the PSNI in the course of a flawed investigation of this rape. The issue before the court was whether, before serving his defence, the defendant could apply to strike out her claim on the basis that as a matter of public policy actions for damages will not lie against the police so far as concerns their functions in the investigation and suppression of crime save in exceptional circumstances. An important point to note when applying C is that it is primarily a case concerning article 3 which of course is not relevant to the facts of the present case. Also unlike the present case where psychiatric injury is alleged, giving rise to the second limb of the defendants' application based on the principles in Alcock v Chief Constable South Yorkshire Police [1991] All ER 907, no such issue arose in C.

[11] Since C, the Supreme Court most recently considered the issue of the duty of care owed by police in such cases, and again reviewed the case law in Michael v Chief Constable of South Wales Police [2015] 2 All ER 635. This case arose out of the killing of a young woman by her boyfriend, where she had telephoned the police to report that her boyfriend had threatened to kill her, and there was a delay in responding partly due to the report being passed from one police service to another.

In a second call she was heard screaming but when police arrived they found that she had already been killed. Her parents and children sued in negligence and under article 2 of the Human Rights Act 1998. The police applied for the claims to be struck out or for summary judgment to be entered in their favour. In the High Court the judge refused those applications. The Court of Appeal upheld the decision of the judge that the art 2 claim should proceed to trial, and gave summary judgment in favour of the police on the issue of negligence. The claimants appealed and the police cross-appealed. The Supreme Court considered: (i) a broad principle of liability; (ii) a narrower principle of liability under which it was suggested that the police would owe a duty of care to M on the facts as alleged; (iii) whether on the basis of what had been said in the first emergency call, and the circumstances in which it had been made, the police should be held to have assumed responsibility to take reasonable care for the safety of M and had therefore owed her a duty in negligence; and (iv) whether there had arguably been a breach of art 2 of the convention.

[12] With respect to the "wider principle" proposed by the plaintiff, the Supreme Court held – (1) (per Lord Neuberger, Lord Mance, Lord Reed, Lord Toulson, and Lord Hodge) A new exception to the ordinary application of common law principles, namely that if the police were aware or ought reasonably to have been aware of a threat to the life or physical safety of an identifiable person, or member of an identifiable small group the police owed to that person a duty under the law of negligence to take reasonable care for their safety, should not be made. They reasoned that it did not follow from the setting up of a protective system from public resources that if it failed to achieve its purpose, through organisational defects or individual fault, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state was not responsible. The imposition of such a burden would be contrary to the ordinary principles of the common law. The duty of the police for the preservation of the peace was owed to members of the public at large, and did not involve the kind of close or special relationship ('proximity' or 'neighbourhood') necessary for the imposition of a private law duty of care. The foundation of a duty of care in the public law duty of the police for the preservation of the peace meant

that it was hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace or why it should be limited to particular potential victims. The court could not judge the likely operational consequences for the police of changing the law of negligence in the way proposed; the only sure consequence would be that the imposition of liability on the police to compensate victims of violence on the basis that the police should have prevented it would have potentially significant financial implications. The suggested development of the law of negligence was not necessary to comply with the convention; there was no basis, on orthodox common law principles, for fashioning a duty of care limited in scope to that of the convention right to life and the convention prohibition of torture or inhuman or degrading treatment or punishment, or providing compensation on a different basis from a claim under the 1998 Act; and there was no principled legal basis for introducing a wider duty in negligence than would arise either under orthodox common law principles or under the convention. The possibility of a claim under the 1998 Act was not a good reason for creating a parallel common law claim, still less for creating a wider duty of care.

[13] The Court went on to hold (2) (per Lord Neuberger, Lord Mance, Lord Reed, Lord Toulson, and Lord Hodge) that the narrower principle of liability proposed by the plaintiff, namely that if a member of the public ('A') furnished a police officer ('B') with apparently credible evidence that a third party whose identity and whereabouts were known presented a specific and imminent threat to his life and physical safety, B would owe to A a duty to take reasonable steps to assess such threat and if appropriate take reasonable steps to prevent it being executed, should be rejected for the same reasons as the broader principle. If it was thought that there should be public compensation for victims of certain types of crime, above that which was provided under the criminal injuries compensation scheme, in cases of pure omission by the police to perform their duty for the prevention of violence, it should be for Parliament to determine whether there should be such a scheme and what should be its scope as to the types of crime, types of loss and any financial limits. The 1998 Act had created a cause of action in the limited circumstances where the police had acted in breach of articles 2 and 3; the positive obligations of the state under those articles

were limited, for good reasons, and the creation of such a statutory cause of action did not itself provide a sufficient reason for the common law to duplicate or extend it.

[14] Reviewing the earlier case law at [44], dealing with the issue of whether or not the police had an immunity from civil action in such cases, that term having been used by Lord Keith in Hill and subsequently by Gillen J in C, Lord Toulson said:

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

[15] At [53] he continued

> *"[53] In Van Colle threats were made against a prosecution witness in the weeks leading to a trial. They included two telephone calls from the accused to the witness. The second call was aggressive and threatening but contained no explicit death threat. The witness reported the threats to the police. The matter was not treated with urgency. An arrangement was made for the police to take a witness statement, after which the police intended to arrest the accused, but in the interval the witness was shot dead by the accused. His parents brought a claim against the police under the Human Rights Act 1998 relying on arts 2 and 8 of the Convention. There was no*

claim under common law. The police were held liable at first instance ([2006] EWHC 360 (QB), [2006] 3 All ER 963), and failed in an appeal to the Court of Appeal ([2007] EWCA Civ 325, [2007] 3 All ER 122, [2007] 1 WLR 1821), but succeeded in an appeal to the House of Lords.

[54] The House of Lords applied the test laid down by the Strasbourg court in Osman v UK (1998) 5 BHRC 293 (para 116) for determining when national authorities have a positive obligation under art 2 to take preventative measures to protect an individual whose life is at risk from the criminal acts of another:

'it must be established to [the court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'

[55] The critical question of fact was whether the police, making a reasonable and informed judgment at the time, should have appreciated that there was a real and immediate risk to the life of the victim. The House of Lords held that the test was not met.

[56] Smith [2008] 3 All ER 977, [2009] AC 225 reached the House of Lords on an application to strike out. The question was whether the police owed a duty of care to the claimant on the assumed facts. The claimant was a victim of violence by a former partner. He had suffered violence at the hands of the other man during their relationship. After it ended, he received a stream of violent, abusive and threatening messages, including death threats. He reported these matters to the police and told a police inspector that he thought that his life was in danger. A week later the man attacked the victim at his home address with a claw hammer, causing him fractures of the skull and brain damage. The assailant was subsequently convicted of making threats to kill and causing grievous bodily harm with intent. The House of Lords held by a majority that the police owed the victim no duty of care in negligence."

[16] Then at [113] onwards he observed

"[113] Besides the provision of such services, which are not peculiarly governmental in their nature, it is a feature of our system of government that many areas of life are

subject to forms of state controlled licensing, regulation, inspection, intervention and assistance aimed at protecting the general public from physical or economic harm caused by the activities of other members of society (or sometimes from natural disasters). Licensing of firearms, regulation of financial services, inspections of restaurants, factories and children's nurseries, and enforcement of building regulations are random examples. To compile a comprehensive list would be virtually impossible, because the systems designed to protect the public from harm of one kind or another are so extensive.

[114] It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.

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

[116] The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case."

[17] That then is the up to date statement of the law and the rationale behind it. In short, so far as this case is concerned those principles are: (a) that the police owe no duty of care in negligence unless the relationship between the claimant and police

demonstrated the special ingredients and characteristics which would create such a duty of care, and it was contrary to public policy that police should owe a duty of care in negligence for the manner in which it conducted a criminal investigation; (b) there may be exceptional cases on the margin of the area covered by the principle in Hill, in particular where the complaint relates to an operational decision made by police that could be the subject of civil liability without compromising the public interest in the investigation and suppression of crime, and the categories of exceptions to the general principle are not closed; these exceptional circumstances where they arise do not amount to an immunity; (c) however, the courts are loath to recognise such exceptions as is demonstrated in the most recent decision by the Supreme Court where no private law duty of care was recognised where police were slow to respond to calls for help by a young woman threatened by her boyfriend who killed her before they arrived.

[18] The plaintiff argues that Gillen J's judgment in C exemplifies a greater readiness by courts to find exceptions to the general principle, citing as an example the Canadian case Hill v Hamilton-Wentworth [2007] 3 SCR 129 in which a previous immunity from suit for negligent investigation was overturned by the Canadian Supreme Court. However, that greater readiness to find exceptions is simply not reflected in the most recent deliberations of the Supreme Court in the United Kingdom in Michael. The fact is that whilst the possibly of exceptions is recognised no such exception has been identified. The plaintiff seeks to argue in terms that where the categories of exceptions are not closed then the court ought not to consider strike out. However, I am satisfied that this places too great a limitation upon the courts powers to order strike out, without considering the facts of the case pleaded. Counsel suggests that the flaws in the investigation in this case were so blatant as to amount to "outrageous negligence" constituting an exception to the general principle. However I find it difficult to find the flawed investigation in this case, serious as it undoubtedly was, demonstrated such a level of competence, worse than what happened in Michael, which would justify deeming this one of those exceptional cases where a private law duty of care could be found. In those circumstances the plaintiff enjoys no reasonable cause of action in negligence,

because based on the principles established in relevant caselaw the circumstances on which the case is based do not give rise to a duty of care. The claim in negligence must therefore be struck out.

[19] The plaintiff also sues in misfeasance in public office, the pleaded particulars of which are identical to the particulars of negligence. The first defendant concedes that they are not on such strong ground on this cause of action because obviously there is no need to demonstrate that a duty of care exists, the case instead resting on malicious acts by a police officer or officers. Counsel argues however that malice cannot be inferred: the plaintiff must plead specifically the facts constituting malice, which she has not done. The plaintiff for her part relies on what is termed "untargeted malice" citing the House of Lords in _[2003] 2 A.C. 1:

> *"[44] The allegation is that this is a case of what is usually called 'untargeted malice' Where the tort takes this form the required mental element is satisfied where the act or omission was done or made intentionally by the public officer (a) in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury, or (b) recklessly because, although he was aware that there was a serious risk that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he wilfully chose to disregard that risk. In regard to this form of the tort, the fact that the act or omission is done or made without an honest belief that it is lawful is sufficient to satisfy the requirement or bad faith. In regard to alternative (a), bad faith is demonstrated by knowledge or probably loss on the part of the public officer. In regard to alternative (b), it is demonstrated by recklessness on his part in disregarding the risk".*

Clearly the principle is well founded but defendant's counsel is correct to say that it must be pleaded, and it has not been pleaded adequately. However, I am satisfied that this is a defect which can be cured by amendment. I am not satisfied that the defendant has made out a case for strike out of the plaintiff's cause of action in misfeasance in public office, and subject to the plaintiff amending her statement of

claim to properly plead the case being made, I refuse to strike out the plaintiff's pleading as disclosing no reasonable cause of action in misfeasance.

[20] Finally, so far as the first limb of the defendants' application is concerned, the question arises as to what case is made out against the second defendant, the Ministry of Defence. I propose dealing with this in brief. If one thing arose from this application it is that the plaintiff's case concerns flaws in the investigation of her husband's murder. Sole responsibility for investigating a civilian death rests with the police, not the army. The fact that army units may have attended the scenes of crimes or conducted joint patrols, does not mean that they assumed some responsibility for investigation, unless the plaintiff alleges some very specific circumstance demonstrating that the military somehow assumed such a responsibility. That has not been pleaded in this case and it is not sufficient to simply join the Ministry of Defence as a defendant and in a general way include them in the particulars of negligence and misfeasance alleged against the police. The statement of claim simply makes out no case whatsoever against the Ministry of Defence, either in negligence or misfeasance, and the pleading must therefore be struck out entirely so far as the second named defendant is concerned.

[21] I turn then to the second limb of the defendants' application, namely that even if the police could be shown to arguably owe a duty of care in negligence such a duty would not extend to psychiatric injury, in the circumstances of this case. I refer back to paragraph [8] above and remind myself of the particulars of personal injuries which for the sake of convenience I repeat: "The evidence now in the possession of the plaintiff following the report by the Historic Enquiries Team has caused her significant psychological upset and distress as it confirms her suspicions about the circumstances of her husband's death…" The plaintiff went on to say: "the failure to properly investigate the murder has exacerbated the Plaintiff's feelings of bereavement; the failed investigation has made her feel vulnerable, pessimistic, victimised and betrayed." Based on this pleading, the defendants maintain that the plaintiff has not suffered any recognisable psychiatric injury as a result of the alleged wrongdoing of the defendants, and the action should be struck out for this reason.

[22] There are two possible ways to approach this issue. Firstly, by failing to plead any recognised psychiatric injury the plaintiff has failed to disclose a reasonable cause of action. In that case the issue is decided by reference to the pleadings only. Secondly, strike out is sought not on the basis of a failure in the pleadings to disclose a reasonable cause of action, but rather because no actionable loss or injury has been sustained, in which case the court can have regard to the medical evidence. In either approach the court must consider the relevant legal principles which arise from a line of cases including Hinz v Berry [1970] 2 QB 40, in which Lord Denning said:

> *"In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant."*

The same approach was followed by Lord bridge in McLoughlin v O'Brien [1983] 1 A.C. 413 who at page 431 observed: "…the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness."

[23] Under the first approach, in the particulars of personal injuries the plaintiff refers to "significant psychological upset" which appears to me to be too wide to constitute a recognisable psychiatric injury, whilst "exacerbation" of the Plaintiff's "feelings of bereavement" or the assertion that the failed investigation made her feel vulnerable, pessimistic, victimised and betrayed, appear to be precisely the sort of complaints which, whilst very human and understandable, are precisely the sort of complaints in respect of which Lord Denning and Lord Bridge have held there can be no claim. If we then adopt the second approach and look to the evidence in the medical reports we find that Dr Harbinson, the plaintiff's expert, concluded:

"The Evidence gathered by the [HET] has confirmed her suspicions about the circumstances of her husband's death and occasioned her significant distress. It is difficult, given the passage of time, some 42 years ago, to quantify the impact of the failure to investigate the murder. There can be little doubt it has exacerbated her bereavement, made her feel undervalued and rendered her vulnerable. She continues to feel pessimistic, victimised and betrayed…"

As the particulars of personal injuries appear to have been taken directly from this conclusion the same comments apply, and indeed the defendants' expert Dr Chada specifically concluded that the plaintiff had not suffered any recognisable psychiatric injury and observed that Dr Harbinson had not diagnosed one. Therefore, whatever approach we adopt, either purely by reference to the pleadings, or on considering the evidence of the medical reports, the plaintiff has not demonstrated that she has suffered a recognised psychiatric injury.

[24] In Page v Smith [1995] 2 All ER 644 the House of Lords focussed on the distinction in claims for psychiatric injury between primary and secondary victims. Lord Lloyd explained the concept in these terms:

"The factual distinction between primary and secondary victims of an accident is obvious and of long-standing. It was recognised by Lord Russell of Killowen in Bourhill v Young [1943] A.C. 92, when he pointed out that Mrs. Bourhill was not physically involved in the collision. In Alcock's case [1992] 1 A.C. 310 Lord Keith of Kinkel said, at p. 396, that in the type of case which was then before the House, injury by psychiatric illness 'is a secondary sort of injury brought about by the infliction of physical injury, or the risk of physical injury, upon another person.' In the same case, Lord Oliver of Aylmerton said, at p. 407, of cases in which damages are claimed for nervous shock:

> *'Broadly they divide into two categories, that is to say, those cases in which the injured plaintiff was involved, either mediately, or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others.'*

Later in the same speech, at pp. 410-411, he referred to those who are involved in an accident as the primary victims, and to those who are not directly involved, but who suffer from what they see or hear, as the secondary victims. This is, in my opinion, the most convenient and appropriate terminology." (at 663)

Applying this analysis to the present case, the plaintiff was not present to witness the murder of her husband and was under no threat to herself. She does not claim in respect of the murder, either on her own behalf or on behalf of the estate, but in relation to the flawed investigation which followed. It is difficult to fit that scenario into either of the categories envisaged by Lord Lloyd. He refers to Alcock v Chief Constable South Yorkshire Police [1991] 4 All ER 907, and it is worthwhile to look at that case again.

[25] The leading authority on primary and secondary victims is Alcock v Chief Constable South Yorkshire Police, a case arising out of the Hillsborough Football Stadium disaster. The facts are all too well known but in brief and referring to the headnote they may be summarised as follows. Shortly before the commencement of a major football match at the Sheffield stadium the police responsible for crowd control at the match allowed an excessively large number of intending spectators into a section of the ground which was already full, with the result that 95 spectators were crushed to death and over 400 injured. Scenes from the ground were broadcast live on television from time to time during the course of the disaster and were broadcast later on television as news items. News of the disaster was also broadcast over the radio. However, in accordance with television broadcasting guidelines none of the television broadcasts depicted suffering or dying of recognisable individuals. Sixteen persons, some of whom were at the match but not in the area where the disaster occurred, and all of whom were relatives, or in one case the fiancé, of persons who were in that area, brought actions against the chief constable of the force responsible for crowd control the match claiming damages for nervous shock resulting in psychiatric illness alleged to have been caused by seeing or hearing news of the disaster. In the case of thirteen of the plaintiffs their relatives and friends were killed,

in the case of two of the plaintiffs their relatives and friends were injured and in the case of one plaintiff the relative escaped unhurt. The chief constable admitted liability in negligence in respect of those persons who were killed and injured in the disaster but denied that he owed any duty of care to these plaintiffs. The question whether, assuming that each plaintiff had suffered nervous shock causing psychiatric illness as a result of the experiences inflicted on them by the disaster, they were entitled in law to recover damages for nervous shock against the defendant was tried as a preliminary issue. The judge found in favour of ten out of the plaintiffs and against six of them. The defendant appealed in respect of nine of the successful plaintiffs and the six unsuccessful plaintiffs cross-appealed. The Court of Appeal allowed the appeals and dismissed the cross-appeals, holding that none of the plaintiffs was entitled to recover damages for nervous shock. Ten of the plaintiffs appealed to the House of Lords, contending that the only test for establishing liability for shock-induced psychiatric illness was whether such illness was reasonably foreseeable.

[25] The House of Lords held that a person who sustained nervous shock which caused psychiatric illness as a result of apprehending the infliction of physical injury or the risk thereof to another person could only recover damages from the person whose negligent act caused the physical injury or the risk to the primary victim if he satisfied both the test of reasonable foreseeability that he would be affected by psychiatric illness as a result of the consequences of the accident because of his close relationship of love and affection with the primary victim and the test of proximity in relationship to the tortfeasor in terms of physical and temporal connection between the plaintiff and the accident. Accordingly, the plaintiff could only recover if (i) his relationship to the primary victim was sufficiently close that it was reasonably foreseeable that he might sustain nervous shock if he apprehended that the primary victim had been or might be injured, (ii) his proximity to the accident in which the primary victim was involved or its immediate aftermath was sufficiently close both in time and space and (iii) he suffered nervous shock through seeing or hearing the accident or its immediate aftermath. Conversely, persons who suffered psychiatric illness not caused by sudden nervous shock through seeing or hearing the accident

or its immediate aftermath or who suffered nervous shock caused by being informed of the accident by a third party did not satisfy the tests of reasonable foreseeability and proximity to enable them to recover and, given the television broadcasting guidelines, persons such as the plaintiffs who saw the events of a disaster on television could not be considered to have suffered nervous shock induced by sight or hearing of the event since they were not in proximity to the events and would not have suffered shock in the sense of a sudden assault on the nervous system. It followed that none of the appellants was entitled to succeed because either they were not at the match but had seen the disaster on television or heard radio broadcasts or their relationship to the victim had not been shown to be sufficiently close to enable them to recover.

[26] Lord Ackner reviewed the case law and formulated the principles derived therefrom at pages 916 -918.

> *"In Hay (or Bourhill) v Young [1942] 2 All ER 396 at 402, [1943] AC 92 at 103 Lord Macmillan said:'In the case of mental shock … there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of the legal liability. 'It is now generally accepted that an analysis of the reported cases of nervous shock establishes that it is a type of claim in a category of its own. Shock is no longer a variant of physical injury but a separate kind of damage. Whatever may be the pattern of the future development of the law in relation to this cause of action, the following propositions illustrate that the application simpliciter of the reasonable foreseeability test is, today, far from being operative.*
>
> *(1) Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as from the experience of having to cope with the deprivation consequent upon the death of a loved one, attracts no damages. Brennan J in Jaensch's case (1984) 54 ALR 417 at 429 gave as examples: the spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result, but who, nevertheless, goes without compensation; a*

parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result also has no claim against the tortfeasor liable to the child.

(2) Even where the nervous shock and the subsequent psychiatric illness caused by it could both have been reasonably foreseen, it has been generally accepted that damages for merely being informed of, or reading, or hearing about the accident are not recoverable. In Bourhill v Young [1942] 2 All ER 396 at 402, [1943] AC 92 at 103 Lord Macmillan only recognised the action lying where the injury by shock was sustained 'through the medium of the eye or the ear without direct contact'. Certainly Brennan J in his judgment inJaensch's case 54 ALR 417 at 430 recognised that 'A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential'. That seems also to have been the view of Bankes LJ in Hambrook v Stokes Bros [1925] 1 KB 141 at 152, [1924] All ER Rep 110 at 117. I agree with my noble and learned friend Lord Keith of Kinkel that the validity of each of the recent decisions at first instance of Hevican v Ruane [1991] 3 All ER 65 andRavenscroft v Rederiaktiebolaget Transatlantic [1991] 3 All ER 73 is open to serious doubt.

(3) Mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury, is not a basis for a claim for damages. To fill this gap in the law a very limited category of relatives are given a statutory right by the Administration of Justice Act 1982, s 3, inserting a new s 1A into the Fatal Accidents Act 1976 to bring an action claiming damages for bereavement.

(4) As yet there is no authority establishing that there is liability on the part of the injured person, his or her estate, for mere phsychiatric injury which was sustained by another by reason of shock, as a result of a self-inflicted death, injury or peril of the negligent person, in circumstances where the risk of such psychiatric injury was reasonably foreseeable. On the basis that there must be a limit at some reasonable point to the extent of the duty of care owed to third parties which rests upon everyone in all his actions. Lord Robertson, the Lord Ordinary, in his judgment in Bourhill's case 1941 SC 395 at 399, did not view with favour the suggestion that a negligent window-cleaner who loses his grip and falls from a height, impaling himself on spiked railings, would be liable for the shock-induced psychiatric illness occasioned to a

pregnant woman looking out of the window of a house situated on the opposite side of the street.

(5) 'Shock', in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.

I do not find it surprising that in this particular area of the tort of negligence, the reasonable foreseeability test is not given a free rein. As Lord Reid said in McKew v Holland & Hannen & Cubitts (Scotland) Ltd [1969] 3 All ER 1621 at 1623: 'A defender is not liable for the consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee.' Deane J pertinently observed in Jaensch's case (1984) 54 ALR 417 at 443: 'Reasonable foreseeability on its own indicates no more than that such a duty of care will exist if, and to the extent that, it is not precluded or modified by some applicable overriding requirement or limitation. It is to do little more than to state a truism to say that the essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonable foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence.'

Although it is a vital step towards the establishment of liability, the satisfaction of the test of reasonable foreseeability does not, in my judgment, ipso facto satisfy Lord Atkin's well-known neighbourhood principle enunciated in M'Alister (or Donoghue) v Stevenson [1932] AC 562 at 580, [1932] All ER Rep 1 at 11. For him to have been reasonably in contemplation by a defendant he must be:

'… so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

The requirement contained in the words 'so closely and directly affected … that' constitutes a control upon the test of reasonable foreseeability of injury. Lord Atkin was at pains to stress that the formulation of a duty of care, merely in the general terms of reasonable foreseeability, would be too wide unless it were 'limited by the

notion of proximity' which was embodied in the restriction of the duty of care to one's neighbour' (see [1932] AC 562 at 580–582, [1932] All ER Rep 1 at 11–12).
The three elements Because 'shock' in its nature is capable of affecting such a wide range of persons, Lord Wilberforce in McLoughlin v O'Brian [1982] 2 All ER 298 at 304, [1983] 1 AC 410 at 422concluded that there was a real need for the law to place some limitation upon the extent of admissible claims and in this context he considered that there were three elements inherent in any claim. It is common ground that such elements do exist and are required to be considered in connection with all these claims. The fundamental difference in approach is that on behalf of the
[1991] 4 All ER 907 at 918 plaintiffs it is contended that the consideration of these three elements is merely part of the process of deciding whether, as a matter of fact, the reasonable foreseeability test has been satisfied. On behalf of the chief constable it is contended that these elements operate as a control or limitation on the mere application of the reasonable foreseeability test. They introduce the requirement of 'proximity' as conditioning the duty of care."

The three elements are:

(1) the class of persons whose claims should be recognised; (2) the proximity of such persons to the accident – in time and space; (3) the means by which the shock has been caused."

[27] In this case the plaintiff claims damages for what we might call a psychiatric reaction, not to the killing itself, but the way it was investigated. I cannot see how this could fit within the principles set out by Lord Ackner. Three of the principles in particular present difficulties for this plaintiff's claim. The first is the requirement that injury must be caused by shock and not for other reasons such as dealing with the repercussions of a loved one's death. The second is that damages are not recoverable for the impact of the claimant being informed of, or reading, or hearing about the death. The fifth principle defines shock as the "…the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system." In this case, on the basis of her own

pleading and medical evidence, whatever way one approaches it, the plaintiff has not suffered nervous shock as a result of a sudden appreciation of flaws in the investigative process, which would not of course of itself constitute a horrifying event. Rather she has suffered an understandable distress at the way the investigation was handled, in a way which seems to reflect the very words used in the fifth principle: "accumulation over a period of time of more gradual assaults on the nervous system." I think that when the principles are applied to the facts of the present case, the conclusion that the plaintiff's claim does not satisfy the tests set by those principles for establishing a claim in negligence is inevitable, and for this reason the action in negligence must be struck out for this reason also. However, that leaves the action in misfeasance which I have not ordered to be struck out on the first limb of the defendants' application, namely lack of any duty of care. Misfeasance in public office is not covered by any of the authorities dealing with nervous shock or recognisable psychiatric injury. The plaintiff's counsel is correct when he says that there is no authority which requires an injury caused by misfeasance in public office to be a recognised psychiatric injury, and the facts of this case demonstrate why that should be the case. In misfeasance there will rarely be a single horrifying event causing shock but rather where misfeasance is proven, a more gradual realisation of what has happened. The nature of the tort is very different in that respect from negligence. The plaintiff's claim for misfeasance in public office cannot therefore be struck out at this stage.

[28] In conclusion therefore, the plaintiff's cause of action in negligence against the police is struck out: (a) because there is no duty of care and (b) because the plaintiff has not suffered a recognisable psychiatric injury in a way which could entitle her to damages. The plaintiff's cause of action in misfeasance in public office against the police is not struck out on either ground, for the reasons given. The plaintiff's causes of action in both negligence and misfeasance in public office against the Ministry of Defence are struck out because on the facts pleaded no reasonable cause of action in either tort is made out against the Ministry of Defence.