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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Laurence Rush
On his own account and
As personal representative of
Elizabeth Imelda Rush [deceased]

Plaintiff;

and

The Chief Constable of the Police Service of Northern Ireland
(formerly known as the Royal Ulster Constabulary)

and

The Secretary of State for Northern Ireland

Defendants.

Master Bell

INTRODUCTION

[1] On 15 August 1998 a bomb planted by the Real IRA exploded in Main Street, Omagh killing 29 men, women and children and two unborn babies. Mrs Elizabeth Rush, the plaintiff's wife, was one of those who died. In this action Laurence Rush sues the Chief Constable of the Police Service of Northern Ireland and the Secretary of State for Northern Ireland in connection with the murder of Mrs Rush. In a Writ of Summons issued on 17 July 202 the plaintiff's claim is for damages:

(i) Under the Law Reform Miscellaneous Provisions (Northern Ireland) Act 1937 by reason of the negligence, misfeasance in public office, and breach of statutory duty of the defendants, their agents and servants in or about their failures in the apprehension, detection and pre-emptive arrest of members of a criminal terrorist conspiracy, namely the "Real IRA" who planted the bomb which killed Mrs Rush;

(ii) Under the Fatal Accidents Order Northern Ireland 1977 for loss and damage sustained by the plaintiff and dependants of Mrs Rush;

(iii) Under section 7 of the Human Rights Act 1998, for a declaration that there was a failure by both defendants to take all such reasonable steps and measures to protect the life of Mrs Rush and in respect of the failure by the first defendant to fully and properly investigate her murder.

[2] A Statement of Claim was served by the plaintiff on 21 January 2004.

[3] On 16 May 2008 the defendants issued a summons seeking an order pursuant to Order 18 Rule 19, striking out the Statement of Claim on the ground that it disclosed no reasonable cause of action.

[4] Following initial submissions from counsel I granted leave to the plaintiff to amend his Statement of Claim so as to include, *inter alia*, allegations concerning the bombers' mobile phone communications. I also granted leave to the defendants to amend their Summons so as to include a ground that the claim was frivolous and vexatious. An amended (but undated) Statement of Claim and an amended Summons were subsequently filed. The amended Summons was grounded by an affidavit from Mr Murray of the Crown Solicitor's Office. The application now being made on behalf of the defendants seeks to have the Statement of Claim struck out on the basis that it discloses no reasonable cause of action and, or alternatively, on the basis that it is frivolous or vexatious. The question underlying the application is, if the police are alerted to a threat to life and take no action to prevent the carrying out of that threat, may a victim obtain compensation in the civil courts and, if so, in what circumstances?

[5] The plaintiff was represented at the hearings before me by Mr Coyle and the defendants by Mr McEvoy. I am indebted to both counsel for their written and oral submissions.

BREACH OF ARTICLE 2 OF THE CONVENTION

[6] The first matter which I will address is an aspect of the application on which the parties are agreed.

[7] On behalf of the defendants Mr McEvoy submitted that, because of the date of Mrs Rush's death, no breach of Article 2 of the European Convention on Human Rights had occurred. As authority for this proposition he offered the decision in *Re McKerr* [2004] 2 All ER 409. In that case their Lordships held that before 2 October 2000 there could not have been any breach of a human rights provision in domestic law because the Human Rights Act 1998 had not come into force. The distinction between the rights arising under the Convention and the rights created by the 1998 Act had to be borne in mind. The former existed before the enactment of the 1998 Act and they continue to exist, but they were not part of United Kingdom law because the Convention did not form part of that law.

[8] On behalf of the plaintiff, Mr Coyle conceded that this argument was correct in law and that he could not resist that part of the defendant's application.

[9] I therefore grant that aspect of the application and strike out that element of the Statement of Claim which concerns an alleged breach of Article 2 of the Convention.

THE LAW : POLICE AND A DUTY OF CARE

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

[11] The most favoured test of liability is the three-fold test laid down by the House of Lords in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, by which it must be shown that :

(i) the harm to *B* was a reasonably foreseeable consequence of what *A* did or failed to do,
(ii) that the relationship of *A* and *B* was one of sufficient proximity, and

(iii) that in all the circumstances it is fair, just and reasonable to impose a duty of care on *A* towards *B*.

[12] The question which is raised by this application is whether a police service, in the course of carrying out its functions of investigating, controlling and preventing the incidence of crime, owes a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty. The principles to be applied flow from a series of decisions made by the House of Lords : *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Metropolitan Police Commissioner* [2005] 1 WLR 1495; and *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police* (2008) 3 WLR 593. Mr Coyle accepted on behalf of the plaintiff that, in the light of this series of decisions, the circumstances in which an individual may successfully sue the police for negligence will be rare, given that a duty of care will be imposed upon the police only in very limited circumstances. The plaintiff's claim is nevertheless that the defendants were liable in tort in respect of Mrs Rush's death for failing to act upon information received regarding the planting of the bomb in Omagh and for failing to give adequate warnings and implement sufficient and adequate evacuation procedures.

Hill

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

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

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

> negligence, to anyone who suffers such injury by reason of breach of that duty."

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

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

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

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

> "In my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. In *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 193, I expressed the view that the category of cases where the second stage of Lord Wilberforce's two stage test in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752 might fall to be applied was a limited one, one example of that category being *Rondel v. Worsley* [1969] 1 A.C. 191. Application of that second stage is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending

towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure - for example that a police officer negligently tripped and fell while pursuing a burglar - others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell L.J., in his judgment in the Court of Appeal [1988] Q.B. 60, 76 in the present case, was right to take the view that the police were immune from an action

> of this kind on grounds similar to those which in *Rondel v. Worsley* [1969] 1 A.C. 191 were held to render a barrister immune from actions for negligence in his conduct of proceedings in court. My Lords, for these reasons I would dismiss the appeal."

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

Brooks

[19] The second notable decision in the line of authorities is *Brooks v Metropolitan Police Commissioner*. The plaintiff was a friend of Stephen Lawrence and was present when Stephen Lawrence was murdered in a racist attack. The plaintiff also was abused and attacked and was deeply traumatised by his experience. He was dealt with by the police in a way that was subsequently the subject of severe criticism in an enquiry into the matters arising from Stephen Lawrence's death. The plaintiff then brought an action against the Commissioner of Police and a number of named police officers in which he claimed damages *inter alia* for negligence. His pleaded case was that whilst the attackers remained at large he was frightened for his own safety, not least because he lived in the same locality. At first instance, the judge struck out the action against five of the named officers and the Commissioner of Police. On appeal, the Court of Appeal allowed the plaintiff's appeal in relation to his claim in negligence against the Commissioner of Police in respect of the three duties of care that he alleged had been owed to him; those were specified to be a duty to take reasonable steps to assess whether he was a victim of crime and, if so, to accord him reasonably appropriate protection, support, assistance and treatment; a duty to take reasonable steps to afford him the protection, assistance and support commonly afforded to a key eye witness to a serious crime of violence and a duty to afford reasonable weight to the account that he had given of events and to act on it accordingly. In the House of Lords their Lordships re-affirmed that as a matter of public policy the police generally owed no duty of care to victims or witnesses in respect of their activities when investigating suspected crimes; they held further that since the duties of care alleged by the plaintiff had been inextricably bound up with the investigation of a crime the claim based on those duties should be struck out.

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

> "Since the decision in *Hill* there have been developments which affect the reasoning of that decision in part. In *Hill* the House relied on the barrister's immunity enunciated in

Rondel v Worsley [1969] 1 AC 191, [1967] 3 All ER 993 That immunity no longer exists: *Arthur J S Hall & Co (A Firm) v Simons* [2002] 1 AC 615, [2000] 3 All ER 673. More fundamentally since the decision of the European Court of Human Rights in *Z and others v United Kingdom* 34 EHRR 97, para 100, it would be best for the principle in *Hill* to be reformulated in terms of the absence of a duty of care rather than a blanket immunity.

With hindsight not every observation in *Hill* can now be supported. Lord Keith of Kinkel observed at p 63 that "From time to time [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it": Nowadays, a more sceptical approach to the carrying out of all public functions is necessary."

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

"But the core principle of *Hill* has remained unchallenged in our domestic jurisprudence and in European jurisprudence for many years. If a case such as the Yorkshire Ripper case, which was before the House in *Hill*, arose for decision today I have no doubt that it would be decided in the same way. It is course desirable that police officers should treat victims and witnesses properly and with respect … but to convert that ethical value into general legal duties of care on the police towards victim and witnesses would be going too far. The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence. … A retreat from the principle in *Hill* would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public function in the interests of the community fearlessly and with dispatch, would be impeded. It would, as was recognised in *Hill*, be bound to lead to an unduly defensive approach in combating crime.

> (31) It is true, of course, that the application of the *Hill* principle will sometimes leave citizens who are entitled to feel aggrieved by negligent conduct of the police, without private law remedy for psychiatric harm. But domestic legal policy and the Human Rights Act 1998, sometimes compel this result."

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

[23] Lord Nicholls said:

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

[24] Lord Steyn agreed:

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

Van Colle and Smith

[25] The most recent House of Lords decision in the line of authorities is *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police*.

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

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

[28] Since Mr Coyle and Mr McEvoy have agreed that, because of the date of Mrs Rush's death, no breach of Article 2 had occurred and no claim under the Human Rights Act 1998 can be sustained, the reasoning of their Lordships in *Van Colle* is of no relevance to this case. In the appeal in *Smith*, however, their Lordships had important observations in relation to common law claims against the police such as that brought by Mr Rush.

[29] The facts in *Smith* are important in respect of the degree of knowledge the police had of the threat. Smith and Gareth Jeffrey lived together as partners. On 21 December 2000 Jeffrey assaulted Smith, after Smith had asked for a few days' break from their relationship. The assault was reported to the police, who arrested Jeffrey and detained him overnight. No prosecution followed. After a time apart, during which Smith moved to Brighton, Jeffrey renewed contact and stayed with Smith on about two occasions in December 2002. Jeffrey wanted to resume their relationship. Smith did not. From January 2003 onwards Jeffrey sent Smith a stream of violent, abusive and threatening telephone, text and internet messages, including death threats. There were sometimes 10 to 15 text messages in a single day. During February 2003 alone there were some 130 text messages. Some of these messages were very explicit: 'U are dead'; 'look out for yourself psycho is coming'; 'I am looking to kill you and no compromises'; 'I was in the Bulldog last night with a carving knife. It's a shame I missed you.' On 24 February 2003 Smith contacted Brighton police by dialling 999. He reported his earlier relationship with Jeffrey, the previous history of violence and Jeffrey's recent threats to kill him. Two officers were assigned to the case and they visited Smith that afternoon. He again reported his previous relationship with Jeffrey (including the earlier violence) and the threats. The officers declined to look at the messages (which Smith offered to show them), made no entry in their notebooks, took no statement from Smith and completed no crime form. They told Smith that it would be necessary to trace the calls and that he should attend at Brighton Police Station to fill in the appropriate forms. Later that evening Smith received several more messages from Jeffrey threatening to kill him. Smith filled in the forms the next day. The information he provided to

the police included Jeffrey's home address and reference to the death threats he had received. Smith then went to London, since Jeffrey had said he was coming to Brighton. He contacted the Brighton Police from London to check on progress, but was told it would take four weeks for the calls to be traced. The messages continued. One read "I'm close to u now and I am gonna track u down and I'm not gonna stop until I've driven this knife into u repeatedly". Smith went to Saville Row Police Station to report his concern. An officer there contacted the Brighton Police and advised Smith that the case was being dealt with from Brighton and he should speak to an inspector there when he returned home. On return to Brighton on 2 March 2003 Smith told an inspector that he thought his life was in danger and asked about the progress of the investigation. He offered to show the inspector the threatening messages he had received, but the inspector declined to look at them and made no note of the meeting. He told Smith the investigation was progressing well, and he should call 999 if he was concerned about his safety in the interim. On 10 March 2003 Smith replied to a communication he had received from the police that day, giving the telephone numbers from which Jeffrey had been sending the text messages. He received a further text message from Jeffrey saying "Revenge will be mine". Later on 10 March 2003 Jeffrey attacked Smith at his home with a claw hammer. Smith suffered three fractures of the skull and associated brain damage. Jeffrey was arrested at his home address. He was charged and in March 2004 was subsequently convicted of making threats to kill and causing grievous bodily harm with intent. He was sentenced to ten years' imprisonment with an extended period on licence.

[30] Smith issued proceedings against the Chief Constable in the County Court on 2 March 2006. Following service of a defence the Chief Constable applied to strike out the claim as disclosing no reasonable grounds for bringing it or, alternatively, for summary judgment against Smith on the ground that he had no real prospect of succeeding on the claim. The application was successful and the claim was struck out. Smith appealed. The Court of Appeal allowed his appeal and remitted the case to the county court for hearing. The Chief Constable then appealed the decision of the Court of Appeal to the House of Lords where he was successful and the claim was struck out.

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

> "The point that [Lord Steyn] was making in *Brooks*'s case, in support of the core principle in *Hill*'s case, was that the principle had been enunciated in the interests of the whole community. Replacing it with a legal principle which focuses on the facts of each case would amount, in Lord

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

[32] Lord Carswell observed:

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

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

> "In *Brooks*'s case Lord Nicholls of Birkenhead said, in para [6], that there might be exceptional cases where the circumstances compelled the conclusion that the absence of

> a remedy sounding in damages would be an affront to the principles that underlie the common law. I respect his approach, which is to guard against the dangers of never saying never. But in my opinion the present case does not fall into that category. That is why, if a civil remedy is to be provided, there needs to be a more fundamental departure from the core principle. I would resist this, in the interests of the wider community."

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

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

[35] Similarly Lord Carswell allowed for exceptions:

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

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

> "In what circumstances ought the police to be subject to civil liability at common law for injuries deliberately inflicted by third parties ie for crimes of violence? When, in short, should they in this type of case be held to owe a duty of care to the victim? That there are such cases is not in doubt. *Swinney v Chief Constable of Northumbria Police Force* [1996] 3 All ER 449, [1997] QB 464 provides one example, the facts there suggesting that the police had

> assumed responsibility for the complainant informer's safety (although his claim in the event failed at trial). Another example (again on the basis of assumption of responsibility) is *Costello v Chief Constable of the Northumbria Police* [1999] 1 All ER 550, [1999] ICR 752 where a police inspector was found liable to a woman police constable for injuries inflicted on her by a woman prisoner in a police station cell."

[37] He went on to say:

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

[38] In essence, therefore, the principles which emerge from *Hill*, *Brooks* and *Smith* are:

(i) In general, an individual cannot be successful in negligence against the police in respect of operational and investigative matters; and

(ii) A police service does not, however, have a blanket immunity and so there may be cases which fall outside this core principle.

THE LAW: THE TEST FOR STRIKING OUT

[39] Order 18 Rule 19 of the Rules of the Court of Judicature provides :

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

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

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

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

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

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

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

[44] The application by the defendants requires to be considered in two parts. Firstly, I must consider whether the plaintiff's claim ought to be struck out on the ground that it discloses no reasonable cause of action. In considering this part of the application, the effect of Order 18 Rule 19(2) is that the parties are not entitled to offer any evidence, whether oral or on affidavit. Secondly, I must consider whether the plaintiff's claim ought to be struck out on the ground that it frivolous and vexatious. In considering this part of the application, the parties are entitled to offer evidence on affidavit. It was presumably because of this distinction that the defendants applied for leave to amend the summons and, following the grant of leave, filed an affidavit sworn by Mr Murray.

CONCLUSION

Ground 1: No Reasonable Cause Of Action

[45] In *O'Dwyer* the Court of Appeal stated that, in considering the application to strike out a statement of claim, all the averments in the statement of claim must be assumed to be true.

[46] A reasonable cause of action means a cause of action with some chance of success. Mr Coyle acknowledged that the plaintiff had a difficult case to make, given the existing case law on the central issue, but described his position as weak but not hopeless.

[47] This application turns on whether the action is likely to fall outside the core principle in *Hill*. Their Lordships have described in various ways the cases which potentially fall outside the core principle:

> (i) "exceptional cases where the circumstances compel the conclusion that the absence of a remedy sounding in damages would be an affront to the principles which underlie the common law" (Lord Nicholls in *Brooks*);
>
> (ii) "cases of outrageous negligence" (Lord Steyn in *Brooks*)

(iii) Cases where there are "special circumstances" (Lord Phillips in *Smith*);

(iv) Lord Brown in *Smith* was reluctant to view a case as exceptional simply because it might be "exceptionally meritorious on its own particular facts", which he did not consider a sufficient basis upon which to exclude a whole class of cases from the *Hill* principle. His Lordship identified one particular category of case which fell outside the core principle, namely instances where the police had assumed responsibility for an individual and gave examples where the police had assumed responsibility for an informer's safety for a woman prisoner in a police station cell.

(v) Lord Carswell in *Smith* preferred to leave the ambit of such exceptions undefined.

[48] How then is a conclusion to be reached as to whether a case is an exception to the core principle in *Hill*? Is it by reference to a class of case or to a set of facts which deviate from the norm?

[49] Mr Coyle's initial approach was to seek to identify special circumstances which were present in the case as pleaded. Mr McEvoy, echoing Lord Brown's comments in *Smith*, argued that the facts of a particular case were not sufficient to identify a case as exceptional. On being given an opportunity to identify a class of cases which the present case fell into Mr Coyle offered the following wording to describe a class of persons to whom a duty was owed:

> "Those persons likely to be affected by an outrageous terrorist plan to carry out mass murder in circumstances where there is apparently credible evidence in relation to the target and there are the means available to prevent the outrage."

However on reflection, Mr Coyle abandoned this approach, declining to identify a particular class of case, preferring instead to identify a number of factors which he submitted elevated the case outside the realm of the core principle. In his second skeleton argument Mr Coyle therefore adopted this alternative approach by setting out six factors which he considered led to the case being exceptional and hence outside the core principle in *Hill*.

(i) The extent to which the crime was unique and quite distinct

[50] Mr Coyle argued that the Omagh bombing was a unique and distinct crime. There is an obvious difficulty with this argument as it is phrased: no

two crimes are identical and therefore each and every crime is unique and quite distinct. The plaintiff is, of course, trying to articulate a different point, namely that, by virtue of the number of fatalities, the momentous size of the Omagh atrocity makes it an exceptional case. In reply, Mr McEvoy submitted that there had been many cases with multiple fatalities and instanced as an example the Narrow Water bombing in which 19 persons died.

[51] Mr McEvoy further submitted that pointing to the magnitude of the crime was not sufficient for a plaintiff who sought to be successful in resisting an application to strike out the Statement of Claim. He referred me to Lord Hope's observations in paragraph 75 of *Van Colle*:

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

[52] Crucially, however, I must bear in mind that the plaintiff's action is not a representative action brought in respect of all the deaths and injuries which occurred as a result of the Omagh bomb. His action is taken on his own behalf and on behalf of the estate of his late wife and that is the case set out in his Statement of Claim. The magnitude of the crime as experienced generally by the people of Northern Ireland (though not in terms of legal liability) and, more particularly, by the other individual victims of that day in Omagh, therefore falls outside the action as brought by the plaintiff.

(ii) The information which the defendants had as to the threat

[53] The Statement of Claim alleges *inter alia* the following facts:

> (i) The Real IRA had been infiltrated by Kevin Fulton who fed information to the security forces about the threat of a bomb attack in Omagh;

(ii) GCHQ had contemporaneous intercepts of the bombers mobile phone communications on 15 August 1998;
(iii) GCHQ had actual knowledge of the route of the bombers and their target being Omagh; and
(iv) This information was not acted upon either to apprehend the bombers or to put into operation a comprehensive evacuation strategy of Omagh.

[54] It is important to emphasise that, for the purpose of this part of the application, the facts set out in the plaintiff's Statement of Claim must be assumed to be true and I can take no account of the affidavit of Mr Murray and the exhibited report of Sir Peter Gibson.

[55] I was directed by counsel for the plaintiff to the speech of Lord Bingham in *Smith* which proposed a liability principle. According to this principle a police officer who is furnished with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to the life or safety of a member of the public owes a duty to that person to take reasonable steps to prevent it being executed. This view was, however, a dissenting one and does not form part of the decision of their Lordships in *Smith*. I may not, and do not, therefore apply it.

[56] Mr McEvoy submitted that, in *Smith*, the police had far clearer information and yet the action was not held to be an exception to the core principle in *Hill*. This argument is sound. I have referred earlier to the detailed facts in *Smith*. In *Smith* the police knew that a particular, identified individual had made a stream of death threats to another identified individual. They had even been provided with his home address. In the case that the plaintiff brings, the facts alleged in the Statement of Claim do not go as far as alleging that the police knew the actual identities of the Omagh bombers. The information which the defendants are alleged to have had in relation to the bomb and the bombers is not such as to distinguish it from *Smith*. Indeed the information in the possession of the police was arguably sparser.

(iii) The ease and ability with experience to have prevented the crime

[57] This factor is not addressed within the Statement of Claim but the thrust of this argument was that the defendants had had sufficient experience with bomb attacks in Northern Ireland either to have taken appropriate action to have prevented the bomb reaching Omagh or to have successfully evacuated the plaintiff's wife and hence to have prevented her death. As there is no material within the Statement of Claim dealing with this factor, I have not taken it into account.

(iv) That is was a terrorist atrocity of monumental proportions

[58] In response to this factor Mr McEvoy argued that bombs had been utilised before by terrorist organisations in Northern Ireland and it was sadly likely that they would be utilised again. He argued that it was not correct to allow the number of people who might die in an incident to reclassify that incident as one which fell outside the core principle in *Hill*.

[59] I conclude that this factor is a re-statement of the first factor using slightly different language.

(v) The involvement of a state agent in the crime or information pertaining to its commission

[60] The facts alleged in the Statement of Claim are that the Real IRA had been infiltrated by Kevin Fulton who fed information to the security forces about the threat of a bomb attack in Omagh. I consider that this is not an exceptional factor. The history of policing in both Northern Ireland and the Western world has shown the importance of infiltrating organised crime groups and thereby obtaining information and evidence about their activities. So commonplace are the use of state agents to infiltrate organised crime groups that Parliament has passed the Regulation of Investigatory Powers Act 2000 which provides for and regulates the use of "covert human intelligence sources". The involvement of a state agent in the crime with a view to gathering information pertaining to its commission cannot therefore be regarded as exceptional.

[61] Mr McEvoy submitted that the Chief Constable must have the freedom to decide what information, intelligence and evidence should be deemed capable of being relied upon. This was at the core of his investigative function. I agree with this submission.

(vi) The extraordinary legal sequelae

[62] Mr Coyle argued that another factor which prompted a conclusion that this case is exceptional is that it was followed by extraordinary legal *sequelae*. Following an unsuccessful prosecution there was a civil action taken by or on behalf of a number of victims against those who were the perpetrators of the bombing. The outcome of that civil action is reported in *Breslin and Others v McKenna and Others* [2009] NIQB 50. The 12 plaintiffs in that action claimed damages including aggravated and exemplary damages for personal injuries sustained by them as a result of the explosion of the Omagh bomb. It was certainly an unprecedented legal action. However I conclude that legal proceedings which occurred after the explosion are not a factor which I should take into account in deciding whether the police had a duty of care to the victims at the time of the explosion. To do otherwise would be to invite potential plaintiffs to launch civil proceedings after the event as a means of supporting an argument that a duty of care was owed at the time of the event.

[63] Having considered the factors offered by the plaintiff in support of his argument, I conclude that none of the factors which have been referred to is capable of classifying this action for negligence as exceptional and thereby sufficient to cause the proceedings to fall outside the core principle in *Hill*. On the arguments before me I am therefore driven to the conclusion that the defendant must be successful on that part of his application that there is no reasonable cause of action.

Ground 2: Frivolous or Vexatious

[64] Mr McEvoy was sensitive, given the attendance of the plaintiff at the hearing of this application, to emphasise that the words "frivolous and vexatious" had a distinct legal meaning and should not be interpreted in the way they might be used in ordinary speech. The Supreme Court Practice, 1999 Edition ("the White Book") at para 18/19/16 defines "frivolous and vexatious" as including cases which are "obviously unsustainable" and states that the pleading must be such that to put it forward would be an abuse of process of the court.

[65] The starting point in respect of this aspect of the defendant's application is the analysis carried out above in respect of whether the plaintiff has a reasonable cause of action. However, there are a number of differences between the first aspect of the application and the second.

[66] In considering this part of the application, the parties are entitled to offer evidence on affidavit. No affidavit evidence was offered on behalf of the plaintiff. An affidavit by Mr Murray was offered on behalf of the defendant. He deposes that the amendments to the Statement of Claim and the allegations that the defendants had foreknowledge of what was to take place by means of contemporaneous interception of the bombers' communications as they made their way to Omagh are based solely on a Panorama programme broadcast on BBC television on 15 September 2008. He further deposes that, following the Panorama programme, Sir Peter Gibson, being the Intelligence Services Commissioner, was invited to review any intercepted intelligence material available to the security and intelligence agencies in relation to the Omagh bombing and how this intelligence was shared. On 16 January 2009 Sir Peter Gibson published a summary of his review and this was exhibited to Mr Murray's affidavit.

[67] Mr Murray also deposes that, after reviewing all the documentation provided by the various agencies and the PSNI Sir Peter Gibson concluded:

> (i) there was nothing to suggest either that a bomb attack was going to take place on 15 August 1998 or that the town of Omagh was to be the target of any bomb attack;

(ii) any intelligence derived from interception as might have existed could not have prevented the bombing;

(iii) there was no information on or before 15 August 1998 that could reasonably indicate, by reference to the bombing of Banbridge on 1 August 1998, that a further bombing attack was about to take place; and

(iv) the portrayal in the Panorama programme of the tracking on a screen of the movement of two cars, a scout car and a car carrying a bomb, had no correspondence whatever with what intercepting agencies were able to do, or did do, on 15 August 1998. Sir Peter Gibson was satisfied that in 1998 it was neither possible to track mobile phones in real time nor to visualise the location and movement of mobile phones in the way that was shown in the panorama programme. It is clear therefore that no intelligence of security agency or law enforcement agency did see, or could have seen, what was suggested in the Panorama programme.

[68] Mr Murray therefore deposes that, in the circumstances, the allegations in the amended Statement of Claim are without merit as they had been discredited by the comprehensive review carried out by Sir Peter Gibson.

[69] An important matter which arises in respect of this aspect of the defendant's application is the effect of sections 17 and 18 of the Regulation of Investigatory Powers Act 2000 (RIPA). I invited both counsel to make further written submissions in respect of any impact which section 17 of RIPA might have in relation to this action. Mr McEvoy on behalf of the defendant subsequently did so. Mr Coyle on behalf of the plaintiff chose not to.

[70] RIPA provides for the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance and the use of covert human intelligence sources. An outline of the statutory scheme is as follows. Section 1 of the Act creates the offence of unlawful interception.

> "(1) It shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of—
>
> (a) …
>
> (b) a public telecommunication system."

Section 5 provides for a warrant regime.

"(1) Subject to the following provisions of this Chapter, the Secretary of State may issue a warrant authorising or requiring the person to whom it is addressed, by any such conduct as may be described in the warrant, to secure any one or more of the following—

(a) the interception in the course of their transmission by means of a postal service or telecommunication system of the communications described in the warrant;

(b) the making, in accordance with an international mutual assistance agreement, of a request for the provision of such assistance in connection with, or in the form of, an interception of communications as may be so described;

(c) the provision, in accordance with an international mutual assistance agreement, to the competent authorities of a country or territory outside the United Kingdom of any such assistance in connection with, or in the form of, an interception of communications as may be so described;

(d) the disclosure, in such manner as may be so described, of intercepted material obtained by any interception authorised or required by the warrant, and of related communications data.

(2) The Secretary of State shall not issue an interception warrant unless he believes—

(a) that the warrant is necessary on grounds falling within subsection (3); and

(b) that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct.

(3) Subject to the following provisions of this section, a warrant is necessary on grounds falling within this subsection if it is necessary—

(a) in the interests of national security;

(b) for the purpose of preventing or detecting serious crime;

(c) for the purpose of safeguarding the economic well-being of the United Kingdom; or

(d) for the purpose, in circumstances appearing to the Secretary of State to be equivalent to those in which

he would issue a warrant by virtue of paragraph (b), of giving effect to the provisions of any international mutual assistance agreement."

Section 17 excludes the product of both warranted and unwarranted interceptions from legal proceedings.

"17 Exclusion of matters from legal proceedings

(1) Subject to section 18, no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings which (in any manner)—

(a) discloses, in circumstances from which its origin in anything falling within subsection (2) may be inferred, any of the contents of an intercepted communication or any related communications data; or

(b) tends (apart from any such disclosure) to suggest that anything falling within subsection (2) has or may have occurred or be going to occur.

(2) The following fall within this subsection—

(a) conduct by a person falling within subsection (3) that was or would be an offence under section 1(1) or (2) of this Act or under section 1 of the [1985 c. 56.] Interception of Communications Act 1985;

(b) a breach by the Secretary of State of his duty under section 1(4) of this Act;

(c) the issue of an interception warrant or of a warrant under the [1985 c. 56.] Interception of Communications Act 1985;

(d) the making of an application by any person for an interception warrant, or for a warrant under that Act;

(e) the imposition of any requirement on any person to provide assistance with giving effect to an interception warrant.

(3) The persons referred to in subsection (2)(a) are—

(a) any person to whom a warrant under this Chapter may be addressed;

(b) any person holding office under the Crown;

(c) any member of the staff of the Serious Organised Crime Agency;

(d) any member of the Scottish Crime and Drug Enforcement Agency;

(e) any person employed by or for the purposes of a police force;

(f) any person providing a postal service or employed for the purposes of any business of providing such a service; and

(g) any person providing a public telecommunications service or employed for the purposes of any business of providing such a service."

Section 18 provides for a limited number of exceptions and in particular provides for disclosure to a relevant judge in certain circumstances.

"18… (7) Nothing in section 17(1) shall prohibit any such disclosure of any information that continues to be available for disclosure as is confined to—

(a) a disclosure to a person conducting a criminal prosecution for the purpose only of enabling that person to determine what is required of him by his duty to secure the fairness of the prosecution…

(b) a disclosure to a relevant judge in a case in which that judge has ordered the disclosure to be made to him alone; or

(c) a disclosure to the panel of an inquiry held under the Inquiries Act 2005 in the course of which the panel has ordered the disclosure to be made to the panel alone.

(8) A relevant judge shall not order a disclosure under subsection (7)(b) except where he is satisfied that the exceptional circumstances of the case make the disclosure essential in the interests of justice.

(8A) …

(9) Subject to subsection (10), where in any criminal proceedings—

(a) a relevant judge does order a disclosure under subsection (7)(b), and

(b) in consequence of that disclosure he is of the opinion that there are exceptional circumstances requiring him to do so,

he may direct the person conducting the prosecution to make for the purposes of the proceedings any such admission of fact as that judge thinks essential in the interests of justice.

(10) Nothing in any direction under subsection (9) shall authorise or require anything to be done in contravention of section 17(1)."

[71] The first question that therefore arises is whether it would breach sections 17 and 18 of RIPA to admit the evidence in Mr Murray's affidavit regarding the exhibited summary report of Sir Peter Gibson.

[72] Mr McEvoy in his written submission argues that the summary report is admissible in the format in which it has been produced and does not breach section 17 of RIPA. Mr McEvoy notes that paragraphs 2 and 3 of the summary report stated:

> "In preparing my Report, which I presented to the Prime Minister on 18 December 2008, I drew on a range of very sensitive and highly classified material made available to me by those agencies involved in the production of intercept intelligence. Some of this material is subject to important legal constraints on its handling and disclosure….
>
> Accordingly I would not recommend that my report be published in the form in which it was presented on 18 December as to do so would damage national security and would be in breach of legal restrictions on disclosure of material relating to security and intelligence. However, very serious and damaging allegations have been made publicly, as a result of which expectations may have been raised among the families of the victims of the bombing. In the circumstances the Government has decided that it is necessary and lawful to publish the following summary of my review, justified by the exceptional and serious matters raised and the weight of public interest. This summary contains as much information as it is possible to publish in light of the restrictions on disclosure mentioned above and the general requirement of national security to maintain secrecy in relation to the work of the security and intelligence agencies."

[73] Mr McEvoy submits that his argument is supported by the fact that the summary report was referred to and relied upon by Morgan J, as he then was, in the unsuccessful application by the plaintiffs in *Breslin and Others v McKenna and Others (Ruling No 15)* [2009] NIQB 19.

[74] I have concluded that the summary report may be admitted in evidence in this application. On the face of it the report draws on "a range of very sensitive and highly classified material" *some of which* "is subject to important legal constraints on its handling and disclosure". The admission of Sir Peter Gibson' conclusions as set out in his published report does not, in my view, breach section 17 of RIPA as it does not have any of the effects set out in the section.

[75] The second question is whether sections 17 and 18 of RIPA will have an impact on the plaintiff's case so as to make it more difficult to sustain. As stated, the allegations of fact made in the plaintiff's Statement of Claim were that:

a. The Real IRA had been infiltrated by Kevin Fulton who fed information to the security forces about the threat of a bomb attack in Omagh.
b. GCHQ had contemporaneous intercepts of the bombers mobile phone communications on 15 August 1998;
c. GCHQ had actual knowledge of the route of the bombers and their target being Omagh;
d. This information was not acted upon either to apprehend the bombers or to put into operation a comprehensive evacuation strategy of Omagh.

[76] While it is not for the court to determine how a plaintiff will run his case if it is permitted to proceed to a full hearing, section 17 of RIPA does seem to make the allegations pleaded in the plaintiff's amended Statement of Claim difficult, if not impossible, to prove.

[77] In *Breslin and Others v McKenna and Others (Ruling No 15)* the plaintiffs in those proceedings sought an order for disclosure directed to the Security Service, GCHQ, the PSNI and the Police Ombudsman for Northern Ireland as to whether they had in their possession, custody or power any audio recording or transcript of any recording or any notes made from such a transcript made by GCHQ of mobile telephone calls made on 30 April 1998, 1 August 1998 and 15 August 1998 referred to in the BBC Panorama programme broadcast on 15 April 2008 and production of any such material. The plaintiffs were unsuccessful in that application for the reasons set out in the decision of Morgan J. I have not been informed by the plaintiff in this case as to whether an application for disclosure of the intercept material is

intended. It would appear, however, in the light of the decision in *Breslin and Others v McKenna and Others (Ruling No 15)* that such an application would, at best, be difficult. As Morgan J observed in his ruling Parliament has made a public interest decision that the warranted system of interception and everything connected with it should be prohibited from disclosure in legal proceedings in order to preserve secrecy associated with it in the interests of national security. Importantly, however, even were an application to be successful, the plaintiff then faces the section 17 prohibition on adducing evidence, asking questions, making assertions or doing anything else which discloses any of the contents of an intercepted communication or any related communications data.

[78] I must conclude therefore that, given the statutory regime under RIPA, it is unlikely that the plaintiff will gain access to the intercept material and, even if he were able to gain access to it, it would not be admissible in the action. Furthermore, the material which is in the public domain, the summary report by Sir Peter Gibson, significantly undermines the allegations of fact made by the plaintiff.

[79] Applying the test articulated in *O'Dwyer*, there will be cases where a plaintiff must make a difficult argument or even an extremely difficult argument in order to succeed. In such cases the court will afford him the opportunity to be heard. In cases wherever the plaintiff is seeking to make an impossible argument, the court will protect the defendant and its own resources from wasteful expenditure.

[80] The overriding objective contained in Order 1 Rule 1A of the Rules of the Court of Judicature requires the court to take into account not just the interests of the parties before the court but also the interests of other litigants and the overall administration of justice including the potential for the costs, expense and time to escalate out of all proportion. In my view such an approach is consistent with the proportionate observation of the Article 6 rights of individuals.

[81] Mr Coyle argued that the case had to be "hopeless" for it to be struck out. He submitted that the plaintiff's case was not a hopeless case. It may be a case which could be described as "weak" or one about which one "had doubts" but it was not hopeless. Taking account of the law in relation to negligence actions against the police in respect of operational and investigative matters, the facts which the plaintiff is seeking to prove, and the impact of sections 17 and 18 of RIPA, I have reached the conclusion that the plaintiff's action does not enjoy that potential prospect of success which it is necessary for it to have in order for it to be allowed to continue. It is obviously unsustainable.

[82] On the arguments before me I am therefore driven to the conclusion that the defendant must also be successful on the second ground of his application.

[83] A tort is a civil wrong. Applying the relevant House of Lords decisions, those who committed the civil wrong against Mr Rush, as a result of which he tragically lost his wife, were the members of the Real IRA who organised and carried out the Omagh bombing. It was not the police or the Secretary of State. I must therefore grant the defendant's application and strike out the plaintiff's action.