Neutral Citation No: [2020] NIQB 30 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE11231** *Delivered:* **30/03/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

EILEEN O'HALLORAN

Plaintiff;

-v-

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

First Defendant;

-and-

THE MINISTRY OF DEFENCE

Second Defendant.

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KEEGAN J

The Plaintiff's claim

[1] The plaintiff's claim is for damages (including aggravated and exemplary damages) for personal injuries, loss and damage sustained by herself by reason of the alleged misfeasance in public office and/or assault by the first and second defendants with respect to the psychiatric injuries suffered by the plaintiff following the attack on "the Hole in the Wall Club, Belfast" on 7 April 1975. The plaintiff's claim is brought against the first defendant as a successor of the Royal Ulster Constabulary, the police force with responsibility for Northern Ireland at all material times. The plaintiff alleges that the first defendant is vicariously liable for the acts and omissions of its servants, agents or employees who were involved, the plaintiff alleges, in the attack. The plaintiff also alleges that the second defendant is vicariously liable for the acts and omissions of its servants, agents or employees involved in the act. The plaintiff alleges that at all material times, servants, agents or

employees of the first defendant working for Special Branch, a department of the first defendant were running agents and/or informants in Northern Ireland. Also at all materials time, servants, agents or employees of unknown units/departments of the second defendant were running agents and/or informants in Northern Ireland.

Factual Background

[2] The plaintiff's case is as follows. On 7 April 1975 the plaintiff's husband Martin O'Halloran was waiting for a bus at the corner of Oldpark Road and Ballynure Street in Belfast opposite the Hole in the Wall Club. An Austin 1100 pulled up at the corner driven by an unknown man and a known man Trevor King who was sitting in the front passenger seat. The vehicle stopped and the driver got out and ran away while King exited and walked to the boot where he lit a fuse of a bomb which was in the boot. King then ran away from the vehicle and the bomb exploded. The plaintiff's husband was injured in the bombing and was taken to the Mater Hospital.

[3] At this time the plaintiff was a patient in the Mater Hospital in relation to an unrelated matter. The plaintiff states that she overheard a person say that a man she identified as her husband had been badly injured in an explosion. This information traumatised the plaintiff. The plaintiff states that on an unknown date shortly after the bombing the plaintiff's husband was interviewed at the Mater Hospital by two unknown officers of the first defendant from CID at Tennent Street RUC station. The officers asked the plaintiff's husband if he had identified any of the perpetrators of the bombing. The plaintiff's husband identified Trevor King to the officers. The officers told the plaintiff's husband that they would return. However, the plaintiff states that they did not return to meet the plaintiff's husband at any point and he was not contacted by any officer of the first defendant. The plaintiff states that at the material time Trevor King and/or unknown other individuals involved in the planning and/or implementation of the attack on the Hole in the Wall Club were servants, agents or employees of the first defendant and/or the second defendant. The plaintiff alleges battery by the first defendant. The plaintiff states that she was a secondary victim of an assault on her husband who was assaulted by battery when he suffered injuries when King, a servant, agent or employee of the first defendant and/or another unknown servant, agent or employee of the first defendant detonated a car bomb outside the Hole in the Wall Club on 7 April 1975.

[4] Additionally the plaintiff alleges that the first defendant's officers committed the tort of misfeasance in public office. The plaintiff invites the court to infer that the first defendant knew that, or was reckless about whether, by reason of the conduct of their servants, agents of employees they would more than likely cause injury to the plaintiff by King, a servant, agent or employee of the first defendant, being involved in the planning and/or detonation of a car bomb outside the Hole in the Wall Club. The plaintiff alleges that King, a servant, agent or employee of the first defendant and/or other unknown servants, agents or employees of the first defendant failed to take all reasonable steps to prevent a real and immediate risk to the plaintiff's

husband by (i) not dissuading the group from conducting the attack, (ii) not informing a servant, agent or employee of the first or second defendant to warn them of the pending attack and/or failing to respond to a warning of the attack. The plaintiff makes the same case against the second defendant.

[5] The plaintiff suffered a post-traumatic stress disorder and recurrent depressive disorder and relies on a report of Dr Brian Mangan dated 12 October 2017 as the foundation for a claim for her psychiatric injury.

[6] The plaintiff had initially claimed in negligence against the first and second defendant however that claim has now been removed. The plaintiff also initiated a claim under the Human Rights Act 1998 but in the course of these proceedings that claim has also been removed. This case therefore involves consideration of whether or not the plaintiff has a valid claim pursuant to the torts of battery and misfeasance in public office.

The decision of Master Mc Corry

[7] This case comes to this High Court on the basis of an appeal from a decision of Master McCorry. Master McCorry heard an application which was brought by the defendants under Order 58, Rule 1 of the Rules of the Court of Judicature (Northern Ireland) 1980 whereby the defendants applied to strike out the plaintiff's claim pursuant to Order 18, Rule 19(1) (a) and Order 18 Rule 19(1)(b) and/or pursuant to the inherent jurisdiction of the High Court.

[8] Master McCorry delivered a decision on 10 May 2019 rejecting the application to strike out the claim. He provided a comprehensive written judgment which I have been referred to. In that he states that by summons dated 29 October 2018 the defendants applied for orders striking out the plaintiff's claim on the grounds that:

(i) The pleadings failed to disclose a reasonable cause of action pursuant to Order 18, Rule 19(1)(a).

(ii) The proceedings are scandalous, frivolous or vexatious.

(iii) That the action should be struck out pursuant to the jurisdiction of the High Court.

[9] The Master refers to Order 18, Rule 19 which provides as follows:

> "(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 in any pleading or in 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)."

[10] The Master refers to the case of *Rush v Police Service of Northern Ireland and Secretary of State for Northern Ireland* [2011] NIQB 28 wherein the principles in relation to an application of this nature are set out by Gillen J drawing on a previous case of *O'Dwyer v Chief Constable of the RUC* [1997] NI 403. The Master relies upon paragraph [8]-[10] of that case as follows:

> "[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."

> "[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 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'.
>
> [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."

[11] The Master also referred to the case of In *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham also said, *inter alia*:

> "This means 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 properly be persuaded that no matter what (within the bounds of the pleading) the actual facts of the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

[12] In his careful judgment the Master recorded his findings at paragraph [25] as follows:

> "I have significant misgivings as to the case pleaded by the plaintiff herein, and would go so far as to

> consider that the case is indeed a weak case. However, that is not a proper basis for striking it out at this stage. The question is whether or not it is arguable and with the reservations I have expressed I am compelled to conclude that at this stage it is arguable. I therefore dismiss the defendant's application of costs to plaintiff."

[13] I am very grateful to counsel in this case who presented the arguments with conspicuous clarity and economy. Mr Nick Scott BL appeared on behalf of the plaintiff/respondent and Mr Scoffield QC appeared on behalf of the defendant/appellant with Mr Warnock BL.

[14] At the core of this case is the question of whether or not the plaintiff as a secondary victim has any prospect of success in a claim for psychiatric injury when control mechanisms apply following from established law in this area which restricts recovery. Essentially the plaintiff's argument is that the claim should not be struck out given that the established case law relates to negligence and this claim is brought on the basis of different intentional torts namely battery (an aspect of trespass to the person) and misfeasance in public office. There was no dispute that the plaintiff has sustained a recognisable psychiatric injury on the basis on Dr Mangan's report. The defendants adopt an approach of neither confirm nor deny in relation to Trevor King however information about him is in the public domain. He is now a deceased person. Of course there are other points in this case which remain to be determined most obviously the question of limitation, but that is not the role of this court which is deciding whether or not to strike out the claim. Before looking at the merits of this argument I will summarise the law in this area as follows.

The relevant case law

[15] The first case in time that I was referred to is a case of *McLoughlin v O'Brian* which is reported at [1983] 1 AC 410. The events in this case occurred in 1973 when the plaintiff's husband and three children were involved in a road accident with a lorry. The plaintiff was at home, two miles away and she was told of events two hours later by a neighbour who took her to the hospital to see her family. There she learned that her youngest daughter had been killed and she saw that her husband and other children were severely injured. She suffered an impact which was described as nervous shock. The House of Lords determined that the claim should succeed in negligence because the nervous shock assumed to have been suffered by the plaintiff had been the reasonably foreseeable result of the injuries to her family caused by the defendant's negligence; and that policy considerations should not inhibit a decision in her favour. In this decision Lord Wilberforce reiterates the point that a claim for damages in respect of nervous shock is legitimate as a stand-alone cause of action. Five principles are set out in his ruling which I summarise as follows:

(i) While damages cannot, at common law, be awarded for grief and sorrow, a claim for damages for nervous shock caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself.

(ii) A plaintiff may recover damages for nervous shock brought on by the injury caused not to him or herself but to a near relative or by the fear of such an injury.

(iii) Subject to the next paragraph there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot to the plaintiff.

(iv) An exception from or an extension of the latter case has been made where the plaintiff does not see or hear the incident but comes upon its immediate aftermath.

(v) A remedy on account of nervous shock has been given to a man who came upon a serious accident involving numerous people immediately thereafter and acted as a rescuer of those involved.

[16] Lord Wilberforce also said this:

> "Throughout these developments, as can be seen, the courts have proceeded in the traditional manner of the common law from case to case, upon a basis of logical necessity."

[17] The court then considered what is described as the policy arguments. Lord Wilberforce explains that the policy arguments against a wider extension can be stated under four heads. First, it may be said that such extension may lead to a proliferation of claims and possibly fraudulent claims, to the establishment of an industry of lawyers and psychiatrists who will formulate a claim for nervous shock damages. Secondly, it may be claimed that an extension of liability would be unfair to defendants, as imposing damages out of proportion to the negligent conduct complained of. Thirdly, to extend liability beyond the most direct and plain cases would greatly increase evidential re difficulties and tend to lengthy litigation. Fourthly, it may also be said that an extension of the scope of liability ought only to be made to the legislature, after careful research. Hence Lord Wilberforce introduced a policy restriction upon recovery in this area.

[18] This issue was taken up again in the case of *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310. The *Alcock* case relates to the tragic events at the Hillsborough Stadium in Sheffield. At the time of that case 95 people had been

killed at the stadium as a result of crushing injuries. A number of plaintiffs took a case in relation to nervous shock for having watched the events on television. In the *McLoughlin* case Lord Wilberforce had mentioned the prospect of simultaneous television broadcasts being the basis of a claim. That was the focus in *Alcock*. It was decided that liability could not be established on the basis of proximity arguments. At page 396 of the judgment Lord Keith, having referred to reasonable foreseeability and the secondary sort of injury involved, states that he is of the opinion that in addition to reasonable foreseeability liability for injury in the particular form of psychiatric illness must also depend upon a requisite relationship of proximity between the claimant and the party said to owe the duty.

[19] At page 402 of the judgment Lord Ackner refers to the three elements as follows:

(i) The class of persons whose claim should be recognised deals with the issue of relationship.

(ii) The proximity of the plaintiff to the accident refers to the fact the proximity must be close both in time and space. Direct and immediate sight or hearing of the accident is not required. It is reasonably foreseeable that injury by shock can be caused to a plaintiff, not only through the sight or hearing of the event, but of its immediate aftermath.

(iii) The means by which the shock is caused.

[20] Lord Ackner also said that although the television pictures certainly gave rise to feelings of the deepest anxiety and distress, in the circumstances of this case the simultaneously television broadcast of what occurred cannot be equated with the "sight or hearing of the event or its immediate aftermath".

[21] The next case I was referred to is that of *Page v Smith* which is reported at [1996] AC 155. This is a case from 1995 where the plaintiff was driving along and involved in a collision with a car driven by the defendant. The plaintiff suffered no physical injury but three hours after the accident he felt exhausted and this continued and as a result of the accident his underlying condition which had been described as a chronic fatigue syndrome became chronic and permanent. The House of Lords determined that once it was established that the defendant was under a duty of care to avoid causing personal injury to the plaintiff, it mattered not whether the injury in fact sustained was physical, psychiatric or both; that, applying that test, it is enough to ask whether the defendant should have reasonably foreseen that the plaintiff might suffer personal injury as a result of the defendant's negligence, so as to bring him within the ambit of the defendant's duty of care; that it was unnecessary to ask as a separate question, whether the defendant should reasonably for foreseen injury as to shock.

[22] In *Page and Smith* at page 197 of the judgment Lord Lloyd states in conclusion that the following propositions can be supported:

(i) In cases involving nervous shock, it is essential to distinguish between the primary victim and secondary victims.

(ii) In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants. Thus, the defendant will not normally be liable unless psychiatric injury is foreseeable in a person of normal fortitude. These control mechanisms have no place where the plaintiff is the primary victim.

(iii) In claims by secondary victims, it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all. Hindsight, however, has no part to play where the plaintiff is a primary victim.

(iv) Subject to the above qualifications, the approach in all cases should be the same, namely, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric. If the answer is yes, then the duty of care is established, even though physical injury does not in fact occur. There is no justification for regarding physical and psychiatric injuries as different kinds of damage.

(v) A defendant who is under a duty of care to the plaintiff, whether as primary or secretary victim, is not liable for damages for nervous shock unless the shock results in some recognised psychiatric illness. It is no answer that the plaintiff was predisposed to psychiatric illness. Nor is it relevant that the illness takes a rare form or is of unusual severity. The defendant must take his victim as he finds him.

[23] The next case of *White v Chief Constable of the South Yorkshire Police* [1999] 2 AC 455 also involves the events of the Hillsborough Stadium whereby by this stage there were 96 deaths. This was a distinct claim brought by the police who had attended at the scene. Again these claims did not succeed, notwithstanding admitted negligence for allowing overcrowding in two spectator pens. The Law Lords deal with the issue of policy considerations and psychiatric harm.

[24] At page 493 of his speech Lord Steyn refers to his impression that there are at least four distinctive features of claims for psychiatric harm which in combination may account for the differential treatment. Firstly, there is the complexity of drawing the line between acute grief and psychiatric harm. Secondly, there is the effect of the expansion of the availability of compensation on potential claimants who have witnessed gruesome events. He also said the third factor is important.

The abolition or a relaxation of the special rules governing the recovery of damages for psychiatric harm would greatly increase the class of persons who can recover damages in tort. Fourthly, the imposition of liability for pure psychiatric harm in a wide range of situations may result in a burden of liability and defendants which may be disproportionate to tortuous conduct involving perhaps momentary lapses of concentration e.g. in a motor car accident.

[25] Lord Steyn also said this:

> "The wide scope of potential liability for pure psychiatric harm is not only illustrated by the rather unique events of Hillsborough but also of accidents involving trains, coaches and buses and the everyday occurrence of serious collisions of vehicles all of which may result in gruesome scenes. In such cases there may be many claims for psychiatric harm by those who have witnessed and in some cases assisted at the scenes of the tragic events. Moreover, protagonists have very wide theories of liability for pure psychiatric loss have suggested that workplace claims loom large as the next growth area of psychiatric injury law, the paradigm case being no doubt workman who witnessed a tragic accident to an employee."

[26] I was provided with the case of *Hambrook v Stokes Brothers* [1925] 1 KB 141 which was a fatal accident claim where there was the view that recovery should occur on the assumption that the shock was caused by what the woman saw with her own eyes as distinguished from what she was told by bystanders. A further case from the Court of Appeal was also drawn upon by counsel namely *Wainwright v Home Office* [2001] EWCA Civ 2081. This involved a claim brought by a mother and son who were strip searched for drugs at a prison. The son who was mentally impaired suffered a post-traumatic stress disorder and a claim was brought on the basis of the tort of intentional infliction of harm. The significance of this case becomes apparent from the judgment particularly that of Lord Hoffmann in the House of Lords at paragraph [44] where he said:

> "I do not resile from the proposition that the policy considerations which limit the heads of recoverable damage and negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a principle you have to be very careful about what you mean by intend. In *Wilkinson v Downton* Wright J

> wanted to water down the concept of intention as much as possible. He clearly thought, as the Court of Appeal did afterwards in *Janvier v Sweeney* [1919] 2 KB 316, that the plaintiff should succeed whether the conduct of the defendant was intentional and/or negligent. But the Victorian Com RS 13 App Cas 222 prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go."

In his judgment Lord Scott refers to the fact that this conduct did not cross the line into misfeasance in public office.

[27] The case of *Essa v Laing Limited* [2004] EWCA Civ 2 also deals with the statutory tort of direct unlawful discrimination. However the issue of an intentional tort is perhaps most clearly dealt with in the case of *O v Rhodes* which is a case decided by the Supreme Court and reported at [2015] UKSC 32. This was a case where the claimant who was 11 years old and psychologically vulnerable mounted a claim in relation to a book that his father wanted to publish which described his experience of sexual abuse as a boy at school and its effects. The mother of the child claimed that this would cause injury to the claimant.

[28] In summary, the Supreme Court decided that:

(i) The tort of intentionally causing physical or psychological harm (or wilfully infringing the right to personal safety) required words or conduct directed towards the claimant for which there was no justification or reasonable excuse; that the father's book, although dedicated to the claimant, was intended for a wide audience and the question of justification had to be considered accordingly, not in relation to the claimant in isolation; that, taking into account the legitimate interest of the father in telling his story to the world at large in the way in which he wished to tell it and the corresponding interest of the public in hearing his story, there was every justification for the publication of the book; and that, accordingly, there was no arguable case that the publication of the book would constitute the requisite conduct element of the tort.

(ii) That the required mental element for the tort was an intention to cause physical harm or severe mental or emotional distress, mere recklessness would not suffice.

[29] The other core authority that has been referred to is the case of *Robinson v West Yorkshire Chief Constable.* This is again a decision of the Supreme Court reported at [2018] UKSC 4. This case involved the liability of police in the circumstance where two police officers attempted to arrest a suspected drug dealer on a weekday

in a busy shopping street and an elderly lady was caught up in this and fell to the ground. She claimed negligence against the police. On appeal the claimant succeeded on the basis that the police generally owed a duty of care in accordance with the ordinary principles of the law of negligence unless statute of the common law provided otherwise, and there was no general rule that they were not under such a duty of care when discharging their functions of preventing and investigating crime; that, applying those principles, the police might be under a duty of care to protect and individual from a danger of injury which they themselves have created, but, in the absence of circumstances such as an assumption of responsibility, they were not normally under such a duty where they had not created the danger of injury, including injury caused by the acts of third parties.

[30] It was held that the chain of events which had resulted in the claimant being injured had been initiated by the attempt to arrest the suspect and that chain of causation had not been interrupted by the suspects voluntarily decision to resist arrest, which had resulted in his knocking into the claimant; that the act of the suspect was the very act which the police were under a duty to guard against; that, accordingly, the claimant had been injured as a result of being exposed to the very danger from the police officers had a duty to protect her; that, on the evidence, the judge had been entitled to find that there had been negligence on the part of the police and those findings should be restored and that therefore the defendant was liable to the claimant, for damages to be assessed.

The arguments of the parties

[31] On behalf of the plaintiff Mr Scott supplemented his helpful written submissions by summarising the main points as follows:

(i) It is clear from the case law that in a secondary victim case where there is psychiatric injury there is a control mechanism in relation to negligence. He argued that this did not apply or at least that the matter was left open in the case of intentional torts.

(ii) Mr Scott submitted that a distinction should exist because intentional torts require a more culpable mental state compared to negligence.

(iii) In relation to what intentional torts require Mr Scott made the point that beyond the comments of Lord Woolf in *Wainwright* the other comments in relation to a secondary victim in an intentional tort stem from *Essa v Laing Limited* which was in relation to a Race Relations Act case where Pill LJ stated that foreseeability is not a pre-requisite.

(iv) In concluding his submissions, Mr Scott said there must be a different test required for assessing whether secondary victims of intentional torts can bring a claim for psychiatric injury compared to secondary victims of negligence.

[32] On behalf of the defendants Mr Scoffield made the following arguments in reply:

(i) Firstly, he queried whether the plaintiff was in fact a secondary victim in the true sense in this case. He relied in particular on the dicta in *French v Chief Constable of Sussex* [2006] EWCA Civ 312 which states:

> "There is no general duty to exercise reasonable care not to cause psychiatric injury as a result of causing the death or injury of someone ('the primary victim') which is witnessed by the claimant."

> "As an exception to proposition 3 there is a duty of care not to cause psychiatric injury to a claimant as a result of causing the death or injury of someone loved by the claimant in circumstances where the claimant sees or hears the accident or its aftermath."

(ii) Accordingly Mr Scoffield argued that the plaintiff was not close in time and space to the incident or its immediate aftermath. She was in the hospital some distance away and her illness was not sustained by the sudden appreciation of sight or sound of the horrifying event but as a result of overhearing a conversation.

(iii) Mr Scoffield also contended that the control mechanisms which flow from *Alcock* appear to exist as a result of the requirement of foreseeability and because of policy restrictions on claims by secondary victims. He said that each of the key limitations on the extent of tortious liability, established in the public interest and by longstanding authority should apply equally to the claims made in this case of battery and misfeasance in public office.

(iv) Mr Scoffield particularly relied on the comments of Lord Steyn in *White v Chief Constable of the South Yorkshire Police* and argued that it is of note that Lord Steyn did not restrict his comments to negligence claims alone and appears to have been speaking more broadly in terms of tortious claims generally. Accordingly, Mr Scoffield made the case that the control mechanisms do not simply apply to negligence.

(v) Mr Scoffield also made the point that even where there is an intentional tort, there is no intentional injury to any victim such as the plaintiff. So even taking the plaintiff's case at her height, no one intended to injure her. He made the point that there is no authority in

the United Kingdom that provides that the control mechanisms and established policy considerations in this type of case do not apply to secondary victims of intentional torts and so the plaintiff's case should be struck out as the plaintiff cannot point to any authority which clearly supports the propositions that she makes.

(vi) Mr Scoffield contended that the Master's decision was finally balanced and fairly recited but that the Master should have gone further to allow this strike out application because the Master simply appeared to reach a conclusion that superior courts could develop the law in a way which draws a distinction upon which the plaintiff relies, however there was no clear legal authority directing him that way.

(vii) In conclusion Mr Scoffield argued that the plaintiff was a secondary victim who does not satisfy the now well-established proximity requirements and cannot advance an arguable cause of action.

Consideration

[33] This is an appeal from the Master and so it has been conducted by way of rehearing. That said I have the benefit of a carefully reasoned decision of the Master. I have also considered the arguments of counsel and the law in this area which has been very helpfully analysed during the hearing. A number of points are clear from the law in this area. First, in cases of nervous shock/psychiatric injury claims may be brought by secondary victims. There is no distinction between physical injury and psychiatric injury; that is clear. Also, secondary victims may claim in certain circumstances. Finally, flowing from the lead cases of *Alcock and White* it is clear that certain controls are placed on liability for the policy reasons that are set out in those cases. That remains the state of the law expressed by the highest courts in our jurisdiction.

[34] The core question in this case is whether this legal rubric applies to intentional torts. It clearly applies to negligence cases and the reason for that is based upon consideration of the duty of care and foreseeability. The answer to this case is whether or not those concepts can read across into intentional torts. Having considered this matter I do not accept that they can naturally read across because of the differences apparent in the torts at issue. Specifically, culpability is in issue and there is no requirement of foreseeability.

[35] To illustrate this I turn to the ingredients of liability in these torts as follows. First, the tort of assault and battery. This comes within trespass to the person and is regarded as a tort of intention see *Clerk and Lindsell* on Torts at chapter 15-02. This section points out that:

> "although there is a generalised principle of liability for tortious conduct (in the form of the tort of

> negligence) English law has not developed a general principle of liability for the intentional infliction of harm; rather a claimant must demonstrate that his case falls within the specific requirements of one of the particular trespass torts."

[36] The distinction is quite important I think. Also important is the fact that the defendant may be a public entity as here. In practice, these torts involving trespass to the person involve actions of public agencies rather than private individuals and as *Clerk and Lindsell* points out at chapter 15-03;

> "the consequence is that more often than not it is the defences to trespass that feature in the cases rather than the basic elements of the relevant torts."

This and the fact that trespass is actionable *per se* makes trespass to the person an important tool in the protection of civil liberties.

[37] One advantage of an action framed in trespass is that the requirement in negligence to establish that the injuries complained of are of a reasonably foreseeably nature does not apply. Thus a defendant may liable for unforeseeable damage – irrecoverable in negligence – arising from the trespass to the person see *Clerk and Lindsell* chapter 15-07. The question in this case is whether the plaintiff can meet the requirements of battery in such an indirectly consequential case as this. I have my reservations. However, as this particular strike out application is not based upon such an argument, I say no more. I am also not convinced that *Rhodes v OPO* [2015] UKSC 32 assists the plaintiff's specific claim. But again I have not heard full argument at this strike out stage.

[38] The other tort at issue here is misfeasance in public office. As *Clerk and Lindsell* says at chapter 14-120:

> "The tort of misfeasance in public office originated in the electoral corruption case of the late 17th century, was expanded in the 19th century to cover the liability of judges of inferior courts for malicious acts within their jurisdiction and has now been authoritatively defined in the speech of Lord Steyn in *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1."

[39] In *Three Rivers* Lord Steyn explained there that there were two limbs to this tort, targeted malice and untargeted malice or illegality. The rationale for this tort is that

> "in a legal system based on the rule of law executive or administrative power may be exercised only for the

> public good and not for ulterior or improper purposes".

This case will inevitably involve consideration of these issues. In *Ashley v The Chief Constable of Sussex Police* [2006] EWCA Civ 1085, Sir Anthony Clarke MR reversed a first instance decision to strike out a claim misfeasance against police. That application was based on an argument grounded on the absence of a duty but the court said that the "case and misfeasance does not depend upon a duty of care or a duty under the Convention". Rather, it depended on whether the police "knew what they were doing was unlawful or … were reckless as to whether it was lawful or not". The emphasis on this tort is upon the state of mind of the public officer, rather than the duty of care. In the case of *Akenzua v Secretary of State for Home Department* [2002] EWCA Civ 1470 proximity arguments were also advanced. There the court gave the following guide that "a claim in misfeasance postulates that the claimant can prove altogether more blameworthy conduct than a negligence action and so it is unsurprising that the law should decline to impose a further limiting requirement akin to proximity". These judicial pronouncements make clear the distinct characteristics of the tort of misfeasance in public office.

[40] Drawing all of this together, it is quite clear to me that the issue of whether or not there should be policy controls on secondary victims in intentional torts was left open in the jurisprudence thus far. The cases where this issue have been dealt with relate to negligence which differs from intentional torts in the ways I have explained. Despite Mr Scoffield's admirable efforts, I am not convinced that any of the core cases referred to purport to set a policy restriction outside of negligence which automatically applies to other intentional torts. That is not to say that this may not be the ultimate conclusion in a case such as this for very many of the reasons given in the negligence cases.

[41] The other argument which is worthy of consideration (although it did not occupy much time by way of submission) is whether or not the plaintiff actually gets over the test of being a secondary victim. The plaintiff has according to the pleadings heard from a third party that her husband had been seriously injured while she was in hospital. To my mind this argument would not succeed in a negligence claim given proximity issues. However, the question is whether the evidence is sufficient to establish a claim under the intentional torts. I consider that a matter for trial for the reasons I have previously discussed.

[42] Therefore, having considered all of the arguments in this case I am of the view that this appeal must fail. I can well understand why this application was brought given the amount of legacy litigation in this jurisdiction and a potential flood of new claims from a wide class of victims. However, I am being asked to strike out a claim. It is not enough for me to say that the case is weak and may have difficulties in succeeding. Rather, the test is as discussed in paragraphs [9]-[12] above. I adopt the Master's articulation of this which both parties accepted was correct in law. There is undoubtedly a high hurdle to be reached before a claim

would be struck out. I am in agreement with the Master that there are legal issues to be determined which militate against striking out the claim altogether at this time. In taking this course I reiterate the fact that there is an obvious impediment to a case such as this succeeding if the policy considerations that apply to negligence are adopted. The fact remains that this particular issue has not arisen in the highest courts before and the point therefore needs to be addressed. This case will provide an opportunity to clarify the law which would be of benefit in this jurisdiction.

Conclusion

[43] The appeal will be dismissed.