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Judgment: approved by the court for handing down (subject to editorial corrections)	*Delivered*: 14/05/2025

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between

JIM AULD

and

LIAM SHANNON

Plaintiffs

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

1st Defendant

and

MINISTRY OF DEFENCE

2nd Defendant

and

PETER ALEXANDER RUPERT, BARON CARRINGTON

3rd Defendant

and

ROBERT ALEXANDER LINDSAY, EARL OF CRAWFORD AND BALCARRES

4th Defendant

and

THE ESTATE OF BRIAN, BARON FAULKNER OF DOWNPATRICK (DECEASED)

5th Defendant

and

THE ESTATE OF SIR EDWARD HEATH, KG, PC, MBE (DECEASED)

6th Defendant

and

THE ESTATE OF REGINALD MAULDING, PC (DECEASED)

7th Defendant

and

THE ESTATE OF PETER ANTHONY GRAYSON, BARON RAWLINSON OF EWELL (DECEASED)

8th Defendant

and

SIR GENERAL FRANK KITSON GBD KCB MC

9th Defendant

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and Between

FRANCIS MCGUIGAN

and

LIAM DAVID RODGERS

and

BRIAN TURLEY

and

KEVIN HANNAWAY

and

PATRICK MCNALLY

Plaintiffs

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

1st Defendant

and

MINISTRY OF DEFENCE

2nd Defendant

and

THE SECURITY SERVICES

3rd Defendant

and

ROBERT ALEXANDER LINDSAY, AKA LORD BALNIEL

4th Defendant

and

THE ESTATE OF LORD PETER CARRINGTON

5th Defendant

and

THE ESTATE OF SIR BRIAN FAULKNER (DECEASED)

6th Defendant

and

THE ESTATE SIR EDWARD HEATH (DECEASED)

7th Defendant

and

THE ESTATE OF SIR REGINALD MAULDING (DECEASED)

8th Defendant

and

THE ESTATE OF SIR PETER RAWLINSON (DECEASED)

9th Defendant

Mr Brian Fee KC leading Mr Kevin Morgan (instructed by KRW Law) for Liam Shannon
Mr Patrick Lyttle KC leading Mr Mark Bassett (instructed by KRW law) for Jim Auld
Mr Hugh Southey KC leading Mr Conan Fegan (instructed by Phoenix Law) for Francis McGuigan, Liam David Rodgers, Patrick McNally and (instructed by PJ McGrory and Co Solicitors) for Kevin Hannaway
Mr Ronan Lavery KC leading Ms Niamh Horscroft (instructed by McNamee McDonald Solicitors) for Brian Turley,
Mr Paul McLaughlin KC leading Mr Ben Thompson (instructed by the Crown Solicitor) for the first and second defendants in all seven cases as well as the ninth defendants in Auld/Shannon and the proposed additional defendants in Auld/Shannon (The Secretary for Defence and the Northern Ireland Office)

MASTER HARVEY

Introduction

[1] The seven plaintiffs are part of a larger group of 14, who have become known as the "Hooded Men." They were arrested, detained and subjected to what the European Court of Human Rights held to be inhuman and degrading treatment by the security forces in the Ballykelly detention centre in August and October 1971.

This included five interrogation techniques consisting of hooding, wall standing, noise exposure, sleep deprivation and food and/or water deprivation. The plaintiffs all settled legal proceedings in the 1970's and obtained damages arising from their detention and mistreatment. The plaintiffs have now variously issued proceedings by way of writs of summons dated 12 December 2018 and 17 June 2020, seeking damages in relation to the events in question. No statements of claim have been served in any of the claims.

[2] At the hearing there was a late development in relation to the involvement of the Chief Constable of the Police Service of Northern Ireland ("PSNI") who is the first named defendant in all seven cases and has brought strike out applications along with the Ministry of Defence ("MoD"). Counsel for the Chief Constable indicated in opening remarks that his client was no longer pursuing a strike out of any the claims, meaning the only institutional defendant in these applications is the MoD.

[3] I have considered the various skeleton arguments, 13 affidavits, authorities bundle and voluminous papers in relation to these applications. I am most grateful to the parties for collating the electronic bundles and to counsel for their commendable written and oral submissions which were of great assistance.

The applications before the court

[4] There are multiple applications before the court for determination. They consist of seven strike out applications brought by the first, second and ninth defendants in the Auld/Shannon cases and the first and second defendants in the McGuigan/Rodgers/Turley/Hannaway/McNally ("McGuigan et al") cases. The applications were variously issued on 14 January 2022 and are pursuant to Order 18 rule 19 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules") and/or the inherent jurisdiction of the court on the basis the defendants argue each set of proceedings is an attempt to re-litigate the same events which were the subject of previous claims which all settled, and damages were paid. They assert the plaintiffs' claims are contrary to the principles of res judicata, issue estoppel, cause of action estoppel, the rule in *Henderson v Henderson* (1843) 3 Hare 100 and/or are otherwise an abuse of process.

[5] The plaintiffs have brought applications to amend the writs pursuant to Order 20 rule 5. In Auld/Shannon this is by way of summons dated 7 July 2021 to remove six of the defendants and add two new defendants. In the McGuigan et al cases they have applied by way of summons dated 6 March 2024 to add an additional relief, namely, to set aside any settlement terms or court order from their initial claims in the 1970's. Such relief is already pleaded in the Auld/Shannon cases.

Relevant legal principles

[6] The applicable legal principles are uncontroversial. Order 18 of the Rules, where relevant to this action, is in the following terms:

> "*Striking out pleadings and indorsements*
>
> 19.-(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).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading. "

[7] It has been held that this provision to strike out proceedings does not offend Article 6 of the European Convention on Human Rights as the right to a fair hearing does not require a plenary trial where the plaintiff clearly does not have a case to make: *McAteer* v *Lismore* [2000] NI 471. It is, however, a power used in exceptional cases as it denies the plaintiff an opportunity to have the case heard on its merits.

[8] In *O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary* [1997] NI 403 the Court of Appeal stated that a strike out was only to be used in "plain and obvious" 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." The Court of Appeal for Northern Ireland in *Magill v Chief Constable* [2022] NICA 49 affirmed the principles to be applied in strike out applications endorsing *O'Dwyer* at paragraph 7, stating:

> "(i) The summary procedure for striking out pleadings is to be invoked in plain and obvious cases only.
>
> (ii) The plaintiff's pleaded case must be unarguable or almost incontestably bad.
>
> (iii) In approaching such applications, the court should be cautious in any developing field of law…

…

(vi) So long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out…

We would add that a strike out order is a draconian remedy as it drives the plaintiff from the seat of justice, extinguishing his claim in limine."

Abuse of process - Order 18 rule 19 (1) (d)

[9] In *Ewing (Terence Patrick) v Times Newspapers Ltd* [2010] NIQB 7 Coghlin LJ, delivering the judgment of the court, at paragraph 37 stated:

> "Today it is necessary to clearly bear in mind the overriding objective contained in Order 1 rule 1A of the Rules which 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."

[10] Under the inherent jurisdiction and Order 18 rule 19(1) (d), evidence by affidavit or otherwise is admissible; the court can explore the facts fully but should do so with caution: *Mulgrew* v *O'Brien* [1953] NI 10, at 14. In *McDonald's Corp v Steel* [1995] 3 All ER 615 involving a defamation action, the Court of Appeal considered the correct approach to an application under Order 18, rule 19(d) to strike out a pleading for abuse of process and held at (623):

> "The power to strike out is a draconian remedy which is only to be employed in clear and obvious cases…it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of being proved."

[11] The lesson one draws from the authorities is that it is not for the court, at this interlocutory stage, to determine whether this is a strong or weak case. In the Northern Ireland Court of Appeal case of *Governor & Company of the Bank of Ireland and John Conway* [2024] NICA 80, the court warned of the dangers of forming conclusions at a preliminary stage, stating:

> "[18] It is not for this court in the exercise of its circumscribed function to make any judgement about any of the foregoing assertions. Rather, it suffices to recognize that the defendant's evidence at trial could include the foregoing

and, further, could be accepted by the trial judge, in whole or in part, giving rise to findings of fact in his favour which, in turn, could establish or contribute to establishing one or more of his causes of action as pleading."

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

Inherent jurisdiction

[13] In *Mulgrew v O'Brien* [1953] NI 10 at page 14 Black LJ in an application to strike out the plaintiff's statement of claim as an abuse of process, set out the exceptional nature of the jurisdiction to do so:

> "The court has an undoubted inherent jurisdiction to strike out a pleading or dismiss an action which it can see is obviously frivolous or vexations or an abuse of its process: *Reichel v. Magrath* ((1889) 14 App. Cas. 665); *Lawrance v. Norreys* ((1890) 15 App. Cas. 210). This however is a very strong course to take and the jurisdiction is one which will be exercised with the greatest care and circumspection. The theory of our law is that every subject has prima facie a right to have his action brought to trial: *Seaton v. Grant* ((1867) L.R. 2 Ch. 459, 464) per Lord Cairns; *Blair v. Crawford* ([1906] 1 I.R. 578, 586) per Palles C.B. Accordingly the court is very slow to make a summary order to stay which will have the effect of stopping the plaintiff's case in limine and of preventing it from going to trial. It will however make such an order if it is manifest that the plaintiff's case cannot possibly succeed or if it is clear that the action is an abuse of the process of the court. In exercising this inherent jurisdiction the court is not confined to what appears on the face of the pleadings."

Amendment to pleadings

[14] The plaintiffs apply pursuant to Order 20 rule 5 of the Rules to amend the writs. In *Loughran v Century Newspapers Ltd [*2014] NIQB 26 Gillen J set out the principles to be applied in amendment applications at paragraphs 35-37:

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

[15] Having set out the relevant legal principles, I will now turn to the various submissions. There are seven claims and lengthy submissions on behalf of the various parties, however, I will briefly summarise the key arguments below.

The plaintiff's submissions

[16] The plaintiffs submit that the defendants' summonses are premature causing the plaintiffs prejudice and should be dismissed. The plaintiffs all give reasons as to why estoppel does not apply in these claims and the burden rests on the defendants to demonstrate that such principles do apply. This will depend on matters such as precisely who the parties to the original settlement were, what issues were raised in the claims and how the proceedings were resolved. The plaintiffs assert that the defendants have failed to produce material regarding the settlements that they allege estop the plaintiffs from litigating these proceedings. The plaintiffs advance the argument that the defendant's inability to produce the relevant records is fatal to the defendants' application to strike out the plaintiffs' claims on the basis of res judicata.

[17] The plaintiffs all now adopt the position that the current claims are different, the causes of action are different and the matters at issue was not previously determined by a court, therefore they cannot be an abuse of process. If that is not correct, and the defendant persuades a court there is sufficient overlap or commonality between the parties in the writ and the claims as set out, to allow estoppel to apply then the plaintiffs argue such previous settlements are vulnerable to be set aside for fraud. The plaintiffs submit that they should be permitted to amend the writ of summons as sought, plead their cases for damages and set aside in a statement of claim, and, if, necessary bring evidence in support of any set aside application.

[18] The plaintiffs argue the previous proceedings did not address the alleged conspiracy and conduct of the defendants prior to the interrogation techniques being used on the men. The previous claims did not include misfeasance or conspiracy, save for Mr Shivers who is not a plaintiff and conspiracy may have been alluded to in the previous claim by Mr McGuigan. They argue these claims concern the practice and authorisation of the techniques, not the acts of interrogation themselves. The previous proceedings were exclusively settled on the basis that the proceedings sought damages for the arrest, detention, and conduct of the interrogations. Put simply, the plaintiffs assert that the previous proceedings did not involve the question as to the authorisation and decision to deploy the unlawful acts in question. They claim new documentation has come to light showing that the practice and deployment of the techniques was allegedly a joint enterprise on the part of the defendants.

[19] The plaintiffs also assert the defendants knew of the long-lasting impact that the techniques had on each of the plaintiffs and was purportedly concerned that those who had already settled their claims could have their cases reopened. The plaintiffs contend they could not have adduced such evidence in the previous proceedings through reasonable diligence as it was not known by virtue of the concealment of that material by the defendants.

Defence submissions

[20] The core argument made by the defendants is that the plaintiffs have each already brought and settled claims in relation to their detention and treatment in the 1970's. The new claims are therefore an abuse of process, and the proceedings should be struck out. The defendant states it is of note that none of the plaintiffs have prepared even a draft statement of claim, which would enable the Court to better understand the proposed claims.

[21] There have been two prior attempts to re-open the claims of mistreatment of the Hooded Men on grounds that new material has now come to light about the treatment and Ministerial knowledge of its use against them. Firstly, in *Ireland v UK* (Application 5310/71 (1978) 2 EHRR 25, the request was refused and on the issue of Ministerial knowledge, the Court noted that while the new materials shed some additional light on matters, the involvement of Ministers in authorising the use of the five techniques was not unknown to the Court in 1978 and pointed out that it had been conceded by the UK from the very outset that the use of the techniques had been authorised at a "high level." Secondly, in the case of *Re McGuigan* [2021] UKSC 55; [2022] 2 WLR 49, the applicants relied upon evidence of Ministerial authorisation to contend that an Article 2 investigative obligation had been revived and this was fresh evidence. The Supreme Court found that the new materials did not reach the requisite threshold as they shed some additional light on events, but did not advance the knowledge from the 1970s of Ministerial involvement.

[22] The defendants contend that the available evidence indicates that in most, if not all, of the prior claims, the plaintiffs made and settled a claim of unlawful conspiracy by Ministers and this was therefore likely to have been known at that time, even without reasonable diligence. This is supported by the position adopted by the UK government in the Irish state case, insofar as high level authorisation for use of the five techniques was admitted from the outset. Those proceedings commenced in December 1971.

[23] The defendant argues the new claims fall squarely within the res judicata principles, which provides an absolute defence**.** The conspiracy claim is ancillary to the original causes of action, since it relates to precisely the same damage and, in substance, simply amounts to additional joint tortfeasors.

[24] Further, the defendant submits that the only evidence available to the Court about the previous claims suggests that they involved payment of damages by police and military but no other parties as they were released. Accordingly, if there were multiple parties to the original litigation, there will be multiple parties affected by an application to set aside the settlement.

[25] If a claim to set aside continues and is successful after trial, the result is that the original proceedings revive. The original proceedings are therefore the vehicle through which the plaintiffs would seek to revive the claim for damages. The inclusion of a new claim for damages against new defendants is therefore inappropriate, premature and is an abuse. For the same reason, the Court should not permit the amendment application to include new defendants to these

proceedings, if the purpose of doing so is to facilitate a damages claim against the new defendants. The plaintiffs' evidence does not identify the parties to the original proceedings and therefore the Court is unaware of the need for amendment, in the event that set aside is permitted. In the event that the old proceedings are revived, any amendment application would be made to those proceedings, if appropriate.

The applications before the court

(i) The defendant's strike out applications

[26] The core submission at hearing, adopted by all plaintiffs is that these are new claims, against new parties for new causes of action. The nub of the claims appears to relate to the authorisation and long-lasting effects of the interrogation techniques used on the plaintiffs. I have taken into account the above submissions from the parties and carefully considered a number of factors which I will set out in greater detail below, including the pleadings, details of the previous settlements and an assessment as to whether these claims raise triable issues.

The pleadings

[27] There are no statements of claim in any of the cases as yet. In five of the claims (McGuigan et al) the plaintiffs seek:

> "Damages, including aggravated, exemplary and punitive damages, for personal injuries, including psychiatric injuries, loss and damage, sustained by him by reason of his torture, and false imprisonment, as committed against him by the Defendants and/or by reason of the Defendants misfeasance in public office and/or his negligence and/or by reason of a conspiracy between the Defendants and others to injure and/or to engage in the Plaintiff's torture, his assault and battery, the trespass to his person, his unlawful imprisonment to engage in misfeasance in public office and/or to breach the Plaintiff's rights under the European convention on Human Rights and Fundamental Freedoms, in and about the arrest and detention of the Plaintiff, his removal to Ballykelly, Co Derry, his questioning and his subjection to five techniques of sensory deprivation and other ill-treatment on/or about the 9th to 18 August 1971.
>
> And the Plaintiff claims interest on all sums found due at such rate and for such period as this Honourable Court shall deem meet pursuant to Section 33A of the Judicature (Northern Ireland Act 1978)."

As can be seen, the endorsement is widely drafted. It includes reference to conspiracy and misfeasance and the submission by counsel for these plaintiffs is that they deliberately did not include declaratory relief setting aside the original settlements as these are new causes of action. That relief is now sought and to be pleaded as an alternative remedy.

[28] In Auld/Shannon, the writs are in the following terms:

"(i) A declaration setting aside a settlement purportedly reached on behalf of the Plaintiff and the [*settlement parties*] Defendants on or about December 1974 by reason of the misrepresentation, non-disclosure, fraud and collusion of the defendants to this action.

(ii) Damages, including aggravated, exemplary and punitive damages, for personal injuries, including psychiatric injuries, loss and damage, sustained by him by reason of his torture, false imprisonment, as committed against him by the Defendants and/ or by reason of the Defendants' misfeasance in public office and/ or their negligence and/ or by reason of a conspiracy between the Defendants and others to injure and/ or to engage in the Plaintiff's torture, his assault and battery, the trespass to his person, his unlawful imprisonment, to engage in misfeasance in public office and/ or to breach the Plaintiff's rights under the European Convention on Human Rights and Fundamental Freedoms, in and about the arrest and detention of the Plaintiff, his removal to Ballykelly, Co. Derry, his questioning and his subjection to five techniques of sensory deprivation and other ill treatment, on or about 9th to 18th August 1971.

AND the Plaintiff claims interest on all sums found due pursuant to the provisions of Section 33A of the Judicature (Northern Ireland) Act 1978."

These cases include a declaration setting aside previous settlements for fraud and the other reasons stated. The settlements parties are not set out. The damages claim largely mirrors that of Auld/Shannon.

[29] It is not immediately apparent from the face of the pleadings that these claims purportedly arise from new causes of action pertaining to ministerial authorisation of interrogation techniques and the alleged long lasting psychological effects of the treatment the plaintiffs were subjected to while detained. It is plainly arguable that these are simply ancillary claims to the original causes of action with new tortfeasors added, however, that is not something which can be determined at this interlocutory stage solely on the basis of a brief endorsement on a writ of summon and is not grounds to strike the cases out at this early stage.

The previous settlements

[30] The defendants robustly contend the plaintiffs are seeking to re-litigate previously settled claims. I have considered the voluminous papers and note there are various references to the compensation claims that were brought in the 1970's by the hooded men, albeit some of the material relates to individuals who are not involved in the current claims. In the course of *Ireland v UK* it was confirmed that all 14 of the hooded men had brought a civil claim arising from their detention and treatment in 1971. By the time of the judgment in 1978, all 14 claims had been settled. Paragraph 107 of the judgment states:

"107. T13 and T6 instituted civil proceedings in 1971 to recover damages for wrongful imprisonment and assault; their claims were settled in 1973 and 1975 respectively for £15,000 and £14,000. The twelve other individuals

against whom the five techniques were used have all received in settlement of their civil claims compensation ranging from £10,000 to £25,000."

[31] This was also referenced in *Re McGuigan* at paragraph 82:

"(iv) Civil claims

82 All 14 men on whom the five techniques had been used made civil claims for damages, including claims alleging unlawful conspiracy, against Ministers. Dr Denis Leigh, Consultant Psychiatrist to the Army, to whom reference will be made below, acted as a defence medico-legal expert in the civil claims. All of the claims were eventually settled for sums ranging from £10,000 to £25,000."

[32] Some documents were identified during the case of *Re McGuigan* relating to the civil claims. This included a table which summarised the settlement figures in each of the 14 claims. Within the settlement table, liability for damages and costs is recorded as split equally between the "MoD" and "PA", which is understood to refer to the Ministry of Defence and Police Authority. Save for the case of *Montgomery*, the pleadings are not available for any of the original claims. It is therefore not possible to know the precise identity of the defendants against whom the claims were brought.

[33] In the case of *Montgomery*, who is not one of the current plaintiffs, the named defendants were the MoD, Merlyn Rees the Secretary of State, James Flanagan the Chief Constable and the Attorney General. It included a claim that the defendants engaged in an unlawful conspiracy to commit unlawful acts of assault and trespass. Other documents touch on the issue of ministerial knowledge of the use of the five interrogation techniques. The defendants submit this means it is likely that many if not all of the plaintiffs included a claim that Ministers were involved in authorising the use of the interrogation methods. The settlement terms recorded an acceptance of liability and the plaintiff "released and discharged all the defendants from all claims and causes of action contained in the statement of claim or arising from the matters alleged in the Statement of Claim." It is not clear whether similar settlement terms were used in other cases.

[34] The consent document in *Montgomery* also refers to the fact that it would be made a rule of court, upon the application of the plaintiff. It is argued that some of the claims may therefore have been settled by way of court orders and not private contractual agreement and therefore re-opening a court judgment involves different principles to setting aside a private agreement.

[35] A notice to admit facts and correspondence is also available in the case of *Shivers* who is also not one of the current plaintiffs. The notice identifies the various defendants who are different from the *Montgomery* case. Other correspondence states that the causes of action included wrongful arrest, assault, mistreatment and conspiracy between Ministers.

[36] Correspondence, but not pleadings were found in the cases of *McKenna* (not a current plaintiff) *Rogers* (current plaintiff) *McGuigan* (current plaintiff) *Shannon* (current plaintiff)**.** The correspondence again appears to evidence the existence of a claim relating to the treatment during detention including allegations of Ministerial knowledge and settlement of the claim but does not identity of the defendants.

[37] In the *Shannon* case, the correspondence includes reference to the fact that the settlement was announced before a judge in chambers on 10 December 1976, that the form of consent had been signed by both solicitors and that it was to be made a rule of court, which would authorise his payment, similar to *Montgomery*.

[38] The parties have collated a variety of material from multiple sources indicating these plaintiffs received compensation almost 50 years ago relating to their arrest, detention and treatment. What is not available, however, is the precise identity of who was sued and the precise causes of action. There may be force in the defendant's submission that the available material could convince a court there is sufficient commonality between these claims and the previous cases to render them an abuse of process. The alternative relief claimed means the cases would then progress to consideration of whether the circumstances surrounding the settlements were such that they should be set aside for fraud or sharp practice. The obvious issue with that scenario is the identification of the original tortfeasors and consideration of whether in fact that is the basis for a separate writ. While there may be several affidavits and a wealth of documents available at present, this court does not have the benefit of the full pleadings including statements of claim, notices for particulars, replies, interrogatories, discovery nor evidence from witnesses or experts. The complexity of the claims and gravity of the allegations are such that this interlocutory hearing should not be viewed as a substitute for a trial.

Are there serious issues to be tried?

[39] In determining the strike out applications, the court must assess whether these cases are unarguable or incontestably bad. That involves consideration of whether there are triable issues which require determination by the court.

[40] In order to establish estoppel, the defendant must demonstrate the parties are the same, the cause of action is the same and it was determined by a court. In these claims it is asserted the parties are different and the causes of action are different. None of the parties know precisely what the claims in the 1970's were and how they were determined. The plaintiffs argue there is no overlap, these are new claims not litigated before, and this cannot be an abuse of process. If that is not correct, they seek to set aside the original settlement due to fraud. The obvious difficulty for the plaintiffs is that if they are seeking to set aside any original settlements, they must name the parties to those settlements. If these are fresh proceedings that is a separate cause of action.

[41] The plaintiffs make the point that simply because conspiracy may have been previously pleaded does not mean it was supported in much the same way as a tripping case where allegations are made about inadequate systems of inspection that can only be proved once discovery has been provided by the defendants.

Conspiracy may have been pleaded but they claim it was not evidenced as the material was not available. The plaintiffs argue the defendants did not provide discovery in the initial proceedings. If discovery had been made at the time, they assert the issue of aggravated and exemplary damages would have been much greater as proof of lifelong effects would have been established. This would not appear to be one of the plaintiff's strongest arguments, however, whether I may have a provisional view on the weaknesses or otherwise of a particular assertion is not determinative of the whole application.

[42] There is, however, force in the argument that the gravity of the allegations in these claims is a relevant factor when determining the applications and as a result, the court should be slow to impede access to justice. It is a particularly high threshold when the only pleadings available are the writs. The gravity of the allegations was a factor in *Keeley v Chief Constable* [2011] NIQB 38, a case involving alleged unlawful arrest, false imprisonment and assault. In that case McCloskey LJ was dealing with several applications including an order dismissing the plaintiff's action for want of prosecution. At paragraph 31 he stated:

> "[31] I also accord weight to the nature and gravity of the plaintiff's allegations. Self-evidently, they give rise to acute public concern and interest. The court provides a forum in which the issues arising can be the subject of orderly, dispassionate, independent and impartial judicial adjudication. The provision, rather than the denial, of access to the court is in principle preferable where the issues sought to be litigated raise important questions relating to the rule of law itself. The core of the doctrine of the rule of law is, in the ipsissima verba of Lord Bingham:
>
> > "… that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts".
>
> Lord Bingham continues:
>
> > "Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably". [The Rule of Law, pp. 8 and 60].
>
> The Plaintiff's allegations raise the spectre of a grave and profound assault on the rule of law and an affront to public conscience, as measured by right thinking members of society generally."

[43] At the heart of these applications is the difficulty faced by the court in making a fair and proper assessment at this interlocutory stage. The plaintiffs credibly assert that the defendants choose the playing field and the timing of these applications. They argue the applications are premature prior to service of a statement of claim and yet the defendant now seeks to criticise the plaintiffs for not even serving draft versions of a statement of claim.

[44] The plaintiffs make the case that it appears from the available pleadings in the *Montgomery* case in 1974 that the defendants denied liability and it is argued that this was despite advice from the Attorney General at the time, that the cases were indefensible. Contrary to submissions by the defendants, they assert it is not clear when the Government publicly admitted the interrogation techniques were authorised at a higher level.

[45] It is worth restating that it is not for the court, at this interlocutory stage, to conduct a mini-trial assessing all the evidence in order to determine whether this is a strong or weak case, nor can this court make findings of fact. While the defendants can bring a strike out application at any stage, none of the plaintiffs have served their statements of claim meaning full particulars of the claims, including fraud, have not yet been pleaded.

[46] The plaintiffs point to the defendant's failure to produce material regarding the settlements that they allege estop the plaintiffs from litigating these proceedings. I consider it difficult, however, to unduly criticise a party to previously litigated proceedings for not retaining all the documentation pertaining to such a settlement some 50 years later.

[47] Put simply, the plaintiffs say the previous proceedings did not involve the question as to the authorisation and decision to deploy the unlawful acts in question. The affidavit of the defendants states at paragraph 6(c):

> "All of those proceedings were settled by the same two public bodies, namely the Police Authority and the MoD, who were the two bodies involved in the arrest, detention and conduct of the interrogations, including the administration of the five techniques"(my emphasis added).

This wording is consistent with the available evidence of the breakdown of the civil settlements.

[48] It is plainly arguable these are new claims, raising fresh issues and involving different defendants. To the extent it is necessary, the plaintiffs seek to set aside the settlements reached in 1970's. They argue a settlement can be set aside on a number of bases. In these cases, the plaintiffs seek to rely upon the grounds of fraud and sharp practice. It is arguable the previous proceedings did not address the conspiracy and conduct of the defendants prior to the interrogation techniques being used on the men. It is arguable the previous claims did not include misfeasance or conspiracy, save for *Shivers* who is not a plaintiff, and that conspiracy was possibly alluded to in *McGuigan*.

[49] It is arguable these claims concern the practice and authorisation of the techniques not the acts of interrogation themselves. The material available suggests that the previous cases may have been settled on the basis that the proceedings sought damages for the arrest, detention, and conduct of the interrogations and did not address the alleged conspiracy and conduct of all of the defendants. The plaintiffs argue this is evidenced by the very fact that none of the parties to whom they now claim to know to be directly involved (defendants 3-9 in McGuigan et al)

were not named as defendants in the previous civil proceedings, save for Mr Faulkner (the sixth defendant) appearing on the civil proceedings of *McClean*, who is not a plaintiff in this litigation and Mr Rees (not a defendant in these proceedings) who was named by *Montgomery* (who is not a plaintiff in these proceedings).

[50] The defendants do not dispute that, as a matter of law, a settlement agreement or consent judgment is capable, in principle at least, of being set aside on the ground that it was procured by fraud or fraudulent misrepresentation. It is also permissible to commence new proceedings raising issues which were not raised in previous proceedings on the basis that they could not with reasonable diligence have been raised.

[51] The defendants point to the affidavit evidence stating it does not address the key question of why a second set of civil proceedings has been commenced or any detail about the previous litigation. It is worth pausing to reflect on the recent authority from the Court of Appeal in *Bank of Ireland v Conway* that these claims are at an interlocutory stage and while clearly the court can explore the facts of the case and the various affidavits, it has a circumscribed function in the context of a strike out application and the authorities are clear that it should approach this with caution. This court cannot make findings of fact, and the burden of proof remains on the defendant. On balance, I am not persuaded the defendants have established these are plain and obvious cases for striking out. Clearly the pleadings may be revised as it appeared during the exchanges at hearing that the human right claims may not be pursued and the case against General Kitson may not continue.

The stance taken by the Chief Constable

[52] It is of note that the police are no longer pursuing the applications. The historical damages awards in the other cases involving these parties appear to have been paid on a 50/50 basis between the MoD and police. The police publicly apologised for their part in the wrongdoing while the plaintiffs state "the MoD has remained silent." The plaintiffs point to purported difficulties which could be anticipated with the procedural trajectory of these claims if the applicants, mainly the MoD here, were to succeed in these applications. The plaintiffs have set out some scenarios in oral submissions which may create issues. For example, the possibility the PSNI could seek to join the MoD as a third party, it could admit liability for the claims or if it contested them and was found liable for conspiracy by a court it would result in conflicting judgments. Ultimately, as these proceedings currently stand, I consider the MoD is entitled to have its applications adjudicated upon without consideration of hypothetical complications arising in respect of another defendant, as a factor in the outcome. I pause to observe this is not the first strike out application recently before this court in which the PSNI has belatedly taken this approach.

The court's decision

[53] The thrust of the purportedly new causes of action appears to be that specific individuals at a high level of the UK Government gave authorisation for use of the interrogation techniques in question and were aware they would have a long lasting

effect on the physical and mental health of the plaintiffs. The claims are for misfeasance, negligence, conspiracy and breach of human rights. These are the primary submissions on behalf of five plaintiffs but now adopted by the other two plaintiffs. On balance, based on the material available to the court at this stage, including the limited pleadings, these are arguable cases. They are neither incontestably bad nor plain and obvious cases which would merit such a draconian remedy as a strike out. Whether or not they are strong or weak cases at this stage is not determinative of the applications and the fact the plaintiffs have resisted the defendant's application is no forecast of their ultimate success. Put simply, they raise triable issues to be determined by the court.

(ii) Plaintiffs' applications to amend the writs

[54] The removal of six of the defendants in the Auld/Shannon cases is with the consent of the defendants and I make that Order accordingly. The plaintiffs also seek to add two new defendants in those cases, the Northern Ireland Office and the Secretary of State for Defence. While I note the UK government was a target of the original proceedings through the MoD and the MoD is a party to these proceedings, the plaintiffs allege the proposed additional defendants had knowledge the methods were illegal, failed to issue any guidelines regarding the interrogation techniques and allege they would have known of a real and immediate risk to the plaintiffs. They further allege Ministers had indicated employees would be protected from prosecution and also be protected from giving evidence in the original civil actions. On balance, I consider this is a bona fide amendment which clarifies the issues in dispute and grant leave accordingly.

[55] The applications in McGuigan et al to add an additional relief seeking to set aside the original settlement in the alternative is also granted. On balance, I conclude that the amendment clarifies the nature of the relief sought, arises from the same facts and refines the issues. I grant leave to the plaintiffs in respect of such amendments.

Conclusion

[56] For the reasons set out in this judgment, I refuse the defendant's strike out applications and award the costs of those applications to the plaintiffs, such costs to be taxed in default of agreement.

[57] I grant the plaintiff's applications in Auld/Shannon to remove the third to eighth defendants and add two new defendants in those cases.

[58] I grant the applications in McGuigan/Rodgers/Turley/Hannaway/McNally to add the relief in the alternative seeking to set aside the original settlements. The costs of all the plaintiff's applications shall be costs in the cause. I certify for counsel in respect of all applications.