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**IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND**
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**KING'S BENCH DIVISION**
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**BETWEEN:**

**JACQUELINE DOHERTY ON HER OWN BEHALF AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EILEEN DOHERTY (DECEASED)**
**Plaintiff**

**and**

**CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND**
**Defendant**

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**Mr Bassett (instructed by O'Muirigh Solicitors) for the Plaintiff**
**Mr Egan KC and Miss Gillen (instructed by The Crown Solicitor's Office) for the Defendant**

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**Master Bell**

## Introduction

[1] This application involves a fundamental difference of opinion between the parties as to how pleadings ought to be drafted and, specifically, whether pleadings may simply contain bare assertions pending discovery or whether plaintiffs must allege particular material facts in their Statement of Claim.

[2] The background to this action is that on 30 September 1973 Eileen Doherty, aged 19, the sister of the plaintiff, was travelling in a taxi along the Annadale Embankment, Belfast. She was sharing the taxi with two men who said they were going towards West Belfast, the same direction as Miss Doherty. However, the two men hijacked the taxi on the Embankment. Miss Doherty and the taxi driver managed to escape.

[3] The two men drove off in the taxi but returned a short time later and stopped. One man got out of the taxi, grabbed Miss Doherty and shot her three times. She sustained gunshot wounds to her head and stomach. She was transported to the

Royal Victoria Hospital but never regained consciousness and was pronounced dead within two hours.

[4] The original police investigation did not manage to make any person amenable for the murder of Miss Doherty. With advances in technology, however, a further investigation, carried out by the Historical Enquiry Team, and utilising computer software introduced in 2005, matched finger and palm prints taken from the taxi after the murder. As a result of this new evidence, Robert James Shaw Rogers was convicted of Miss Doherty's murder in 2013 by Horner J (*R v Robert James Shaw Rodgers* [2013] NICC 2).

[5] In 2018 the plaintiff initiated proceedings against the defendant for negligence, misfeasance in public office, assault, battery, and trespass to the person, conspiracy to commit trespass to the person, and conspiracy to injure.

[6] There were four applications before the court in respect of the plaintiff's action:

(i) An application by the plaintiff for a list of documents and for specific discovery (2018/64969/01).
(ii) An application by the plaintiff for a list of documents and for specific discovery (2018/64969/02).
(iii) An application by the defendant seeking for the Statement of Claim to be struck out on the grounds that it fails to disclose a reasonable cause of action (2018/64969/03)
(iv) An application by the plaintiff to amend her Statement of Claim (issued four days after the defendant's strike out application) (2018/64969/04).

[7] I granted an order allowing the plaintiff to amend her Statement of Claim under Order 20 Rule 5 so that the application to strike out could be considered in the light of the amended Statement of Claim. Counsel for the defendant did not oppose the application.

[8] Counsel for the defendant subsequently made his submissions, which were thorough and extensive. A difficulty then arose, in that counsel for the plaintiff indicated that the plaintiff's Statement of Claim could still be, in his view, further improved. Following discussions with both counsel, I therefore adjourned the hearing to allow a further amendment so that the defendant's application should be made in respect of the plaintiff's case articulated at its height.

[9] As a result, the plaintiff then subsequently filed an amended Statement of Claim. I am assured by counsel that this latest version of the plaintiff's Statement of Claim represents the height at which the plaintiff's allegations can be pleaded. Both counsel's submissions then concluded.

**Defendant's Submissions**

[10] The essence of Mr Egan's submissions is that, in respect of the torts of negligence, misfeasance in public office and assault and trespass, there are virtually no material facts which are pleaded in the plaintiff's Statement of Claim. All that is essentially presented is the belief of the plaintiff and bare assertions. The underlying thinking behind the Statement of Claim is that police colluded with terrorists but there are no facts stated in the pleading to support that suspicion. Indeed Mr Egan commented that there were no facts provided which remotely pointed to those allegations being true. It was therefore impermissible to allow the proceedings to proceed on the basis that "something might turn up". He noted that such an approach had been condemned by the courts as a "Micawber approach". Mr Egan also submitted that there were no facts from which inferences could properly be drawn which would support the plaintiff's underlying thinking.

[11] Mr Egan observed that it was an incontrovertible fact that state agencies had used agents to penetrate terrorist groups. However he submitted that that alone did not get the court close to determining that the defendant was liable in the individual circumstances of this particular case.

[12] Mr Egan submitted that one of the fundamental principles involved in pleading was that a defendant was entitled to know the facts he had to meet. A crucial difficulty for any defendant who faces a Statement of Claim which is not properly particularised and does not sufficiently plead facts is that the discovery process becomes unworkable as the defendant cannot assess what is relevant or not relevant to the plaintiff's case. In particular, the repeated use in the Statement of Claim of the words "system" and "systemic" to describe the allegation of collusion raises the fundamental issue as to the parameters within which the defendant is being asked to consider discovery. The discovery which a party should make is defined by the facts which are pleaded. If there are no facts pleaded, Mr Egan argued, then there can be no attempt to make discovery.

[13] Mr Egan noted that pleadings served a further fundamental purpose in litigation (above and beyond defining the issues to be addressed by the parties and the court) which was to weed out cases which were fundamentally flawed. He submitted that this was such a case.

[14] Counsel articulated that a typical example of the plaintiff's approach to pleading can be seen in para 6 of the Statement of Claim which sets out the alleged particulars of negligence. As now amended, it reads:

> "(a) Colluding with terrorists in recruiting, directing and supervising agents in the UVF including those involved directly or indirectly with the murder of the deceased in September 1973.

(c) Providing information, weaponry and expertise to loyalist paramilitaries that assisted in targeting persons for sectarian murder including the murder of the deceased in September 1973.

(d) Causing personal injuries and death of the deceased by, or as a result of, the discharge of a firearm by an agent of the Defendant.

The plaintiff will further reply in proof of the negligence alleged upon such other facts as may be known to the Defendant, his servants and/or agents, but not to the Plaintiff, and which may be given in evidence by the Defendant and his witnesses upon the trial of this Action."

[15] Mr Egan submitted that the use of the words "system" and "systematic" followed by such vague particulars meant that the parameters within which his client was expected to conduct discovery were "almost without bounds". Essentially the burden on the defendant was as if a public enquiry had been established.

[16] Mr Egan also made what he described as a "floodgates argument", namely that, if the proceedings were allowed to continue in their current state, full of assertions but with a lack of material facts to undergird those assertions, then the logical outcome would be that family members of each and every loyalist murder could adopt a similar approach, suing the authorities, alleging collusion, having no facts to back up the allegation and waiting to see if the discovery process threw up any facts which might suggest the allegation was true. This would be an abuse of the litigation process.

**Plaintiff's Submissions**

[17] Mr Bassett's submission was that the relief sought by the defendant should be refused on two distinct bases.

[18] The first basis was that the Statement of Claim on its face revealed three separate actionable torts which flowed from the sectarian murder of Miss Doherty. These were each based on the contention that the police operated a system of collusion with loyalist paramilitaries in 1973.

[19] The second basis on which Mr Bassett opposed the defendant's application was that any such relief, even if considered appropriate, should not be granted until after such time as the defendant had provided full and adequate discovery, including that of sensitive material, which would allow for refinement of the plaintiff's claim. This was because the existence, nature and extent of collusion between the sectarian killers of Miss Doherty and police officers might be corroborated in documents which the defendant was still "withholding". Further, the pleading of malice in respect of identified officers could not realistically occur unless and until adequate discovery was provided.

[20] Mr Bassett submitted that the plaintiff had already been given general discovery of non-sensitive documents in this case and the defendant had not complained about having to do so. He submitted that the delay in bringing the strike out application militates against the granting of a strike out.

[21] Counsel set out in his skeleton argument:

> "This is a collusion claim in which it is alleged that the Defendant operated and controlled members of loyalist paramilitaries including those involved in the murder."

And further argued:

> "The allegation that the Defendants (*sic*), together, operated the system of collusion with the UVF is clearly and adequately pleaded in the (amended) Statement of Claim.

[22] Mr Bassett offered the decision in *Askin, White and Byrne v PSNI, MOD and NISOS* [2024] NIMaster 7 as a comparable situation to the present one and suggested that since the Statement of Claim in that case had not been struck out, the Statement of Claim in this action should also not be struck out.

**Discussion**

***The Law on Striking Out***

[23] The plaintiff and the defendant agree as to the law in respect of the power of the court to strike out pleadings.

[24] In the decision of the Court of Appeal for Northern Ireland in *Magill v Chief Constable* [2022] NICA 49 McCloskey LJ summarised the principles to be applied in strike out applications:

> "[7] In summary, the court (a) must take the plaintiff's case at its zenith and (b) assume that all of the factual allegations pleaded are correct and will be established at trial. As a corollary of these principles, applications under Order 18 rule 12 of the 1980 Rules are determined exclusively on the basis of the plaintiff's statement of claim. It is not appropriate to receive any evidence in this exercise. Based on decisions such as that of this court in *O'Dwyer v Chief Constable of the RUC* [1997] NI 403 the following principles apply:

(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; 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'.

(iv) 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.

(v) A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.

(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." Thus, in *E (A Minor) v Dorset CC* [1995] 2 AC 633 Sir Thomas Bingham stated:

> "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 it 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."

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*."

[25] These are the principles which the court will therefore apply in deciding whether or not to strike out the plaintiff's Statement of Claim.

**Discussion**

***Pleadings and Material Facts***

[26] Master Harvey recently made important observations on the subject of pleadings in *Askin and others v Chief Constable of the Police Service of Northern Ireland and others* [2024] NIMaster 7:

> "It is insufficient to make bare assertions, rather it is necessary to plead the facts which it is intended to prove to support the claim, with sufficient particularity."

and

> "Since only material facts may be included, Order 18 rule 7 also precludes the inclusion of statements of belief. Beliefs do not constitute facts which a plaintiff proposes to prove. The minimum requirements in each case will inevitably depend upon the context, nature of the claim and the complexity of the facts upon which it is founded, however the pleading must contain "the necessary

> particulars of any claim." The court has power to order particulars of the claim (Order 18, Rule 12(3)) on such terms as it thinks just. This would be futile in this case given the plaintiffs all but concede the current statement of claim and replies to particulars are the best they can muster."

Unfortunately, the case before Master Harvey is not an isolated example of when litigants and their counsel have had to be reminded of these fundamental points. It is now necessary to address this issue again. Although it may seem surprising that they need to be addressed, this is a common judicial experience. For example, prior to the 1999 civil procedure reforms in England and Wales, Lord Woolf felt it necessary to say in "Access to Justice: Interim Report" (London: HMSO, 1995):

> "… essentially, the problem is that the basic function of pleadings—to state succinctly the facts relied on—has been lost sight of. The primacy of this requirement needs to be clearly restated."

[27] Indeed, as Phipson on Evidence expresses it in para 2-02 of the 20th edition, any claim form (ie any Statement of claim) which fails to provide a concise statement of facts relied upon is likely to be struck out. Similarly, Bullen & Leake & Jacobs in para 1-18 of their "Precedents and Pleadings" (19th edition) concisely express the principle involved and the likely consequence of failure to comply:

> "The statement of case must state facts which, if correct, give rise to a valid legal claim or defence. If it does not do so, it is liable to be struck out."

[28] The law reports are replete with explanations as to how pleadings must be drafted. The material facts are all those facts necessary for the purpose of formulating a complete cause of action: *Bruce v Odhams Press Ltd* [1936] 1 K.B.697 at p.712; It is not sufficient that a Statement of Claim simply express a conclusion drawn from facts which are not stated: *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 F.C.R. 109 at p.114. Not only must all material facts be pleaded, but they must be pleaded with a sufficient degree of specificity, having regard to the general subject-matter, to convey to the opposite party the case that party has to meet: *Ratcliffe v. Evans* [1892] 2 Q.B. 524 at p.532. The absence of material facts is a fundamental stumbling block in litigation. In their decision in *Michael O'Higgins v Barclays Bank plc* [2022] CAT 16 Marcus Smith J and Anthony Neuberger commented:

> "Bare or unparticularised assertion is not enough: a pleading must set out (but does not have to prove) all the material facts on which a party relies for his or her claim or defence."

Likewise, Popplewell LJ explained in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 at [18] a pleading must be supported by evidence which establishes a factual basis for an allegation. It is not sufficient simply to plead allegations which, if true, would establish a claim. There must be evidential material which establishes a sufficiently arguable case which undergirds it.

[29] In *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm) Leggatt J said:

> "Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

[30] The approach in *Tchenguiz* has been approved in many subsequent authorities, including by Stuart-Smith J in *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB) where under the heading "The proper function of pleadings" he stated (the emphasis being in the original):

> "30. It should not need repeating that Particulars of Claim *must* include a *concise* statement of the facts on which the Claimant relies: CPR 16.4(1)(a). The "facts on which the Claimant relies" should be no less and no more than the facts which the Claimant must prove in order to succeed in her or his claim … The Queen's Bench Guide provides guidelines which should be followed: they reflect good and proper practice that has been universally known by competent practitioners for decades. They include that "a statement of case must be as brief and concise as possible and confined to setting out the bald facts and not the evidence of them": see 6.7.4(1). A statement of case exceeding 25 pages is regarded as exceptional: experience shows that most cases can be accommodated in well under 25 pages even where the most serious allegations are made. Experience also shows that prolix pleadings normally tend to obfuscate rather than to serve their proper purpose of identifying the material facts and issues that the parties have to address and the Court has to decide.

> 31. Where statements of case do not comply with these basic principles, the Court may require the Claimant to achieve compliance by striking out the offending document and requiring service of a compliant one: see *Tchenguiz v Grant Thornton* [2015] EWHC 405 (Comm) and *Brown v AB* [2018] EWHC 623 (QB). It has always been within the power of the Court to strike out either all or part of a pleading on the basis that it is vague, irrelevant, embarrassing or vexatious."

[31] The concept of "material facts" is described in *The Supreme Court Practice* (1999 edition), at para 18/7/11:

> "It is essential that a pleading, if it is not to be embarrassing, should state those facts which will put those against whom it is directed on their guard, and tell them what is the case which they will have to meet (per Cotton LJ in *Philipps v Philipps* (1878) 4 QBD 127, p 139). "Material" means necessary for the purpose of formulating a complete cause of action; and if any one material statement is omitted, the statement of claim is bad (per Scott LJ in *Bruce v Odhams Press Ltd* [1936] 1 All ER 287 at 294). Each party must plead all the material facts on which he means to rely on at trial; otherwise he is not entitled to give any evidence of them at the trial. No averment must be omitted which is essential to success. Those facts must be alleged which must, not may, amount to a cause of action (*West Rand Co v R* [1905] 2 KB 399; see *Ayers v Hanson* [1912] WN 193)."

[32] A court must, of course, bear in mind that not all facts are proved directly. Some facts are proved by inference. In *Thorn Security Ltd v Siemens Schwartz AG* [2008] EWCA Civ 1161 Mummary LJ described what an inference is:

> "The drawing of inferences is, of course, a familiar technique in judicial decision making. It enables a judge to conclude that, on the basis of proven facts A and B, a third fact, C, was more probable than not."

[33] However counsel sometimes confuse the concept of "inference" with mere speculation and suspicion. In *Jones v Great Western Railway Company* (1930) 144 LT194 at p 202, Lord Macmillan observed that:

> "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it

> is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."

Collins Rice J similarly said in *Sivananthan v Vasikaran* [2023] EMLR 7 at [53]:

> "There is a difference between inference and speculation. The components of an inferential case must themselves be sufficiently evidenced and/or inherently probable to be capable of adding up to something which discharges a claimant's burden".

[34] The proper pleading of facts is a fundamental aspect of litigation practice. In *NEC Semi-Conductors Ltd v* IRC [2006] STC 606 Mummery LJ made the following observations:

> "While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason – so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court. Proper pleading of the material facts is essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial. In my view, the fact that the nature of the grievance may be obvious to the respondent or that the respondent can ask for further information to be supplied by the claimant are not normally valid excuses for a claimant's failure to formulate and serve a properly pleaded case setting out the material facts in support of the cause of action."

[35] These authorities from England and Wales on the subject of pleading also represent the position which applies in this jurisdiction. The importance of pleading material facts to undergird assertions in a Statement of Claim was referred to in *Re Rooney's Application* [1995] NI 398 where Hutton LCJ referred to the judgment of Sir Thomas Bingham MR in *R v Secretary of State for Health, ex p Hackney London Borough* [1994] CA Transcript 1037. In his judgment the Master of the Rolls had stated:

> "In the ordinary inter-partes civil action the plaintiff usually makes a series of factual averments which may well be challenged, but which are usually sufficiently

> plausible to raise issues calling for discovery. It is not open to a plaintiff in a civil action, or to an applicant for judicial review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertions the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the proscribed activity usually described as "fishing": the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."

The Lord Chief Justice, with whom Carswell LJ and Nicholson LJ both agreed, adopted the position that the pleadings in civil actions should contains a series of factual averments alleging acts or omissions by the defendant.

[36] The principles governing pleadings are applied across the full range of civil litigation in Northern Ireland and England and Wales. There are no categories of civil litigation to which these principles do not apply. Hence the principles outlined above apply to clinical negligence cases, commercial litigation and legacy cases.

[37] An example of the application of the foregoing principles can be seen in *Media Entertainment NV v Karyagdyyev and another* [2020] EWHC 1138 (QB) Master Dagnall concluded:

> "It is now six years since the accident. It is four years since proceedings were commenced. It is three and a half years since the original particulars of claim were served. In this procedural context, the claimant has been given ample opportunity to amend and to seek directions to enable him to clarify his case, but he has failed to do that. In those circumstances, there being no factual basis pleaded on which the bare assertions of employment and occupation are made, I am afraid I cannot conclude that the grounds for bringing the claim which are pleaded are reasonably pleaded or are reasonable."

[38] In his application Mr Egan has criticised the plaintiff's "Micawber approach". This references the expression famously associated with the character Wilkins Micawber from Charles Dickens' novel "David Copperfield" that "something will turn up." Counsel is correct in asserting that the courts have frequently criticised the Micawber approach (whether resorted to by a plaintiff or a defendant). The approach has been criticised, for example, by Lord Leggatt and Lord Burrows in their decision in *Tindall v Chief Constable of Thames Valley Police* [2024] UKSC 33; and by Lord Briggs in *Lungowe and others v Vedanta Resources plc*

*and another (International Commission of Jurists and others intervening)* [2019] UKSC 20. Essentially the approach of the courts is that a party must lay a sufficient evidential foundation and that it is just not good enough for them to express an unparticularised hope that something may "turn up."

[39] As Master Harvey stated in *Askin*:

> "The case is founded upon vicarious liability for individuals who are not defendants. It is a minimum requirement that the defendant know the identity of the individuals, the conduct for which it is alleged they are vicariously liable and the relationship which provides the basis for the claim of vicarious liability."

This applies to the majority of the plaintiff's allegations in the case before me.

[40] It is not proper for a plaintiff to asset that a tort has been committed but provide almost no facts in relation to it and say the facts are known to the defendant's witnesses. This is so for 3 reasons.

[41] Firstly, at the stage of the issue of such a statement of claim, all that exists is mere speculation. For example, in para 8 of the plaintiff's Statement of Claim she alleges that one of the particulars of assault, battery and trespass to the person, conspiracy to commit trespass to the person and conspiracy to Injure is:

> "(b) Operating an agent who was involved in the assault and murder of the deceased."

However, crucially, the Statement of Claim at no point alleges that Robert Rodgers, who was convicted of Eileen Doherty's murder in 2013, was an agent of the defendant. Nor is there any other individual identified as an agent. Nor can it be argued by the plaintiff that there is an inference which can be drawn that this is a fact because there are no underlying facts from which to draw such an inference.

[42] Secondly, there are no facts for a defendant to accept or deny. A crucial function of pleadings is therefore undermined.

[43] Thirdly, it creates a situation where the defendant has to assume responsibility for making the plaintiff's case. He has to go and question all possible witnesses and find out whether the plaintiff does have a case against the defendant. Then, if he does find material which might justify such a case, the defendant is then in possession of material which it is his responsibility to disclose. The result is that the defendant has been saddled with the task of investigating his own actions.

[44] Where what is pleaded is that the defendant or one of his servants has colluded with terrorists, this is not the pleading of an alleged fact. It is the

presentation of an overarching conclusion. Where it is correct, there must be a number of facts from which that overarching conclusion can be drawn.

[45] I cannot accept the plaintiff's argument that this application is similar to that in *Askin*. I consider that *Askin* was a fundamentally different case. As Master Harvey stated:

> "At the heart of this case is an allegation that serving soldiers, policemen and informants were part of the Glenanne Gang which carried out these bombings (along with a huge string of other crimes). The plaintiffs have pieced together material in the public domain to set out the facts as far as possible that support such allegations, providing names of several soldiers or policemen who were in the Gang."

By comparison, the only core facts which the plaintiff has alleged in this case is that Eileen Doherty was tragically murdered and Robert Rodgers was convicted of her murder. The rest appears to be speculation and suspicion. It is highly notable that when para 18 of Mr Bassett's skeleton argument refers to "the basic requirements of a properly pleaded Statement of Claim" and references Order 18 Rule 15, it entirely omits the mention in Order 18 Rule 15 of "facts giving rise to a cause of action."

***Vicarious Liability***

[46] The plaintiff relies greatly in her Statement of Claim on the concept of vicarious liability. This concept was recently explained by Lord Burrows in *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15:

> "Vicarious liability in tort is an unusual form of liability. This is because the vicariously liable defendant is held liable (and treated as a joint tortfeasor) not because it has itself committed a tort against the claimant but because a third party has committed a tort against the claimant. Vicarious liability has often been treated as imposing strict liability because it is not dependent on proving the fault of the defendant. But it differs from strict liability torts. They impose personal liability on a defendant irrespective of fault whereas vicarious liability is precisely not a personal liability. Vicarious liability therefore does not rest on the defendant having owed a duty, whether strict or of reasonable care, to the claimant. It was the third party (who I shall refer to as the tortfeasor) who owed that duty to the claimant."

[47] Lord Burrows went on to explain that there are two stages of the inquiry into vicarious liability. Stage 1 looks at the relationship between the defendant and the tortfeasor and asks whether the relationship was "akin to employment". Stage 2 looks at the connection between that relationship and the commission of the tort by the tortfeasor. The wrongful conduct must be so closely connected with acts the employee was authorised to do that it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment.

[48] In *Various Claimants v Wm Morrison Supermarkets plc* [2020] UKSC 12 Lord Reed gave the leading judgment and clarified that, at stage 2, where one was dealing with an employee, the appropriate test was that set out by Lord Nicholls in *Dubai Aluminium*:

> "… the wrongful conduct must be so closely connected with acts the employee was authorised to do that … it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment."

[49] Lord Reed then added the following:

> "The general principle set out by Lord Nicholls in *Dubai Aluminium*, like many other principles of the law of tort, has to be applied with regard to the circumstances of the case before the court and the assistance provided by previous court decisions. The words 'fairly and properly' are not, therefore, intended as an invitation to judges to decide cases according to their personal sense of justice, but require them to consider how the guidance derived from decided cases furnishes a solution to the case before the court. Judges should therefore identify from the decided cases the factors or principles which point towards or away from vicarious liability in the case before the court, and which explain why it should or should not be imposed. Following that approach, cases can be decided on a basis which is principled and consistent."

[50] When the plaintiff summarises the concept in her Statement of Claim, she does so in a way that is entirely reasonable:

> "The Defendant is vicariously liable for the tortious acts of his agents in the UVF when such persons can be considered to be in a relationship of employment or akin to employment and the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can be fairly and properly be regarded as done

> by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment."

[51] However the plaintiff's Statement of Claim then goes on to state:

> "The Defendant operated a system of recruitment, training, direction and assistance of paramilitary members in the UVF at the time of the murder of the deceased in September 1973. That system of recruitment, training, direction and assistance of paramilitary members in the UVF extended to those persons directly and/or indirectly involved in the murder of the deceased in 1973. Those UVF members that were directly involved in the murder were Mr Rodgers and another individual. Those indirectly involved in the murder were those who supplied the weaponry, training and assisted with their escape and protection after the murder."

[52] In this para, as with a number of other paras in the plaintiff's Statement of Claim, there is significant emphasis on the "system" which the defendant is alleged to have developed. The conclusions which the plaintiff wishes the court to draw from this para are clear. Firstly, Mr Rodgers, who was found guilty of the murder of Eileen Doherty, is alleged to be a member of the UVF (despite the fact he was not charged or convicted of that offence before Horner J). Secondly, there was a "system" whereby the police tried to recruit informers in the UVF. Thirdly, the police should bear civil liability for every murder carried out by the UVF. It is notable, however, that at no point in the Statement of Claim is it ever alleged that Mr Rodgers was himself an agent acting on behalf of the police. Nevertheless, such is the confusion in the case being put forward on behalf of the plaintiff, that the skeleton argument contains the following:

> "The plaintiff alleges that the violence of Shaw [presumably this is a typographical error and counsel is referring to Robert James Shaw Rodgers] and his accomplice together with the support of unknown others before and after the murder can on the basis of established principles of vicarious liability, be attributed to the Defendant."

[53] This illustrates one of the crucial missing links in the plaintiff's case. In order to bring the concept of vicarious liability into play in the plaintiff's case, there would have needed to have been a clear statement of fact in the Statement of Claim such as:

> "Robert James Shaw Rodgers was a covert human intelligence source working within the UVF on behalf of the defendant."

Alternatively,, given that the Statement of Claim pleads that the defendant caused the death of Miss Doherty "by, or as a result of, the discharge of a firearm by an agent of the Defendant" the plaintiff must identify who that agent was. Otherwise, what is pleaded is merely bare assertion or speculation or suspicion. It is clear that the defendant does not know if the person who murdered Miss Doherty was a police agent or not. If she knew, she would have identified him in her pleading.

[54] As Master Harvey stated in *Askin*:

> "The difficulty faced by these plaintiffs is that they cannot have personal knowledge of the identity of state agents or what precise role any individual had in a terrorist incident unless the information is put in the public domain."

But, as I have indicated, in *Askin* the plaintiff had pieced together factual material which was in the public domain and had pleaded the names of several soldiers or policemen who were in the Glenanne gang. No such identification has been made in this case.

[55] However, the plaintiff's legal team have not included any such a statement of fact in the Statement of Claim. Instead, they seek to remedy its crucial absence with the statement:

> "That system of recruitment, training, direction and assistance of paramilitary members in the UVF extended to those persons directly and/or indirectly involved in the murder of the deceased in 1973."

[56] The repeated use of the words "system" and "systematic" in the Statement of Claim are particularly notable. The failure to allege that Mr Rodgers (who is the only individual named by the plaintiff as involved in Miss Doherty's murder) as an agent of the police is similarly notable. The essence of the plaintiff's case is: Miss Doherty must have been killed by someone who was a member of the UVF; the police had informers in the UVF; therefore the defendant is vicariously liable for her murder. If this is the legal theory of the case, then the police and the Ministry of Defence are civilly liable for every murder carried out by every proscribed organisation in which they had informers.

[57] Courts have a certain reluctance to accept "floodgates arguments". When counsel resort to them, the fears which are portrayed can often be exaggerated. In *Mount Salus Residents' Owners Management Company Limited by Guarantee v An Bord Pleanála and Others* [2023] IEHC 691 Holland J commented:

> "Floodgates arguments, while very proper for consideration and sometimes influential, are often to be taken with a pinch of salt."

However in this instance, however, there would appear to be merit to what Mr Egan suggests.

**Conclusion**

[58] It is not every lack of particularisation in a pleading that has to be corrected, let alone be struck out. A pleading should not be struck out because others would have pleaded it better. Tugendhat J in *In Soo Kim Park & Others* [2011] EWHC 1781 (QB) said at [40]:

> "However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right…."

In the case before me, however, counsel for the plaintiff has had two opportunities to amend the Statement of Claim and now submits that the Statement of Claim has been pleaded at its height of what can be achieved. The court therefore does not have the option of ordering the plaintiff to improve the pleading. The only choice it has is letting the action proceed with the allegations as they currently stand or striking out the action.

[59] Arguably, in an action which is focussed on the "system" of the use of informers by the police, every document held by the police which concerns the use of informers in the UVF becomes potentially liable to be discovered. If this appears to be a fishing exercise, it is because it is one. As McFarland J observed in *Winters and others v News Group Newspapers Ltd* [2023] NIKB 45

> "A 'fishing exercise' is when a party is looking for evidence to make a case which is not pleaded with sufficient precision."

This is undoubtedly what is being attempted in this case. Indeed, arguably, counsel admits as much in the final para of his skeleton argument:

> "Receipt of sensitive discovery which details the existence, extent, scope and nature of the collusion between the RUC and those involved in the sectarian murder of Eileen Doherty will likely lead to further refinement of the claim."

[60] Albeit in a different context from the case before me, Cooke J said in *Nomura International plc v Granada Group Limited* [2007] EWHC 642 (Comm):

> "If there is insufficient knowledge to begin the process of putting together Particulars of Claim, without the need for 'something to turn up', there is no known or valid basis for a claim to be made."

That is the position in this action.

[61] The plaintiff has failed to provide any meaningful particulars of the broad and amorphous allegations. Referring to para 6 of the Statement of Claim, no agent operated by the defendant has been identified as having been involved either directly or indirectly in the murder of Miss Doherty. No police information has been identified as having assisted in the targeting of Miss Doherty. No police weaponry has been identified as having been used in her murder. No police agent has been identified as having discharged the firearm which killed Miss Doherty. To allow this action to continue without such material facts being pleaded would manifestly be an abuse of process. It gives the court cause for concern that there has been a failure to appreciate fundamental principles of pleading.

[62] Legacy cases provide great difficulty for both parties. There are plaintiffs who wonder if, given the number of informers operated by state agencies, their loved one's murder could have been prevented or, even worse, whether the murder was perpetrated by one of those informers. But the plaintiffs may not have enough facts to initiate a valid civil action. However, if a civil action is launched with only bare assertions and without any underlying basis of facts, being pleaded, then the task of defendants in defending such actions is immensely difficult because bare assertions are impossible to rebut whereas, if facts are asserted, they can be demonstrated to be either true or false (as per Lord Hoffman's famous dictum in *Re B (Children)* [2008] UKHL35). This is why facts are so important to the legal process. Often, what plaintiffs in legacy litigation hope to engage in is a truth-seeking process. Another description of such a process is a public inquiry. There are cases where the courts recognise the claimants would like there to have been a public inquiry and that they hope that a civil action will to some extent fill the gap (*Ashley v Chief Constable of Sussex Police* (CA) [2007] 1WLR per Sir Anthony Clarke MR). However, the civil justice system does not offer what a public inquiry does. It offers a forum in which parties allege facts, which they will seek to prove by the calling of witnesses and production of documents, and so demonstrate to the court that they are entitled to be granted relief of a particular kind.

[63] In his judgment at Mr Rodgers' criminal trial, Horner J stated:

> "Murder is murder. The passage of time, whether it is 5 years or 55 years, in no way dilutes the seriousness of such

> a crime. The tragic loss of Eileen Doherty, aged 19 years, remains 40 years later just that, a tragic loss. It has obviously affected all those who knew her – her fiancé, her sisters and her wider circle of family and friends. Their lives, touched by the ineffable sadness of such a pointless loss, will have been altered permanently. Their hurt remains; their need for justice continues; their desire that the guilty should be held to account has not changed."

Nothing has changed since Horner J made those remarks. Unfortunately, however, to allow the plaintiff's Statement of Claim to proceed in this unparticularised state holds out illusory hope and unrealistic expectations both to the plaintiff and to other litigants. The only beneficiaries from such hopeless litigation are the legal profession. Allowing the Statement of Claim to proceed in this unparticularised state, without any facts which might indicate that the defendant is responsible for Miss Doherty's murder, would distort the civil process that has operated in a particular way for decades. The court must therefore strike it out.