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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	27/03/2026

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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Between:

DANNY McAULEY
and
ROSALEEN McAULEY

Plaintiffs

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant

_____

Mr Lavery KC with Mr McLean (instructed by Phoenix Law Solicitors) for the Plaintiffs
Mr Henry KC (instructed by A&L Goodbody Solicitors) for the Defendant

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COLTON LJ

Introduction

[1] The plaintiffs are the parents of Karl McAuley, who died in a tragic road traffic accident on 1 December 2007, when he was aged just 17.

[2] He was a restricted driver at the time of the accident when his vehicle left the road, striking a tree. A person driving a Landrover and towing a trailer was at the scene of the accident. The plaintiffs are concerned that this person may have contributed to the accident by leaving his vehicle in a dangerous position.

[3] The Police Service of Northern Ireland ("PSNI") carried out an investigation into the accident. They forwarded a file to the Public Prosecution Service ("PPS"), who issued a decision on 4 July 2008 directing no prosecution.

[4] Being dissatisfied with the investigation, the plaintiffs made a complaint to the Police Ombudsman for Northern Ireland ("PONI") on 12 January 2009.

[5] PONI met with the plaintiffs on 10 February 2011 and produced its written report on 24 March 2011. The report identified several failings in the investigation to the accident by the PSNI.

[6] There was a coroner's inquest investigating Karl's tragic death which delivered its findings on 8 May 2021. The family was legally represented at the inquest and police witnesses gave evidence. The coroner did not make any referral to the PPS in respect of any alleged offences. The plaintiffs were unhappy about the assistance provided by the PSNI to the coroner. In particular, they complained that the PSNI failed to deliver telephone records relevant to the investigation.

[7] Arising from their dissatisfaction, the plaintiffs issued a writ of summons on 5 August 2014 claiming damages for, inter alia, misfeasance in public office arising from the failings referred to above. A statement of claim was served on 6 July 2022.

Interlocutory applications before the court

[8] The defendant applied by way of summons dated 9 October 2023 seeking to strike out the plaintiffs' claim pursuant to Order 18, rule 19(1)(a), (b) and (d) of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules"). In short, the defendant argues that at its height the plaintiffs' claim is incapable of amounting to the tort of misfeasance in public office. Further, they contend that the case is irredeemably out of time and statute barred.

[9] The plaintiffs issued a summons pursuant to Order 20, rule 5 of the Rules, dated 15 November 2024 seeking leave to amend the statement of claim. The amendments withdrew any claim based on negligence and the plaintiffs' purported rights under the European Convention on Human Rights ("the Convention") but refined the claim for misfeasance in public office.

[10] Master Harvey heard both applications together and provided his customary comprehensive written judgment.

[11] He granted the plaintiffs' application to amend the statement of claim. He proceeded to deal with the strike-out application on the basis of the amended statement of claim and granted the order sought by the defendant.

[12] The plaintiffs now appeal the decision of the master to strike-out the claim.

Preliminary issue

[13] When the matter came before the court, the plaintiffs indicated that they wished to apply to adduce additional evidence. This application was opposed by the defendant. The parties agreed that this matter should be dealt with as a preliminary issue before determining the appeal on the merits.

The proceedings to date

[14] The plaintiffs do not get off to a good start given the manner in which the proceedings have progressed.

[15] The misfeasance is alleged to have occurred between 1 December 2007 and 14 August 2008 and between 21 February 2012 and 8 May 2012. The writ of summons was issued on 5 August 2014.

[16] No statement of claim was served until 6 July 2022, almost eight years later.

[17] Faced with the summons to strike-out the plaintiffs applied to amend the pleadings shortly before the hearing, presumably to address the defendant's application.

[18] At the hearing before the master, apart from the pleadings, the only material that was made available to him was the report from the PONI. That was served in support of the application to amend the statement of claim and, therefore, not strictly to resist the application to strike-out.

[19] Nonetheless, the report was available to the master, and at the hearing it was confirmed that the report will also be available for the court dealing with this appeal.

[20] The master's judgment was delivered on 20 July 2025. The application to submit the further evidence was contained in an affidavit sworn by the first-named plaintiff on 19 August 2025.

[21] It is further noted that an issue arises as to whether the defendant was ever served with a notice of appeal. Mr Henry reserved his position on this issue and indicated that the matter could be left to any substantive hearing.

The fresh evidence

[22] The first-named plaintiff's affidavit robustly conveys the strong sense of grievance held by Karl's parents. The affidavit is replete with commentary and the first plaintiff's analysis of the deficiencies of the police investigation. He exhibits extensive material to the affidavit. The primary material is the report from PONI which as already has been indicated will be before the court in the absence of the affidavit in any event.

[23] The remainder of the material relates to police statements, minutes from coroner's meetings, correspondence, telephone records, internal police reports, evidence at the inquest and material gathered in the course of the coroner's investigation.

Legal principles

[24] It is well settled that an application pursuant to Order 18, rule 19(1)(a) to strike out an action should be dealt with solely on the pleadings. As per the "White Book" prior to the introduction of CPR in England & Wales at 18/19/5:

> "**Evidence –**
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> 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 …; and where the only ground on which the statement of claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is equally inadmissible …
>
> On an application to strike-out an originating summons on the ground that it discloses no reasonable cause of action, the prohibition in para (2) against adducing evidence on the application itself does not apply to an affidavit already put in as supporting the originating summons, and affidavits used before the Master without objection cannot be excluded before the judge."

[25] In this case, having read the pleadings and having regard to the fact that the PONI report will be available for consideration by the court, I see no basis upon which any affidavit evidence, let alone new affidavit evidence is required to determine the application under Order 18, rule 19(1)(a).

[26] In this case, however, Mr Lavery points out that the master also dismissed the claim on the grounds set out in Order 18, rule 19(1)(b) and (d), namely that the statement of claim is purportedly frivolous or vexatious and an abuse of process of the court. Mr Lavery correctly points out that affidavit evidence is admissible to rebut a claim based on these grounds.

[27] My reading of the master's judgment is that in striking out the claim on this basis, he did so on the grounds that the case was "obviously unsustainable."

[28] In short, his order under (b) and (d) was as a consequence of the view he took in relation to Order 18, rule 19(1)(a). At the hearing, I pressed Mr Henry on this point. He agreed with my interpretation of the judgment.

[29] One can understand given the circumstances in which the master also relied on Order 18, rule 19(1)(b) and (d) that they have provoked the application to file the affidavit and fresh evidence. This is particularly so because the master described the fact that the plaintiffs were seeking "vindication" as being suggestive of an "ulterior,

if not perfectly understandable, motive, indicative of families seeking answers not compensation, which would be the only remedy open to the court in these proceedings."

[30] Returning to the applicable legal principles, the court does have a discretion to admit fresh evidence on an appeal from the master. In this regard, Mr Lavery points to the recent decision of McBride J in *KRW LLP and others v Corrigan and others* [2025] NIKB 18. There the judge said at para [37]:

> "[37] It is accepted by all parties that an appeal from the Master is a *de novo* hearing. It is also accepted that on appeal from the Master the High Court has a discretion to admit fresh evidence. As was set out by Girvan J in *Lough Neagh Exploration v Morrice* [1999] NIJB 43, the onus is on the party seeking to admit the evidence to demonstrate that the interests of justice are better served by admitting the evidence than by refusing and that there was a sound reason for failing to file the evidence below."

[31] If one turns to the decision of Girvan J, in the *Lough Neagh* case it will be seen that that case involved an appeal from an order of the master whereby the plaintiff's action was dismissed on the grounds that an action raising the same causes of action and/or the same subject matter of the dispute between the parties was pending in the High Court in the Republic of Ireland and on the grounds that the action was frivolous and vexatious and an abuse of the process of the court.

[32] The key passage in the judgment is at page 45 as follows:

> "In *Bailie v Cruickshank* [1995] reported in [1995] NIJB 47, McCollum J (as he then was) made a number of cogent points which should be taken into account when the question of the exercise of that discretion arises. Thus:
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> 1. Parties have a duty to put their case properly and fully before the Master and adduce all available evidence at that stage. This is just another aspect of the general principle that it is incumbent on parties to put their full case before the court at the material time.
>
> 2. A party seeking to adduce fresh evidence before the judge in chambers or on appeal should advance a sound reason for the failure to adduce that evidence before the Master.

3. A party seeking to adduce such additional evidence carries the burden of establishing that the interests of justice would be better served by the admission of additional evidence rather than by refusing to admit it."

[33] It is difficult to see how the plaintiffs meet the suggested criteria set out in the judgment.

[34] All of the "new" material was available to the plaintiffs at the time of the master's hearing. No sound reason has been adduced for the failure to adduce that evidence before the master. Clearly, it was not considered relevant, in my view, properly so. As indicated above, the application seems to have been prompted by the master's reference to the "ulterior motive."

[35] The final question is whether the interests of justice require the admission of the fresh evidence.

[36] It is important to note that the reason fresh evidence was introduced in the *KRW* case was to correct a mistaken belief of the master to the effect that the plaintiff had failed to file an affidavit in response to a discovery order. The fresh evidence was admitted to address that incorrect belief. One can see therefore why the interests of justice required that the affidavit evidence be admitted in that case.

[37] Mr Lavery says that the purpose of the application is to provide context for the background to the claim.

[38] Having considered the affidavit evidence now sought to be introduced, it occurs to me that this would inevitably result in a detailed replying affidavit from the defendant given the nature of its contents.

[39] I consider that the court is well able on appeal to determine the fundamental issue in this case, that is whether the pleadings disclose a reasonable cause of action with some chance of success.

[40] All the relevant authorities highlight the obstacle faced by a defendant in bringing a "strike-out" application. The court will approach the task on the basis that all the averments in the statement of claim are true. The draconian remedy is not easily granted.

[41] Whilst recognising the court's discretion to introduce fresh affidavit evidence on appeal, particularly in the context of an application based on grounds (b) and (d), I am not persuaded that the plaintiffs at this late stage should be entitled to introduce further detailed and voluminous material with a view to providing the "context" to the case. The context is abundantly clear from the statement of claim and from the PONI report which is available to the court.

[42] In my view, permitting the introduction of this evidence will inevitably lead to a detailed replying affidavit and runs the risk of the court, in effect, trying the case.

[43] Standing back, I take the view that the High Court judge dealing with this appeal, without expressing any view on the merits of the appeal, is well able to determine the Order 18 application on the basis of the amended pleadings and the PONI report which will be available to it.

[44] Therefore, in relation to the preliminary issue the court does not permit the introduction of the affidavit evidence of the first-named plaintiff dated 18 August 2025. For the avoidance of doubt, I do so based on my interpretation of the master's judgment and Mr Henry's agreement with this interpretation (see para [28] above). Should the defendant seek to advance an argument on appeal that the court should make an order under Order 18, rule 19(1)(b) and (d) other than as a consequence of the ruling in relation to Order 18, rule 19(1)(a) the matter could be revisited. Hopefully, this will not be necessary.