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No 16/11178

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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MAUREEN MAGEE as administratrix of the estate of JONATHAN MAGEE Deceased.

AND

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

MASTER MCCORRY

[1] The defendant applies by summons issued 16th February 2017, for an order that the plaintiff's action be struck out on the grounds that: (a) the pleadings do not disclose a reasonable cause of action, and/or (b) the plaintiff's case is scandalous, frivolous and/or vexatious, and/or (c) is otherwise an abuse of process, pursuant to Order 18, rule 19 of the Rules of the Court of Judicature (NI) 1980.

[2] The plaintiff's claim arises from the death of her son who on 29th January 2011 committed suicide by walking in front of a moving train near Knockmore Bridge, Lisburn. At the time of his death Jonathan Magee was a young man with a significant history of mental illness including, schizophrenia and drug abuse from an early age. In the period leading up to his death he had been reviewed by a consultant psychiatrist at the Mater Hospital, Belfast on 20th December 2010. He gave consideration to detaining him under the Mental Health Order 1986 at that point but opted instead to see him again on 24th January 2011, because he was taking significant medication and it was hoped that he would continue to take this until the next appointment. The Deceased assured his general practitioner on 23rd December 2010 that he would do so and on 7th January 2011 again confirmed that he was taking his medication, albeit not on a regular basis. He attended the Mater Hospital on 11th January 2011 complaining that he had been drugged and was exhibiting persecutory traits, but was just encouraged to attend his next review appointment with the consultant scheduled for 24th January. He attended the day before, 23rd January, in an agitated state and again was encouraged to see the consultant the next day, which he did, but was noted to be dishevelled, "grandiose and manic" and

"deluded". He was referred to, but not immediately offered admission to, the "Home Treatment Team" and an attempt to contact him the following day to arrange a domiciliary visit was initially unsuccessful. When the team went to his home later that day he was found to be agitated and irritable.

[3] On 26th January 2011 the Deceased attended Whiteabbey Hospital and was assessed by the Home Treatment Team who noted that he had suicidal thoughts but was assessed as showing no evidence of psychosis or mood disorder and was refused admission to Holywell Hospital. The police were contacted but the Deceased left the hospital and was uncontactable thereafter. Later the same day he was briefly assessed at Lagan Valley Hospital, where a history of acute anxiety and paranoia was noted and it was also noted that a bed was available at Ward K at the Mater Hospital, an ambulance transfer was arranged and the Deceased was taken to the Mater Hospital where he was admitted voluntarily. However, he absconded and the police were notified to investigate and return him to Ward K. The Deceased attempted suicide by cutting his wrists and taking an overdose on 28th January. He was detained by police at 16.49 at Cavehill Park following concerns by his family about tablets he had removed from the house.

[4] After being detained by the police the Deceased was taken by ambulance to Belfast City Hospital where he arrived at 17.30. He was initially arrested at the park by the police because he was in possession of a knife, raising concerns that he presented a danger to himself or the public At the hospital he was no longer deemed to meet the criteria for arrest and was therefore de-arrested at 18.24 by the police, who left him in the care of the hospital staff and did not remain at the premises. The Deceased's father was present both before and after the police left. Hospital staff arranged for an out of hours general practitioner and a social worker to attend to assess whether the Deceased should be detained under the Mental Health Order. A social worker did attend at 22.30 and concluded that he was paranoid but did not demonstrate ideas of self-harm or suicide. There was no general practitioner available to attend until 00.30 on 29th January (he in fact arrived at 00.40) but by that stage the Deceased had left the hospital. The police were notified by hospital staff at 01.13 on the 29th January and they circulated his description to patrols; contacted his mother (the plaintiff) who provided a number of addresses which he may have gone to, and further names were provided by the Deceased's sister. During the early afternoon the police were able to speak to the Deceased by mobile telephone but he wouldn't tell them his whereabouts. In fact he was at a Simon Community Hostel at Flush Street, Lisburn but no-one had suggested that address to the police. He left the hostel at approximately 16.30 and was killed when he walked in front of a train at 17.00 hours.

[5] Order 18, rule 19 provides:

> "(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything and any pleading or the endorsement, on the ground that –

(a) It discloses no reasonable cause of action or defence, as the case may be; or
(b) It is scandalous, frivolous or vexatious; or
(c) It may prejudice, embarrass or delay the fair trial of the action; or
(d) It is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a)."

[6] The approach to applications under Order 18, rule 19 (1) was considered by Gillen J in Rush v Police Service of Northern Ireland and Secretary of State for Northern Ireland [2011] NIQB 28. He summarised the principles as follows:

> *"[7] For the purposes of the application, all the averments in the Statement of Claim must be assumed to be true. (See O'Dwyer v Chief Constable of the RUC (1997) NI 403 at p. 406C).*
> *[8] O'Dwyer's case is authority also for the proposition that it is a "well settled principle that the summary procedure for striking out pleadings is to be used in plain and obvious cases." The matter must be unarguable or almost incontestably bad (see Lonrho plc v Fayed (1990) 2 QBD 479).*
> *[9] In approaching such applications, the court should be appropriately cautious in any developing field of law particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the Statement of Claim. Thus in Lonrho plc v Tebbit (1991) 4 All ER 973 at 979H, in an action where an application was made to strike out a claim in negligence on the grounds that it 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:*
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> *"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.*
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> *(See also E (A Minor) v Dorset CC (1995) 2 AC 633 at 693-694).*
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> *[10] Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence no evidence is admitted. A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out."*

[7] This means that so far as the application pursuant to Order 18, rule 19 (1) (a), to strike out pleadings as disclosing no reasonable cause of action is concerned, the court must deal with it on the face of the pleadings alone and without any reference to affidavit or other evidence. Such evidence can however be considered in dealing with applications pursuant to the remaining provisions of Order 18 rule (1) including that the claim is frivolous and vexatious as is alleged in this instance. In this case the application is grounded on the affidavit of Andrew Jackson, a Senior Legal Advisor in the Chief Constable's Office. Whilst it refers to the factual background most of the substantial averments deal with interpretation of the facts and the police powers and duties under the Mental Health Order rather than the evidence, which are matters more appropriate to written submissions or skeleton argument, and provide little or no basis for concluding that the plaintiff's case is scandalous, frivolous and/or vexatious, and/or is otherwise an abuse of process. Likewise in the defendant's counsel's skeleton argument and oral submissions at hearing, the application was focussed on striking out as disclosing no reasonable cause of action only.

[8] The starting point in such applications is the pleadings, which at this stage in this case consists only of a statement of claim. Paragraph 1 sets out the capacity in which the plaintiff sues, namely pursuant to the Law Reform (Miscellaneous Provisions) (Northern Ireland) Act 1937 on behalf of the estate and under the Fatal Accidents (Northern Ireland) Order 1977, on the plaintiff's own behalf and that of the Deceased's dependants. No detail is given of the dependency claim. Paragraph 2 pleads that the defendant was responsible for failing to detain the Deceased; failure to investigate his absconding from hospital and failure to investigate and search for him after he absconded from hospital on 28th January 2011. Paragraph 3 of the statement of claim sets out the basic facts surrounding the Deceased's death and at Paragraph 4 pleads the causes of action relied upon, namely negligence of the defendant, its servants and agents and breach of article 2 of the European Convention of Human Rights.

The Duty of Care in Negligence

[9] Turning then to the main thrust of the defendant's application, and firstly that the circumstances pleaded do not give rise to a duty of care in negligence. The extent and limitations on such a duty of care has been the subject of numerous judgments by the superior courts in the United Kingdom including most notably Hill v Chief Constable of West Yorkshire [1989] A.C. 53, Van Colle v Chief Constable of Hertfordshire; Smith v Chief Constable of Sussex Police [2008] 2 Al ER 977, and in this jurisdiction by Gillen J in Rush v Police Service of Northern Ireland (2011) GIL 8123 and again in C v Chief Constable of the PSNI [2014] NIQB 63, a judgment upon which the plaintiff places much weight. The general principle as set out in Hill (the "Yorkshire Ripper Case") is that the police owed no duty of care in negligence (a) unless the relationship between the claimant and police demonstrated the special ingredients and characteristics which would create such a duty of care, and it was contrary to public policy that police should owe a duty of care in negligence for the

manner in which it conducted a criminal investigation. Lord Keith explained this at 243/244 of his judgment, as follows:

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

[10] Gillen J in C v Chief constable of the PSNI, reviewing the cases which came after Hill, concluded that it was well established that there were exceptional cases on the margin of the area covered by the principle in Hill. In particular where the complaint related to an operational decision made by police that could be the subject of civil liability without compromising the public interest in the investigation and suppression of crime. He also concluded that the categories of exceptions to the general principle were not closed, observing:

"[16] This is not to say there is immunity from liability in negligence for police officers in all circumstances. Whilst the shortcomings of the police in individual cases cannot undermine the core principle nonetheless that principle has some ragged edges. It is well established that there are exceptional cases on the margins which will have to be considered if and when circumstances appropriately arise."

[11] In C the plaintiff was a vulnerable young woman who was raped on 16 June 2007. She sued the PSNI for personal injuries suffered by her on account of the negligence of, and breach of her rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, by the PSNI in the course of a flawed investigation of this rape. The issue before the court was whether, before serving his defence, the defendant could apply to strike out her claim on the basis that as a matter of public policy actions for damages will not lie against the police so far as concerns their functions in the investigation and suppression of crime save in exceptional circumstances.

[12] Since C, the Supreme Court most recently considered the issue of the duty of care owed by police in such cases, and again reviewed the case law, in Michael v Chief Constable of South Wales Police [2015] 2 All ER 635. This case arose out of the killing of a young woman by her boyfriend, where she had telephoned the police to report that her boyfriend had threatened to kill her and there was an imminent risk to her life. There was a delay in responding partly due to the report being passed from one police service to another. In a second call she was heard screaming but when police arrived they found that she had already been killed. As in the present case her parents (and dependent children) sued in negligence and under article 2 of the Human Rights Act 1998. The police applied for the claims to be struck out or for summary judgment to be entered in their favour. In the High Court the judge refused those applications. The Court of Appeal upheld the decision of the judge that the Article 2 claim should proceed to trial, and gave summary judgment in favour of the police on the issue of negligence. The claimants appealed and the police cross-appealed. The Supreme Court considered: (i) a broad principle of liability; (ii) a narrower principle of liability under which it was suggested that the police would owe a duty of care to M on the facts as alleged; (iii) whether on the basis of what had been said in the first emergency call, and the circumstances in which it had been made, the police should be held to have assumed responsibility to take reasonable care for the safety of M and had therefore owed her a duty in negligence; and (iv) whether there had arguably been a breach of Article 2 of the convention.

[13] With respect to the "wider principle" proposed by the plaintiff, the Supreme Court held – (1) (per Lord Neuberger, Lord Mance, Lord Reed, Lord Toulson, and Lord Hodge) a new exception to the ordinary application of common law principles, namely that if the police were aware or ought reasonably to have been aware of a threat to the life or physical safety of an identifiable person, or member of an identifiable small group the police owed to that person a duty under the law of negligence to take reasonable care for their safety, should not be made. They reasoned that it did not follow from the setting up of a protective system from public resources that if it failed to achieve its purpose, through organisational defects or

individual fault, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state was not responsible. The imposition of such a burden would be contrary to the ordinary principles of the common law. The duty of the police for the preservation of the peace was owed to members of the public at large, and did not involve the kind of close or special relationship ('proximity' or 'neighbourhood') necessary for the imposition of a private law duty of care. The foundation of a duty of care in the public law duty of the police for the preservation of the peace meant that it was hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace or why it should be limited to particular potential victims. The court could not judge the likely operational consequences for the police of changing the law of negligence in the way proposed; the only sure consequence would be that the imposition of liability on the police to compensate victims of violence on the basis that the police should have prevented it would have potentially significant financial implications. The suggested development of the law of negligence was not necessary to comply with the convention; there was no basis, on orthodox common law principles, for fashioning a duty of care limited in scope to that of the convention right to life and the convention prohibition of torture or inhuman or degrading treatment or punishment, or providing compensation on a different basis from a claim under the 1998 Act; and there was no principled legal basis for introducing a wider duty in negligence than would arise either under orthodox common law principles or under the convention. The possibility of a claim under the 1998 Act was not a good reason for creating a parallel common law claim, still less for creating a wider duty of care.

[14] The Court went on to hold (2) (per Lord Neuberger, Lord Mance, Lord Reed, Lord Toulson, and Lord Hodge) that the narrower principle of liability proposed by the plaintiff, namely that if a member of the public ('A') furnished a police officer ('B') with apparently credible evidence that a third party whose identity and whereabouts were known presented a specific and imminent threat to his life and physical safety, B would owe to A a duty to take reasonable steps to assess such threat and if appropriate take reasonable steps to prevent it being executed, should be rejected for the same reasons as the broader principle. If it was thought that there should be public compensation for victims of certain types of crime, above that which was provided under the criminal injuries compensation scheme, in cases of pure omission by the police to perform their duty for the prevention of violence, it should be for Parliament to determine whether there should be such a scheme and what should be its scope as to the types of crime, types of loss and any financial limits. The 1998 Act had created a cause of action in the limited circumstances where the police had acted in breach of Articles 2 and 3; the positive obligations of the state under those articles were limited, for good reasons, and the creation of such a statutory cause of action did not itself provide a sufficient reason for the common law to duplicate or extend it.

[15] Reviewing the earlier case law at [44], dealing with the issue of whether or not the police had an immunity from civil action in such cases, that term having been used by Lord Keith in Hill and subsequently by Gillen J in C, Lord Toulson said:

"[44] An 'immunity' is generally understood to be an exemption based on a defendant's status from a liability imposed by the law on others, as in the case of sovereign immunity. Lord Keith's use of the phrase was, with hindsight, not only unnecessary but unfortunate. It gave rise to misunderstanding, not least at Strasbourg. In Osman v UK (1998) 5 BHRC 293 the Strasbourg court held that the exclusion of liability in negligence in a case concerning acts or omissions of the police in the investigation and prevention of crime amounted to a restriction on access to the court in violation of art 6. This perception caused consternation to English lawyers. In Z v UK (2001) 10 BHRC 384 the Grand Chamber accepted that its reasoning on this issue in Osman was based on a misunderstanding of the law of negligence; and it acknowledged that it is not incompatible with art 6 for a court to determine on a summary application that a duty of care under the substantive law of negligence does not arise on an assumed state of facts."

[16] At [53] he continued

"[53] In Van Colle threats were made against a prosecution witness in the weeks leading to a trial. They included two telephone calls from the accused to the witness. The second call was aggressive and threatening but contained no explicit death threat. The witness reported the threats to the police. The matter was not treated with urgency. An arrangement was made for the police to take a witness statement, after which the police intended to arrest the accused, but in the interval the witness was shot dead by the accused. His parents brought a claim against the police under the Human Rights Act 1998 relying on arts 2 and 8 of the Convention. There was no claim under common law. The police were held liable at first instance ([2006] EWHC 360 (QB), [2006] 3 All ER 963), and failed in an appeal to the Court of Appeal ([2007] EWCA Civ 325, [2007] 3 All ER 122, [2007] 1 WLR 1821), but succeeded in an appeal to the House of Lords.
[54] The House of Lords applied the test laid down by the Strasbourg court in Osman v UK (1998) 5 BHRC 293 (para 116) for determining when national authorities have a positive obligation under art 2 to take preventative measures to protect an individual whose life is at risk from the criminal acts of another:
'it must be established to [the court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.'
[55] The critical question of fact was whether the police, making a reasonable and informed judgment at the time, should have appreciated that there was a real and immediate risk to the life of the victim. The House of Lords held that the test was not met.
[56] Smith [2008] 3 All ER 977, [2009] AC 225 reached the House of Lords on an application to strike out. The question was whether the police owed a duty of care to the claimant on the assumed facts. The claimant was a victim of violence by a former partner. He had suffered violence at the hands of the other man during their relationship. After it ended, he received a stream of violent, abusive and threatening messages, including death threats. He reported these matters to the police and told a police inspector that he thought that his life was in danger. A week later the man

attacked the victim at his home address with a claw hammer, causing him fractures of the skull and brain damage. The assailant was subsequently convicted of making threats to kill and causing grievous bodily harm with intent. The House of Lords held by a majority that the police owed the victim no duty of care in negligence."

[17] Then at [113] onwards he observed

"[113] Besides the provision of such services, which are not peculiarly governmental in their nature, it is a feature of our system of government that many areas of life are subject to forms of state controlled licensing, regulation, inspection, intervention and assistance aimed at protecting the general public from physical or economic harm caused by the activities of other members of society (or sometimes from natural disasters). Licensing of firearms, regulation of financial services, inspections of restaurants, factories and children's nurseries, and enforcement of building regulations are random examples. To compile a comprehensive list would be virtually impossible, because the systems designed to protect the public from harm of one kind or another are so extensive.

[114] It does not follow from the setting up of a protective system from public resources that if it fails to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the actions of a third party for whose behaviour the state is not responsible. To impose such a burden would be contrary to the ordinary principles of the common law.

[115] The refusal of the courts to impose a private law duty on the police to exercise reasonable care to safeguard victims or potential victims of crime, except in cases where there has been a representation and reliance, does not involve giving special treatment to the police. It is consistent with the way in which the common law has been applied to other authorities vested with powers or duties as a matter of public law for the protection of the public. Examples at the highest level include Yuen Kun-yeu v A-G of Hong Kong[1987] 2 All ER 705, [1988] AC 175 and Davis v Radcliffe [1990] 2 All ER 536, [1990] 1 WLR 821 (no duty of care owed by financial regulators towards investors), Murphy v Brentwood DC (no duty of care owed to the owner of a house with defective foundations by the local authority which passed the plans), Stovin v Wise and Gorringe v Calderdale Metropolitan BC (no duty of care owed by a highway authority to take action to prevent accidents from known hazards).

[116] The question is therefore not whether the police should have a special immunity, but whether an exception should be made to the ordinary application of common law principles which would cover the facts of the present case."

[18] That then is the up to date statement of the law and the rationale behind it. In short, so far as this case is concerned those principles are: (a) that the police owe no duty of care in negligence unless the relationship between the claimant and police demonstrated the special ingredients and characteristics which would create such a duty of care, and it was contrary to public policy that police should owe a duty of care in negligence for the manner in which it conducted a criminal investigation; (b) there may be exceptional cases on the margin of the area covered by the principle in Hill, in particular where the complaint relates to an operational decision made by police that could be the subject of civil liability without compromising the public

interest in the investigation and suppression of crime, and the categories of exceptions to the general principle are not closed; these exceptional circumstances where they arise do not amount to an immunity; (c) however, the courts are loath to recognise such exceptions as is demonstrated in the most recent decision by the Supreme Court where no private law duty of care was recognised where police were slow to respond to calls for help by a young woman threatened by her boyfriend who killed her before they arrived.

[19] Applying this in the present case the plaintiff's pleaded case and the defendant's basis for striking it out, have two limbs. The first can broadly be called the "custody" or "assumption of a special relationship" argument. The defendant argues that at the time the Deceased absconded he was no longer in their custody. He had been arrested and then de-arrested and left in the care of hospital staff. The police had no power to detain the Deceased under the Mental Health Order (MHO). All that they were empowered to do was detain him and take him to hospital so that the hospital trust could take the necessary steps to detain him under the MHO, which they had done. However, the plaintiff argues that when the police left the Deceased in the hospital he had still not been detained under the MHO, and they were aware that he had absconded from another hospital the previous day and therefore might do so again, and therefore in fact had not left him in a safe place. This, they argue is not a situation covered by any of the authorities. They submit therefore that the police had clearly assumed responsibility for the Deceased and did not exercise that responsibility with sufficient care.

[20] I do not think that it is necessary in this judgment for me to consider the intricacies of either section 26 of the Police and Criminal Evidence (Northern Ireland) Order 1989 or section 130 of the Mental Health Order 1986. It is very clear that the police cannot detain people under the MHO, that being a function of the Health Trust. What the police do is detain a person in order to bring him/her to a place where he/she can be assessed by doctors and social workers as to his/her detention under the MHO. Additionally, in this case the Deceased had also been arrested because he was in possession of a knife constituting a potential danger to himself and others. However, once he was in the hospital and no longer presented a danger to himself or others, and the knife having, I assume, been removed, the police no longer had any cause to detain him for that reason, and clearly would have been acting illegally had they sought to do so. Hence he was de-arrested. It seems to me that the police would have had no legal power to do anything else so far as arrest is concerned.

[21] The second limb is the investigatory or search for a missing person case. The defendant says this part of the plaintiff's case is incontestably bad because searching for missing persons is a normal or routine part of police operations, affording no grounds for departure from the general rule as set out in Michael, the culmination of a long line of authorities. In his report the Police Ombudsman approached the search for a missing person as an investigation even though the Deceased was in danger from himself as opposed to anyone, or anything, else. He concluded that failings in that investigation could have made a material difference in terms of preventing the

Deceased's death. The plaintiff argues that whether or not police failings did have a material bearing on the outcome is something which should be investigated by the court. The defendant maintains that even if this was so, it still does not constitute the assumption of a special responsibility which would be required in order to impose a duty of care in negligence on the defendant. I think that the defendant is correct in this submission. I have no doubt that, for example in Michael, questions could have been asked about the adequacy and speed of the police response and whether or not if they had acted more quickly a different outcome may have resulted. Those questions were asked by the ombudsman in this case, and failings were found in the investigatory process leading to the disciplining of officers, but that does not detract from the established principle that the police owe no private duty of care in relation to how they go about their operational activities except in the very narrow situation postulated in Michael, examples of which situations have never been identified and the courts are loath to find.

[22] Whether one is considering the investigation limb or the custody/assumption of a special responsibility limb of the case against the police in negligence, it seems to me that it is difficult to see that there is anything which would take this case outside the general principles as they have now been clarified by the Supreme Court in Michael. It is not really necessary or helpful to compare the particular facts of this case with those in Michael or any of the earlier authorities, and conclude that this is a stronger or weaker case. The court should focus on the facts of this case as pleaded and when I do so what seems to me as inescapable is that this case is not one so different that a court, having regard to the law as clarified, could conclude that its facts as pleaded take it outside the general to the point where a private duty of care could be imposed upon the police. Therefore, regretfully, I must conclude that the plaintiff's case in negligence, based on a finding that such a private duty of care has been established herein, is unarguable and incontestably bad.

Article 2, the Right to Life

[23] I turn then to the claim based on Article 2 of the Convention, the right to life. Once again there are two limbs to the defendant's application. The first is whether there is any sustainable claim under the Convention and the second is the issue of limitation in Convention claims. Relevant to both issues is Rabone v Pennine National Health Service Trust [2012] UKSC 1, a case concerning the release of a patient, who had not been detained under the United Kingdom Mental Health Act, and went on to self harm, a scenario similar to part of the present case. In that case Lady Hale set out the 3 elements to Article 2 in these terms:

> *"Everyone's right to life shall be protected by law". As Lord Dyson has explained it is now clear that this simple sentence imposes 3 distinct obligations on the State. The first, which does not arise here, is the negative obligation, not itself to take life except in limited cases provided for in Article 2(2). The second, which does not arise here, is the positive obligation to conduct a proper investigation into any death to which the State might bear some degree of responsibility. And the third, with which this case is concerned is the positive obligation to protect life. As a general rule, the positive*

obligation is fulfilled by having in place laws and a legal system which deter threats to life from any quarter and punishes their perpetrators or compensates the victims if deterrence fails. In the health care context, this also entails having effective administration and regulatory systems in place, designed to protect patients from professional incompetence resulting in death, but it is not suggested that English law and the English legal system are defective in this respect".

[24] The instant case raises issues in respect of the second and third limbs; the positive obligation to conduct a proper investigation into any death to which the State might bear some degree of responsibility; and the positive obligation to protect life. In the plaintiff's statement of claim these are pleaded at Particulars (b) to (e) which in summary allege: (b) failure to ensure that the Deceased was detained under the MHO for his own safety and well-being; (c) causing or allowing him to be discharged from the care of the defendants thereby placing his life in danger; (d) upon the Deceased absconding failing to carry out an immediate, efficient and appropriate investigation to assess his risk and apprehend him, and (e) failing to carry out a timely and appropriate assessment to ensure that the appropriate assessments under the MHO could be made prior to the Deceased's life being put in danger. Therefore, so far as the pleading goes, the allegations are quite narrow. There is no real allegation about failure to investigate the death, which is understandable given that there was an inquest and a police ombudsman's investigation, and the main thrust of the plaintiff's case is on the inadequacies of the investigation, in the sense of trying to locate and re-apprehend the Deceased, after he absconded (see 4(d)), the area where the plaintiff points out, the police ombudsman found fault. The plaintiff submits that the question for the court is: "whether the police knew or ought to have known that there was an immediate risk to the life of the victim of violence or whether they did all that could reasonably be expected of them to prevent it from materialising." (Lord Dyson in Sarjantson v Chief Constable of Humberside Police [2014] Q.B. 411). It seems to me that in this case, as the police had arrested the Deceased for his own safety at just before 5.00pm in the evening of the 28th January, and were informed just after 1.00am that he had absconded again, they must have been aware from that point on that he was at risk. So far as that goes the plaintiff would appear to have an arguable case.

[25] However, the defendant raises further submissions in relation to just satisfaction and the purposes of damages in a Convention claim, which focuses on the very purpose of claims under the Convention, which is clearly different from private law claims at common law. Lord Browne at [138] in Van Colle v Chief Constable of Hertfordshire and Smyth v Chief Constable of Sussex Police [2009] AC 225, observed:

"…. As Lord Bingham pointed out in R (Greenfield) v Sec. of State for the Home Department [205] 1 WLR 673 , Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights. That is why the time limits are markedly shorter….It is also why s.8(3) of the Act provides that no damages are to be awarded unless necessary for just satisfaction…"

Section 8(3) provides:

> "No award of damages is to be made unless, taking into account of all the circumstances of the case, including-
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
> (b) the consequences of any decision (of that or any other court) in respect of that act,
> The court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made."

[26] The defendant argues that the issue of just satisfaction has to be viewed against the aim of the claim. In this instance there has been an internal police investigation and an ombudsman's investigation which found fault with some officers leading to police disciplinary proceedings. This, it says, represents just satisfaction in this case. They argue that the primary aim of Human Rights Act claims is declaratory, with damages to be awarded only as a last resort, whereas this plaintiff has not pleaded anything to justify why damages are necessary in this case. I have to say that the defendant's submissions carry weight and at very least it can be concluded at this stage that the plaintiff's Convention claim faces considerable difficulties, and is by any standards a weak case. However, it is not the function of an interlocutory court dealing with a striking out of pleadings as disclosing no reasonable cause of action application, to strike out weak cases, but rather to consider whether or not the case pleaded is unarguable or incontestably bad. This is indeed a weak case, but I am not satisfied that it can be deemed unarguable.

[27] I turn then to the second limb of the defendant's attack on the plaintiff's convention claim, namely limitation. In answer the plaintiff appears to believe that the defendant not only raises limitation in respect of the Convention claim but also the common law claim in negligence. I am not sure that this is correct, but if it is, then clearly central to this court's consideration is the discretion to disapply the limitation period provided by article 50 of the Limitation (Northern Ireland) Order 1989: the plaintiff cites Gillen J's very useful summary of the principles set out in McArdle v Marmion [2013] NIQB 123: I do not see how a defendant could argue that pleadings disclose no reasonable cause of action because it has a limitation defence without trespassing upon the discretion conferred on the trial judge or whichever court deals with the question of limitation. Further, the issue of a limitation defence does not even properly arise until it has been pleaded in a defence to the statement of claim. The position is arguably different with respect to Convention claims, not least because of the very significantly shorter period allowed for taking a claim, but also because the Article 50 discretion does not apply, although a court dealing with the issue of extension of time in a Convention claim may have regard to the various criteria applicable in an Article 50 application. In Rabone, referring to the equivalent provision in the 1980 Act in England at [75] Lord Dyson notes:

"The Court has a wide discretion in determining whether it is equitable to extend time in the particular circumstances of the case. It will often be appropriate to take into account factors of the time listed in Section 33(3) of the Limitation Act 1980 as being relevant when deciding whether to extend the time for a domestic law action in respect of personal injury or death. These may include the length of and reasons for the delay in issuing the proceedings; the extent of which, having regard to the delay, the evidence in the case is or likely to be less cogent than it would have been if the proceedings had been issued within a 1 year period; and the conduct of the public authority after the right to claim arose, including the extent (if any) to which it responded to any request reasonable made by the Plaintiff for information for the purposes of ascertaining facts".

[28] The statutory basis for dealing with extensions of time for Human Rights Act claims is section 7(5) (b) of the 1998 Act itself which provides:

> "(5) Proceedings under subsection (1)(a) must be brought before the end of –
> (a) the period of one year beginning with the date on which the act complained of took place; or
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question."

[29] The defendant refers the court to AP v Tameside Borough Council [2017] EWHC 65, which it acknowledges is a persuasive but not binding authority. In that case a local authority took a child out of a family home and placed him in a state run facility because Social Services had been concerned about the wellbeing of a child who had special needs. There were allegations that the mother had assaulted the child. After returning him to the mother's care the authorities accepted that they had failed to follow the proper procedures and wrote a letter of apology. The claim was lodged 1.5 years after the limitation period expired and the argument on behalf of the child with special needs was that his circumstances were such that a more sympathetic approach should be taken to limitation. At [71] the Court said:

"In MT Rix LJ at paragraph 30 highlighted that section 7 [of the HRA] made no exception with regards to a child claimant as well as noting the policy reasons for Parliament adopting a much tighter limitation period in HRA claims against public authorities compared with common claims in tort and contract governed by the Limitation Act 1980:

"Thirdly Mr Simblet submitted that insufficient weight was given to the fact time would not have been running against the Claimant if his claim had been under the Fatal Accidents Act or in negligence. In my judgment this submission is of no value whatsoever. Plainly the judge expressly had in mind both the position under the Limitation Act and the fact that the HRA made no exception for a minor … In fact if anything, the judge made quite light of the fact that it is a striking feature of section 7 that it provides a limitation period of only one year to be contrasted strongly with the much longer period allowed under the Limitation Act, and indeed makes no allowance

in respect of a minor. The clear inference is that, in the case of such claims against public authorities, perhaps reflecting the tight three month time limit for judicial reviews, it is considered right that there should be really quite tight limitation periods. The judge made little of that factor but in my judgment could well have made more."

[30] At [77] the Court continued:

"I have already set out the observations of Rix LJ in MT. There are other authorities which make the same point as to the underlying reason for the shortness of the primary limitation period in claims against public authorities under the HRA. See for example Lord Brown [Van Colle] at paragraph 138. I concur with the views stated by Jay J in Bedford at paragraph 76 that the court must take into account that the primary limitation period under the HRA is one year, not three years, and it is clearly the policy of the legislature that HRA claims should be dealt with both swiftly and economically. All such claims are by definition brought against public authorities and there is no public interest in these being burdened by expensive, time consuming and tardy claims brought years after the event."

That seems to reflect a modern trend towards a more rigorous enforcement of the one year time limit in Convention claims.

[31] In the more persuasive authority of London Borough of Hackney v Williams & Williams [2017] EWCA Civ 26, the claim was taken 5 years after the cause of action. In that case the High Court had originally extended time and allowed the Human Rights Act claim to succeed on merit, based upon the evidence the court had heard. The Court of Appeal overturned the ruling stating that the limitation period should not have been extended. The Court stated that public authorities shouldn't have to deal with costly litigation lodged years out of time, particularly where there had already been Ombudsman involvement and cost to the public authority already.

[32] These authorities are clearly important in establishing the approach adopted by courts dealing with issues of limitation and extension of time in the context of Article 2, or other, Convention claims, and at very least suggest that the plaintiff in this case could face an uphill struggle persuading a court to extend time. However, it is not the role of this court to determine that issue. This court's function is to consider the pleadings against the relevant legal principles, as clarified by relevant legal authorities, and decide whether or not a cause of action is disclosed. It is not the function of this court, hearing this type of application, to decide limitation issues. Therefore, whilst the defendant's submissions identify clear potential weaknesses in the plaintiff's claim under the Convention, that is not a sufficient basis for this Court to decide the issue in an application pursuant to Order 18, rule 19 (1) (a).

[33] In conclusion therefore, for the reasons set out at paragraphs [18] to [22] above, I order that the pleadings in the plaintiff's statement of claim, so far as they relate to a claim against this defendant in negligence, disclose no reasonable cause of action and are struck out. However, for the reasons set out at [24] to [26] and [29] to [32] I refuse to strike out that part of the plaintiff's statement of claim which relates to

a claim pursuant to Article 2 of the Convention. I will hear counsel as to costs at a time to be arranged.