Neutral Citation : [2023] NIMaster 5 | *Ref:* **[2023] NIMaster 5**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **16/8/23**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Richard Kerr

Plaintiff;

and

The Department of Health, Social Services, and Public Safety

First Defendant

and

The Northern Ireland Office

Second Defendant

and

The Chief Constable of the Police Service of Northern Ireland

Third Defendant

and

The Secretary of State for the Home Department

Fourth Defendant.

AND BETWEEN

Gary Hoy

Plaintiff;

and

The Department of Health, Social Services, and Public Safety

First Defendant

and

The Chief Constable of the Police Service of Northern Ireland

Second Defendant

and

The Secretary of State for the Home Department

Third Defendant

Master Bell

Introduction

[1] This written judgment concerns four applications in two separate actions, one commenced by Richard Kerr and the other by Gary Hoy. Both actions concern the treatment which they allege occurred in Kincora Boys' Home (and in Mr Kerr's case also in Williamson House and Millisle Borstal). Because of the considerable overlap in respect of two of the applications, I shall address all the applications in one judgment.

[2] In the public memory, for those who recognise it, the name Kincora Boys' Home (hereafter "Kincora") will forever evoke feelings of societal shame because it was there that a number of young boys, who ought to have been cared for and supported, were abused and violated in the 1960s and 1970s. The plaintiffs were amongst those young boys who later made such allegations and they have now brought civil proceedings against various agencies of the state which they claim are liable.

[3] The defendants whom Mr Kerr is claiming against are the Department of Health, Social Services and Public Safety (hereafter referred to as "the Department of Health"), the Northern Ireland Office, the Chief Constable of the PSNI, and the Secretary of State for the Home Department (hereafter referred to as "the Home Secretary"). The defendants whom Mr Hoy is claiming against are the Department of Health, the Chief Constable of the PSNI and the Home Secretary.

[4] The Department of Health is sued on the basis that it was the authority responsible for Kincora and Williamson House. The Northern Ireland Office is sued on the basis that it was responsible for the Millisle Borstal. The Chief Constable is sued in connection with criminal investigations into what occurred at Kincora and at Williamson House. The Home Secretary is sued on the basis of her responsibility for the Security Service (often referred to as "MI5") in connection with the activities of

William McGrath who is alleged to have been an agent of both the Chief Constable and the Security Service.

[5] I am grateful to Mr Aidan Magowan who appeared on behalf of Mr Kerr and Mr Hoy, to Mr Andrew McGuiness who appeared on behalf of the Department of Health, and to Miss Fiona Fee who appeared on behalf of the Chief Constable, the Northern Ireland Office, and the Home Secretary, for their written and oral submissions.

The Department of Health's Application

[6] The First Defendant in Mr Kerr's action is the Department of Health and it will come as no surprise to any member of the public that the plaintiffs have sued the Department which the plaintiffs allege was responsible for running Kincora. It is obvious that something went seriously wrong in Kincora and the Historical Institutional Abuse Inquiry concluded that there were systemic failings in the way Kincora operated.

[7] The Department of Health issued a summons on 24 February 2022 in respect of Mr Kerr's action, seeking to have his action struck out. A detailed defence filed by the Department of Health argued that it was not the entity responsible for the running of Kincora and that that responsibility fell to the Welfare Authority (the predecessor of the Health and Social Services Boards) and later to the relevant Health and Social Services Board.

[8] Subsequent to the filing of that defence, however, the Northern Ireland Assembly passed the Health and Social Care Act (Northern Ireland) 2022. Section 5 of the Act required the Department of Health to make one or more schemes for the transfer of all the assets and liabilities of the Board. In the light of this legislation, the Department of Health did not consider that their strike out application could now be sustained. I therefore dismiss that element of their summons and Mr Kerr's action against the Department of Health in respect of what he alleges happened to him at Kincora and Williamson House will continue.

[9] The Department's summons also sought a second form of relief, namely the provision of proper replies to their Notice for Further and Better Particulars dated 20 November 2020. In relation to this second aspect of the Department's summons, the parties agreed at the hearing that the application for replies should be adjourned until Mr Kerr's application to amend his Statement of Claim had been determined. I therefore adjourn that element of the summons to a date to be fixed by the parties with the Masters' Office.

Mr Kerr's application to amend his Statement of Claim

[10] Mr Kerr's application seeks an order under Order 20 Rule 5 granting him leave to amend his Writ and Statement of Claim. It is grounded on an affidavit from

his solicitor, Claire McKeegan. Ms McKeegan submits that the proposed amendments are being sought to raise and clarify the real issues in the action.

[11] Ms McKeegan's grounding affidavit also avers that an order allowing Mr Hoy to amend his Writ and Statement of Claim in similar terms to that now sought by Mr Kerr was granted on 20 January 2023. When I asked counsel about this, both Mr Magowan and Miss Fee agreed that this was the position (although Miss Fee was somewhat tentative in her agreement). Following the hearing, I requested that the Court Service provide me with any papers in relation to an application on 20 January 2023. The physical court papers show that, on the date in question, the only note made in respect of Mr Hoy's action was that the application was "Adjourned to a date to be fixed by the parties in consultation with the Masters' Office." The ICOS computer record also contains no indication that an order was made by me under Order 20 Rule 5 giving Mr Hoy leave to amend his Statement of Claim. I have, however, considered the strike out application against Mr Hoy's Statement of Claim as if Mr Hoy's application to amend his Statement of Claim was granted on 20 January 2023.

[12] Mr Magowan submitted that the decision of *Loughran v Century Newspapers Ltd* [2014] NIQB 26 sets out the principles to be applied in applications governing amendment of pleadings. Three of the most important paragraphs in Gillen J's judgment in that case are:

> "[35] A pleading may be amended by leave at any time. The guiding principle is that it will be allowed in order to raise or clarify the real issues in the case or to correct a defect of error, provided that it is bona fide and there is no injustice to the other party which cannot be compensated in costs (see Beoco v Alfa Labil [1995] QB 137 and Valentine (Civil Proceedings, The Supreme Court) at 11.18). However as a general rule, the later the application to amend, the more likely it is to be enquired into and the greater risk is that it will be refused.
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> [36] An amendment may introduce a new case, but not a case which is unarguable (Chan-Sing-Chuk v Innovision Ltd [1992] LRC (Com) 609 (Hong Kong CA).
>
> [37] An amendment may be allowed notwithstanding that the effect will be to add or substitute a new cause of action outside the relevant period of limitation if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed. A cautionary note was struck by Waller LJ in Worldwide Corp LTD v G P T Ltd, December 2 1998 CA when he said:
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> > "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should

> he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants?" "

[13] I will deal in this section with the proposed amendments made in respect of Mr Kerr's action against the Chief Constable and the Home Secretary. The amendments which Mr Kerr wishes to make to his Writ and Statement of Claim against these defendants may usefully be discussed under three headings: firstly, omissions material; secondly, assumption of responsibility; and thirdly, vicarious liability. The core issue in the application is, to use Gillen J's language, whether the proposed amendments introduce a case, or further aspects of a case, which is, or are, unarguable.

Omissions material

[14] The amendments in the proposed re-amended Statement of Claim are too extensive to set out in full in this judgment. However, the majority of them deal with concerns raised by a number of different individuals with police, and even in some circumstances by police, about allegations of what was happening in Kincora. The draft re-amended Statement of Claim then uses this material to allege that the police "failed to take any or adequate steps to investigate these allegations."

[15] Mr Magowan submitted that the amendments which his client wished to make were not entirely omissions by the Chief Constable and the Home Secretary. In particular, he emphasised that police officers "were blocked at a higher level from doing anything further" in relation to investigating Kincora. Miss Fee responded that the terminology of "blocked" and "obstruction" was simply another way of describing a failure to investigate. She termed it as a semantic exercise and a mere drafting device by counsel. She submitted that in hierarchical organisations decisions were sometimes made by senior officers and the reasoning for those decisions was not always communicated to lower-ranked officers. Hence those lower in the organisation might interpret this as "blocking". I agree with Miss Fee's submissions. Even with the use of the words "blocked" and "obstructed" in the proposed re-amended Statement of Claim, this does not convert an omissions case (which might be summarised as an action that the police either failed to prevent abuse at Kincora or failed to investigate it) into an action where the plaintiff sues in relation to positive acts committed by the police.

[16] It is clear that after the decision of the Northern Ireland Court of Appeal in *Magill v Chief Constable* [2022] NICA 49, where the Court allowed an amendment which had the effect of allowing the litigation to survive a strike out application, that other litigants involved in litigation against the police would inevitably make applications to include positive acts, or at least to attempt to frame omissions as positive acts, so as to prevent their litigation from being struck out.

[17] I am persuaded that the majority of the proposed amendments to Mr Kerr's Statement of Claim are simply omissions material, that is to say assertions that the police and the Home Secretary failed to investigate allegations of abuse made in respect of Kincora or failed to prevent the abuse alleged to have been committed by

third parties from taking place. As I will deal with later on in this judgment, however, it is clear that omissions cases do not generally result in civil liability being imposed on public authorities such as the police. Nevertheless, As McCloskey LJ said in *Magill v Chief Constable*, there are, however, exceptions to this general principle and it is to one of these that I now turn.

Assumption of Responsibility

[18] The draft re-amended Statement of Claim provides that:

> "Further or in the alternative, the Plaintiff asserts that these failures to investigate were committed in circumstances where the Third Defendant had taken on a status in loco parentis given that the complaints were made against the public authority which was supposed to be caring for the Plaintiff and there was no one else to care for the Plaintiff."

[19] The defendants acknowledge that there are exceptions to the principle that, while generally liability in negligence is not imposed for omissions, special considerations, such as an assumption of responsibility, will create a duty of care. The pleading proposed by Mr Kerr is therefore a potentially significant one. As Lord Reed observed in *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4 at para [69]:

> "… the exceptions to the general non-imposition of liability for omissions include situations where there has been a voluntary assumption of responsibility to prevent harm (situations which have sometimes been described as being close or akin to contract), situations where a person has assumed a status which carries with it a responsibility to prevent harm, such as being a parent or standing in loco parentis, and situations where the omission arises in the context of the defendant's having acted so as to create or increase a risk of harm."

[20] I recently dealt with the issue of assumption of responsibility in *Holbeach v Chief Constable* [2023] NIMaster 4. My judgment in that case outlines the law on this issue. Of particular note is the decision in *Michael and Others v Chief Constable of South Wales Police and Another* [2015] UKSC 2 where the Supreme Court held that the duty of the police for preservation of the peace was owed to members of the public at large and did not involve the kind of close or special relationship necessary for the imposition of a private duty of care. In the majority judgment Lord Toulson, delivering the judgment of the Court, observed at paragraph 100 of his judgment, that there had sometimes been a tendency for the courts to use the expression "assumption of responsibility" when in truth the responsibility had been imposed by the court rather than assumed by the defendant. Lord Toulson warned that the concept "should not be expanded artificially." He also stated:

"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 Attorney-General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 (no duty of care owed by financial regulators towards investors), *Murphy v Brentwood District Council* (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 Borough Council* (no duty of care owed by a highway authority to take action to prevent accidents from known hazards)."

and later he observed:

"119. If the foundation of a duty of care is the public law duty of the police for the preservation of the Queen's peace, it is hard to see why the duty should be confined to potential victims of a particular kind of breach of the peace. Would a duty of care be owed to a person who reported a credible threat to burn down his house? Would it be owed to a company which reported a credible threat by animal rights extremists to its premises? If not, why not?

120. It is also hard to see why it should be limited to particular potential victims. If the police fail through lack of care to catch a criminal before he shoots and injures his intended victim and also a bystander (or if he misses his intended target and hits someone else), is it right that one should be entitled to compensation but not the other, when the duty of the police is a general duty for the preservation of the Queen's peace? Similarly, if the intelligence service fails to respond appropriately to intelligence that a terrorist group is intending to bring down an airliner, is it right that the service should be liable to the dependants of the victims on the plane but not the victims on the ground? Such a distinction would be understandable if the duty is founded on a representation to, and reliance by, a particular individual but that is not the basis of the interveners' liability principle. These questions underline the fact that the duty of the police for the preservation of the peace is owed to members of the public at large, and does not involve the

kind of close or special relationship ("proximity" or "neighbourhood") necessary for the imposition of a private law duty of care."

[21] In *N v Poole Borough Council* (2020) AC 780 Lord Reed analysed the concept of assumption of responsibility in the context of public authorities exercising their statutory duties and powers. At paragraphs 80 to 82 he said:

> "[80] As Lord Browne-Wilkinson explained in relation to the educational cases in *X (Minors) v Bedfordshire* (particularly the *Dorset* case), a public body which offers a service to the public often assumes a responsibility to those using the service. The assumption of responsibility is an undertaking that reasonable care will be taken, either express or more commonly implied, usually from the reasonable foreseeability of reliance on the exercise of such care. Thus, whether operated privately or under statutory powers, a hospital undertakes to exercise reasonable care in the medical treatment of its patients. The same is true, *mutatis mutandis*, of an education authority accepting pupils into its schools.
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> [81] In the present case, on the other hand, the council's investigating and monitoring the claimants' position did not involve the provision of a service to them on which they or their mother could be expected to rely. It may have been reasonably foreseeable that their mother would be anxious that the council should act so as to protect the family from their neighbours, in particular by re-housing them, but anxiety does not amount to reliance. Nor could it be said that the claimants and their mother had entrusted their safety to the council, or that the council had accepted that responsibility. Nor had the council taken the claimants into its care, and thereby assumed responsibility for their welfare. The position is not, therefore, the same as in *Barrett v Enfield*. In short, the nature of the statutory functions relied on in the particulars of claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those functions with reasonable care.
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> [82] It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred. In the present case,

> however, the particulars of claim do not provide a basis for leading evidence about any particular behaviour by the council towards the claimants or their mother, besides the performance of its statutory functions, from which an assumption of responsibility might be inferred. Reference is made to an email written in June 2009 in which the council's anti-social behaviour co-ordinator wrote to Amy that "we do as much as it is in our power to fulfil our duty of care towards you and your family, and yet we can't seem to get it right as far as you are concerned", but the email does not appear to have been concerned with the council's functions under the 1989 Act, and in any event a duty of care cannot be brought into being solely by a statement that it exists: *O'Rourke v Camden London Borough Council* [1998] AC 188, 196."

[22] It is clear and obvious that the government entity which was responsible for managing and operating the Kincora Boys' Home had assumed responsibility for the welfare of the boys living there. It is clear that it was acting *in loco parentis*. However Miss Fee submitted that there had been no assumption of responsibility for the young people in Kincora by the police and that it was quite a stretch to claim that the police ought to have parental responsibility conferred upon them by default as a consequence of potential failures elsewhere in the child welfare system. Such a finding, she submitted, could have far reaching implications for organisations such as the police which are not constituted to function as child welfare authorities.

[23] There are, of course, circumstances when the police will assume responsibility for a child or young person. For example, when police arrest a minor, and he is in their custody, they assume responsibility to act for his continued wellbeing. Again, if police pluck a child or young person out of a river where he has been in difficulty, they assume responsibility to act to the best of their ability for his welfare until such time as he is handed over to his parents or guardians, or perhaps until the Ambulance Service assumes responsibility for him as they transport him to hospital.

[24] Interestingly, in *Robinson* the court referred to *in loco parentis* as a status which a person assumes rather than a role which is imposed upon a person or organisation. The role of acting *in loco parentis* is therefore, in my view, one which is voluntarily assumed (for example, a grandparent who agrees to look after a grandchild upon the unfortunate death of a child's parents) rather than being imposed upon a person by a court. The concept of one state agency having the status of *in loco parentis* imposed on it because another state agency (which because of its statutory functions clearly did have that status) was acting ineffectively would appear to be completely misconceived.

[25] The flawed logic of the argument submitted on behalf of Mr Kerr can be seen when one examines the consequences of the argument. If one accepts that the police were acting *in loco parentis* for boys in Kincora, the police were responsible not only for protecting the boys from sexual abuse, but were also responsible for feeding

them, clothing them, for their health care, and for their education. After all, this is what parents are responsible for.

[26] As I observed in *Holbeach v Chief Constable*, although McCloskey LJ said in *Magill v Chief Constable* that the concept of assumption of responsibility could not be characterised by either exhaustive definition or rigid boundaries and would always be intensely fact-sensitive, it is reasonable to imagine that certain features will usually be present in cases where the court determines that police have assumed responsibility for an individual's safety. It is clear from previous decisions of the courts that where responsibility for a person's safety, or the safety of their property, has been assumed, three elements will usually be involved. Firstly, there will usually have been some form of engagement or relationship between the police and the plaintiff. Secondly, there will usually have been communication between the police and the plaintiff. Thirdly, some form of assurance will usually have been given by the police to the plaintiff (either expressly or implied).

[27] Miss Fee submitted that none of these elements were present in the Mr Kerr's case. Although dealing with young children is entirely different from the factual matrices of previous judicial decisions on assumption of responsibility which usually deal with circumstances such as the aftermath of 999 calls or motoring accidents, Miss Fee submitted that, while one would not have expected police to have discussions with the children themselves that police were assuming responsibility for them, for an assumption of responsibility to have taken place, police would have needed to have such discussions with someone in authority in the relevant agency that they were assuming responsibility for the children. This did not occur.

[28] Mr Magowan's submission on this issue was that where police had become aware that vulnerable children who were in the care of the state were being abused by the people who were meant to be caring for them, there was no one else who could act in loco parentis. On that basis, he argued that police had assumed responsibility for those children. Fundamentally, however, the facts alleged by the plaintiff do not allege that, using the approach of Lord Toulson in *Michael v Chief Constable of South Wales Police*, there was any representation made by police to Mr Kerr as a young boy, or to anyone else, upon which he or some other person relied upon that police would take care of him. The allegation by Mr Kerr therefore falls well short of satisfying the legal test created by the Supreme Court for assumption of responsibility.

Vicarious Liability

[29] Mr Kerr's proposed re-amended Statement of Claim asserts that police were using William McGrath as an agent in circumstances where they knew he was perpetrating abuse at Kincora. The proposed pleadings do not explicitly use the term "vicarious liability" but it is clear that this is the allegation which is being made. Paragraph 115 of the draft re-amended Statement of Claim refers to William

McGrath as a "servant or agent of the Chief Constable" and paragraph 122 refers to him as a "servant or agent of the Home Secretary".

[30] The concept of vicarious liability 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."

[31] 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.

[32] In the application before me, in respect of the issue as to whether William McGrath was a police agent, Miss Fee adopted the usual "NCND response" (Neither confirm nor deny). The NCND response is most often used by public authorities in the national security and law enforcement contexts to avoid revealing sensitive information. However, Miss Fee did not oppose my suggestion that, in respect of police agents generally, the first stage of the vicarious liability test would usually be met, namely such a person would be in a relationship with the police which was sufficiently akin to that of employer and employee as to satisfy stage 1 of the test. The question then arises whether, if William McGrath was a police agent at the time he was working in Kincora, this satisfies the stage 2 test for vicarious liability.

[33] 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."

[34] 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."

[35] If one examines cases where employers have been found vicariously liable for sexual assaults committed by employees, one finds that they are entirely dissimilar to the context of the Kincora allegations. In *AB v Chethams School of Music* [2021] EWHC 1419 (QB) the court held that a school was vicariously liable for the sexual acts committed by a teacher on a pupil. Fordham J analysed the facts and concluded that his finding of vicarious liability was supported by the following features:

> "(1) The functions which CSM entrusted to Mr Li, as Abigail's lead instrumental teacher, included the pastoral responsibility owed to her as a teacher, these being within his field of activities and the nature of his job. (2) CSM conferred on Mr Li authority over Abigail. (3) Mr Li abused that authority, by actions at CSM and in the teacher-pupil setting: of exercising control over Abigail and manipulating her (acts of 'grooming'), paving the way for the sexual assaults which followed, as the beginning of a course of conduct which manipulated Abigail into a position of submission in relation to those sexual assaults. (4) Mr Li further abused that authority, by actions at CSM and in the teacher-pupil setting: of repeated sexual assault in the practice room at CSM, actions which were the beginning of an escalating course of sexual assaults which followed, in the private setting of actions in Mr Li's car and at his house when hosting Abigail as guardian. (5) The employment relationship between CSM and Mr Li caused Mr Li to have access to Abigail, in circumstances where sexual abuse was facilitated. (6) CSM through the employment relationship with Mr Li provided him with the opportunity – an opportunity incidental to his functions as CSM's employee – to abuse his power. (7) CSM, through the employment relationship with Mr Li, created or significantly enhanced the risk that Abigail would suffer the sexual

> abuse. (8) The risk that Abigail would suffer the sexual abuse, which CSM through the employment relationship with Mr Li created or significantly enhanced, was a function of both close proximity and a position of trust. (9) The employment relationship between CSM and Mr Li facilitated the commission of the sexual abuse of Abigail by Mr Li, by placing Mr Li in a position where he enjoyed both physical proximity to Abigail and the influence of authority over her. (10) The employment relationship between CSM and Abigail entrusted Mr Li with responsibility for care of Abigail. (11) There was a strong causative link between the employment relationship between Mr Li and CSM and Mr Li's sexual assaults of Abigail. (12) This strong causative link can be seen in the fact that CSM's use (deployment) of Mr Li, in the furtherance of CSM's operations, as Abigail's principal instrumental teacher – with the pastoral responsibility of a teacher – was done in a manner which created or significantly enhanced the risk that Abigail would suffer the relevant abuse. (13) The sexual assaults in Mr Li's car and flat, while he was acting as host under the guardianship arrangement with Abigail's parents, flowed directly from actions of control and manipulation by Mr Li at CSM and in the teacher-pupil setting. (14) The sexual assaults in Mr Li's car and flat, while he was acting as host under the guardianship arrangement with Abigail's parents, were an escalation of a course of conduct of sexual abuse of Abigail by Mr Li which began at CSM and in the teacher-pupil setting. In my judgment, having regard to these features and for all the reasons I have given, on the facts and in all the circumstances of the present case, CSM is vicariously liable for all of the sexual assaults in this case."

[36] None of the type of factors which caused the court in *AB v Chethams School of Music* to find that the school was vicariously liable for the teacher's acts are present in the Kincora case. Crucially, the alleged employment relationship between the police and Mr McGrath did not create or significantly enhance his opportunity to abuse Mr Kerr. The opportunity to abuse children at Kincora came to Mr McGrath by virtue of his employment by the Belfast Welfare Authority alone, and not by virtue of any employment he may have had as a police agent.

[37] The issue of vicarious liability in respect of Mr McGrath's actions is thrown into stark relief when one compares the position of Mr McGrath with that of Mr Edmonds. As mentioned previously, Mr Edmonds is described as a prison officer and/or orderly in Millisle Borstal and was at all material times clearly the servant or agent of the Northern Ireland Office. He allegedly admitted perpetrating abuse against Mr Kerr. In my view the circumstances in respect of Mr Edmonds clearly and obviously raises a viable argument that the stage 2 test for vicarious liability is met, whereas the circumstances in respect of Mr McGrath clearly do not.

Conclusion as to the Application to Amend

[38] For the reasons set out above, I do not accept the assertion in Ms McKeegan's affidavit that the proposed amendments in respect of the action against the Chief Constable and the Home Secretary raise or clarify the real issues in the action. I regard the material which Mr Kerr's legal advisers wish to add to his Writ and Statement of Claim in respect of the Chief Constable and the Home Secretary of State as introducing matters which are unarguable. On the basis of what Gillen J set out in *Loughran v Century Newspapers Ltd* therefore, the amendments in respect of Mr Kerr's case against the Chief Constable and the Home Secretary cannot be allowed.

[39] Firstly, the majority of the proposed amendments are what one might describe as "Omissions Material", namely allegations that the police and the Security Service failed to protect Mr Kerr from the unlawful actions of third parties or failed to investigate the criminal actions of third parties. As I will explain in depth later in this judgment, given the current state of the law such allegations do not create legal liability for the police either under the tort of negligence or the tort of misfeasance in public office.

[40] Secondly, the argument that police stood *in loco parentis* is unarguable because of the governing caselaw on the assumption of responsibility. Particularly there was no representation made to Mr Kerr, or to anyone else, by the Chief Constable or the Home Secretary on which he, or they, placed reliance.

[41] Thirdly, because of the decisions of the Supreme Court in *Various Claimants v Wm Morrison Supermarkets plc* [2020] UKSC 12 and *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15, it is unarguable that police are vicariously liable for any sexual abuse carried out on Mr Kerr by Mr McGrath. For these three reasons therefore, I dismiss the application to amend the Writ and the Statement of Claim in respect of the allegations against the Chief Constable and the Home Secretary.

[42] When it comes to the application to amend the Writ and Statement of Claim in respect of the Department of Health and the Northern Ireland Office, however, the position is significantly different.

[43] In respect of Mr Kerr's application to amend the Statement of Claim against the Department of Health, the Department has not had an opportunity to make submissions on this. Given that the Department withdrew its strike out application and had asked for the replies issue to be adjourned, it was overlooked by the participants that it also needed to address the court on the Order 20 Rule 5 application. I therefore agreed to adjourn this aspect of Mr Kerr's application to a date to be fixed.

[44] In respect of Mr Kerr's application to amend the Statement of Claim against the Northern Ireland Office, which is alleged to be the Department having responsibility for the running of Millisle Borstal, I conclude that the application should be granted. Paragraph 63 of the draft re-amended Statement of Claim states:

> "William Edmonds, prison officer and/or orderly in Millisle Borstal and at all times the servant or agent of the Second Defendant, admitted perpetrating abuse against the Plaintiff."

That paragraph, together with the consequent particulars pleaded against the Second Defendant does not fall into the category of being "Omissions Material". It is clearly an allegation of a positive act. Furthermore, there is clearly a viable argument of vicarious liability to be made. Accordingly, I grant an order under Order 20 Rule 5 in this regard.

[45] It is important, however, that I note at this point that, even if I am wrong in dismissing Mr Kerr's application to amend his Writ and Statement of Claim in respect of the Chief Constable and the Home Secretary, the conclusions which I reach on the strike out applications would have been the same regardless as to whether the application to amend had been granted or dismissed.

The Law on Applications to Strike Out

[46] In the decision of the court in *Magill v Chief Constable*, 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 19 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-bycase 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*."

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

Duty of Care

[48] There is a long line of modern decisions on the issue of whether there is a duty of care owed by the police to citizens who are injured by third parties. The line is often traced through the series of decisions made by the House of Lords and the Supreme Court in *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Brooks v Metropolitan Police Commissioner* [2005] 1 WLR 1495; *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police* (2008) 3 WLR 593; *Michael v Chief Constable of South Wales Police* [2015] AC 1732, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 and *Commissioner of the Police of the Metropolis v DSD and another* [2018] UKSC 11. In the light of this series of decisions, the circumstances in which an individual may successfully sue the police for negligence as a result of injury caused by third parties will be rare, given that a duty of care will be imposed upon the police only in very limited circumstances.

[49] In *Magill v Chief Constable* McCloskey LJ described the current legal position as follows:

> "[15] The Supreme Court revisited this legal territory in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736. The distinguishing feature of the factual framework in this case is its "operational" dimension, involving as it did one of two police officers inadvertently knocking the plaintiff, a frail lady aged 76, to the ground when attempting to arrest a suspected drugs dealer in a public place. Both at first instance and on appeal the plaintiff failed essentially on the ground of the espousal by both courts of an immunity from suit approach. On further appeal, the Supreme Court held that on the particular facts a duty of care was owed by the police officers to the claimant.
>
> [16] One striking feature of this decision is the adoption of a starting point based not on immunity from suit, rather a principle expressed in positive terms: the police generally do owe a duty of

care to members of society in the discharge of their duties and functions in accordance with the ordinary principles of the law of negligence unless otherwise provided by statute or the common law. Thus, there is no general rule that the police do not owe a duty of care in the discharge of their functions of preventing and investigating crime, no general rule of immunity from suit. Applying these principles, therefore, a duty of care to prevent a person from a danger of injury created by police officers could arise. There is a second important element of this decision. The Supreme Court, having formulated the foregoing principles, applying the prism of actual conduct of police officers then turned its gaze to the different scenario of omissions. In so doing it espoused the central theme of the decisions considered above. Thus, it held, the police are not normally under a duty of care to protect an individual from a danger of injury which they themselves did not create (including injury caused by the acts of third parties) in the absence of circumstances such as an assumption of responsibility by them.

[17] The formulation of the starting point in *Robinson*, noted above, is discernible in paras [31] ff and paras [45]-[46] in particular. However, the proposition that police officers are subject to liability for causing personal injury in accordance with the general law of tort – *Robinson*, para [45] – leads to a second stage of the analysis. It is at this stage that the limited nature of this liability emerges clearly. Fundamentally, the common law generally does not impose liability for omissions and, more particularly, for a failure to prevent harm caused by the conduct of third parties. It follows that public authorities are not generally under a duty of care to provide a benefit to individuals through the performance of their public duties: see para [50]. The qualifying word "*generally*" in this passage is of self-evident importance; so too the final clause:

> "… The common law does not **normally** impose liability for omissions, or more particularly for a failure to prevent harm caused by the conduct of third parties. Public authorities are not, therefore, **generally** under a duty of care to provide a benefit to individuals through the performance of their public duties, in the absence of special circumstances such as an assumption of responsibility."
>
> [emphasis added]

[18] In our review of the jurisprudence belonging to this sphere, we have taken into account also *Costello v Chief Constable of Northumbria Police* [1999] 1 All ER 550, the key feature whereof is that of assumption of responsibility coupled

with the express acknowledgement in evidence at trial by the defaulting police officer of a professional duty to provide assistance in the relevant circumstance. We have also considered *Tindall v Chief Constable of Thames Valley Police* [2022] EWCA Civ 25.

[19] Factual comparisons being unavoidable in the discrete jurisprudential sphere to which the present appeal belongs, *Tindall* was, in substance, a case of alleged police omissions in an operational situation where police had attended the scene of a traffic accident caused by black ice, had taken certain measures and then left the scene, following which a fatal collision at the same location. The Court of Appeal found in favour of the police. Their core reason for doing so was based upon the principle that the non-conferral of a benefit on a given person by a public authority in the exercise of a statutory power or function cannot render it liable in negligence: this is our somewhat more elaborate formulation of what is stated in para [69] of the judgment of Stuart-Smith LJ. We do not overlook the other ingredients in the court's reasoning and take into account in particular the code of principles formulated (inexhaustively, NB) in para [54]:

> "(i) Where a statutory authority (including the police) is entrusted with a mere power it cannot generally be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. In general the duty of a public authority is to avoid causing damage, not to prevent future damage due to causes for which they were not responsible: see East Suffolk, Stovin;
>
> (ii) If follows that a public authority will not generally be held liable where it has intervened but has done so ineffectually so that it has failed to confer a benefit that would have resulted if it had acted competently: see Capital & Counties, Gorringe, Robinson;
>
> (iii) Principle (ii) applies even where it may be said that the public authority's intervention involves it taking control of operations: see East Suffolk, Capital & Counties;
>
> (iv) Knowledge of a danger which the public authority has power to address is not sufficient to give rise to a

duty of care to address it effectually or to prevent harm arising from that danger: see Stovin;

(v) Mere arrival of a public authority upon, or presence at, a scene of potential danger is not sufficient to found a duty of care even if members of the public have an expectation that the public authority will intervene to tackle the potential danger: see Capital & Counties, Sandhar;

(vi) The fact that a public authority has intervened in the past in a manner that would confer a benefit on members of the public is not of itself sufficient to give rise to a duty to act again in the same way (or at all): see Gorringe;

(vii) In cases involving the police the courts have consistently drawn the distinction between merely acting ineffectually (eg Ancell, Alexandrou) and making matters worse (eg Rigby, Knightly, Robinson);

(viii) The circumstances in which the police will be held to have assumed responsibility to an individual member of the public to protect them from harm are limited. It is not sufficient that the police are specifically alerted and respond to the risk of damage to identified property (Alexandrou) or injury to members of the public at large (Ancell) or to an individual (Michael);

(ix) In determining whether a public authority owes a private law duty to an individual, it is material to ask whether the relationship between the authority and the individual is any different from the relationship between the authority and other members of the same class as the individual: See Gorringe, per Lord Scott."

[50] The essence of the action raised by both Mr Kerr and Mr Hoy against both the Chief Constable and the Home Secretary is that, knowing that young boys were being abused in Kincora (and in Mr Kerr's case also at Williamson House), they failed to properly investigate those allegations and are therefore liable in negligence. Both actions are what are often referred to as "Omissions cases", that is to say they focus on what the police failed to do rather than making allegations that positive actions by the police caused harm to the plaintiff. As a matter of law, given the decision of the Supreme Court in *Robinson v Chief Constable*, that is not a viable basis for civil proceedings in negligence against these defendants. I therefore strike out the

allegations of negligence against the Chief Constable and the Home Secretary by both Mr Kerr and Mr Hoy.

Misfeasance in Public Office

Allegations of Misfeasance against the Chief Constable and the Home Secretary

[51] Both Mr Kerr and Mr Hoy allege that there has been misfeasance in public office by the Chief Constable and the Home Secretary. The leading authority on the subject of misfeasance in public office is *Three Rivers District Council and Others v Governor and Company of the Bank of England* (No 3) [2003] 2 AC 1. The ingredients of the tort were subsequently and usefully summarised by Tugendhat J in *Carter and others v Chief Constable of the Cumbria Police* [2008] EWHC 1072 (QB) as follows:

> "(a) The defendant must be a public officer;
>
> (b) The conduct complained of, that is an act and/or an omission (in the sense of a decision not to act) must be in the exercise of public functions;
>
> (c) Malice: The defendant's state of mind must be one of two types, namely either:
>
> i) "Targeted malice" i.e. the conduct is "specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of a public power for an improper or ulterior motive…".
>
> ii) "Untargeted malice": i.e. the public officer acts knowing that he has no power to do the act complained of or with reckless indifference as to the lack of such power and that the act will probably injure the claimant. "… it involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful…"
>
> Thus the unifying element is "…. conduct amounting to an abuse of power accompanied by subjective bad faith…"
>
> (d) The claimant must have a "sufficient interest to found a legal standing to sue" but there is no requirement of sufficient proximity between the claimant and the defendant ;

(e) Causation of damages/loss;

(f) Remoteness of damage: Where the malice is of the second type, see (c)(ii) above – The defendant must know that his/her conduct "would probably injure the plaintiff or person of a class of which the plaintiff was a member." "

[52] If therefore one was attempting to define the essence of misfeasance in public office, one might usefully define it as a dishonest abuse of public power exercised in a deliberate or reckless manner.

[53] In *Carter*, an action by nine police officers against their Chief Constable in respect of misconduct proceedings which they alleged were taken against them unlawfully, Tugendhat J stated ;

"[66] … It is essential that before this action for misfeasance is allowed to be pursued through the courts, anxious scrutiny should be made of it to ensure that the Defendant's immunity against actions for negligence is not circumvented by the pleading device of converting what is in reality no more than allegations of negligence into claims for misfeasance in public office.

[67] As Chadwick LJ said in *Marsh v Chief Constable of Lancashire* [2003] EWCA Civ 284 para 57, allegations of misfeasance in public office are amongst the most serious – short of conscious dishonesty – that can be made against police officers, or any public official.

[68] An allegation of bad faith must be properly particularised. As Megaw LJ said in *Cannock Chase DC v Kelly* [1978] 1 WLR 1, at p6:

"… bad faith, or, as it is sometimes put, "lack of good faith," means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant. If a charge of bad faith is made against a local authority, they are entitled, just as is an individual against whom such a charge is made, to have it properly particularised. If it has not been pleaded, it may not be asserted at the hearing. If it has been

> pleaded but not properly particularised, the pleading may be struck out."

[54] In 2019 the Law Commission for England and Wales conducted a project on the subject of "Reforming Misconduct in Public Office". Although the Law Commission's focus was on criminal law offences, one of its background papers considered the related tort of misfeasance in public office. Appendix B to the Commission's background paper stated:

> "Pleading bad faith is difficult, because the pleading rules require details, and professional conduct rules forbid practitioners supporting obviously baseless allegations. Proving bad faith is even more difficult. Where they have a choice, the courts are strongly disposed to believing that bureaucratic error was caused by genuine mistake, even incompetence, rather than by bad faith. The result is that of the hundreds of misfeasance claims that are actually filed, very few make it to trial. Most are filtered out for inadequate pleading of bad faith, or because an allegation of bad faith has no real prospect of success. … Misfeasance in public office is an oddity in several respects. Not allowed to trespass on better established torts, it occupies a tiny niche reserved, in essence, for redressing harms caused by public officers who knew or suspected that they were abusing their public power or position to the detriment of the individual."

[55] In *Young v The Chief Constable of the Warwickshire Police and The Director of Public Prosecutions* [2020] EWHC 308 (QB) Master Davison discussed inadequate pleading and the particularising of malice when alleging misfeasance in public office:

> "[26] In line with the heavy burden thus imposed, the claimant must specifically plead and properly particularise the bad faith or reckless indifference relied upon. It may be possible to infer malice. But if what is pleaded as giving rise to an inference is equally consistent with mistake or negligence, then such a pleading will be insufficient and will be liable to be struck out. The claimant must also specifically plead and properly particularise both the damage and why the public officer must have foreseen it. A pleading that fails to do so is similarly liable to be struck out. These propositions have been established in a series of cases, including *Three Rivers* , *Thacker v Crown Prosecution Service* CA, 16 December 1997 (unreported) and *Carter v Chief Constable of Cumbria* [2008] EWHC 1072 (QB)."

[56] In *Young* both defendants submitted that the claimant had not pleaded a claim for misfeasance with sufficient particularity. In essence, it was submitted that what the claimant complained about was as (or more) consistent with mistake or negligence than with malice. Further, the claimant had not pleaded a case of knowledge on the part of the defendants as to the consequences for the claimant of their acts and omissions. Master Davison stated:

> "I should scrutinise the claim carefully to ensure that the allegations of misfeasance in public office amount or are capable of amounting in reality, to something more than "mere" negligence. They do not. And I should make it clear that a pleading that does not or cannot give proper particulars of bad faith is not saved by the "bootstraps" operation of alleging that this is the "only explanation" when, on the facts pleaded, that is quite clearly not the case."

[57] On appeal, Master Davison's exposition of the legal position on misfeasance in public office, and the application of those principles in his decision to strike out the allegations, was upheld by Martin Spencer J in the latter's decision at [2021] EWHC 3453 (QB).

[58] In addition to the difficulties with inadequate pleading, there are two abuses of this tort which are sometimes, perhaps often, demonstrated by the inclusion of misfeasance in public office in a Statement of Claim, Firstly, as Master Davison recognised from the authorities such as *Gizzonio & Anor v Chief Constable of Derbyshire* (Court of Appeal), The Times, April 29, 1998 and *Carter and others v Chief Constable of the Cumbria Police*), litigants and their lawyers sometimes attempt to circumvent the demands of other torts by framing their cause of action in misfeasance.

[59] Secondly, as Scofield J observed in a different context in *In the Matter of an Application by Cyril Glass for Judicial Review* [2023] NIKB 22, there is a recent tendency in many cases to adopt a 'kitchen sink' attitude to pleadings. In many cases, the inclusion of misfeasance adds nothing to the pleadings above and beyond the other torts.

[60] Whatever the motivation for the inclusion of such allegations of misfeasance in a Statement of Claim, they are undesirable, leading both to increased complexity and increased costs. They usually do not benefit the litigants, leading instead to inevitable applications to strike out the unjustifiable allegations.

[61] In my view, Mr Kerr's claim of misfeasance has not been sufficiently particularised. Significantly, the plaintiff has failed to specify the individuals who have committed this tort. As Miss Fee argued, there was a total absence of any factual basis upon which a finding of malice could be found or even inferred. An institution can only be subjectively reckless if one or more individuals acting on its

behalf are subjectively reckless and therefore their subjective state of mind needs to be established. To that end they usually require to be identified.

[62] Furthermore, I consider that the inclusion of allegations of misfeasance in public office amount to an abuse of process in that they add nothing of substance to the Statement of Claim. In the application before me I consider that the plaintiffs, to use the language of Tugendhat J, are converting what is in reality no more than allegations of negligence into claims for misfeasance in public office. I consider that they should be regarded as merely an attempt to avoid the difficulties of launching proceedings for negligence against the Chief Constable and the Home Secretary created by the decision of the Supreme Court in their decision in *Robinson v Chief Constable of West Yorkshire Police*.

[63] I therefore grant the Chief Constable's and the Home Secretary's application to strike out Mr Kerr's allegations of misfeasance in public office against them.

Allegations of Misfeasance against the Northern Ireland Office

[64] As I have indicated in respect of Mr Kerr's application to re-amend the Statement of Claim, I am allowing the amendment in respect of the Northern Ireland Office. It specifically states that William Edmonds, a prison officer and/or orderly in Millisle Borstal admitted perpetrating abuse against Mr Kerr. That allegation is sufficiently particularised and specified to have involved both physical and sexual abuse to be allowed to stand. (It may be that, in due course, the Northern Ireland Office may issue a Notice for Further and Better Particulars in respect of that allegation and my view that it is sufficiently particularised so as to prevent it from being struck out at this stage should not be regarded as having closed the door on any such application.)

[65] It is obvious and indisputable that allegations that a named prison officer has committed physical and sexual abuse against someone detained in an institution must amount to allegations of misfeasance in public office. Hence Mr Kerr's claim of misfeasance in public office against the Northern Ireland Office must continue.

Limitation

[66] On behalf of the Chief Constable and the Home Secretary and the Northern Ireland Office Miss Fee submitted that the allegations against them by both Mr Kerr and Mr Hoy should also be struck out on the ground that it is statute barred because they had an unanswerable limitation argument. In *Carberry v Ministry of Defence* [2023] NIKB 54 McAlinden J comprehensively explained the legal principles to be applied in a limitation argument:

> "[166] Article 50(1) states:

"50. —(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –

the provisions of Article 7, 8 or 9 prejudice the plaintiff or any person whom he represents; and

any decision of the court under this paragraph would prejudice the defendant or any person whom he represents,

the court may direct that those provisions are not to apply to the action, or are not to apply to any specified cause of action to which the action relates."

[167] Article 50(4) of the 1989 Order directs as follows:

"(4) In acting under this Article, the court is to have regard to all the circumstances of the case and in particular to –

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7, 8 or, as the case may be, 9;

(c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the

injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

[168] In the case of *Pearce and Others v Secretary of State for the Home Departments* [2018] EWHC 2009, Turner J explained how the court should approach limitation issues when raised in cases such as this. He stated at para [59] et seq:

"[59] The issue of limitation should be determined before any consideration of the issue of liability.

[60] In *KR v Bryn Alyn Community (Holdings) Ltd* [2003] QB 1441 Auld LJ held at paragraph 74:

'(vii) Where a judge determines the section 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues, including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. Much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him. To rely on his findings on those issues to assess the cogency of the evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would effectively require a defendant to prove a negative, namely, that the judge could not have found against him on one or more of the substantive issues if he had tried the matter earlier and without the evidential disadvantages resulting from delay.'

[61] In *B v Nugent Care Society* [2010] 1 WLR 516, Lord Clarke MR, who gave the judgment of the court, observed at paragraphs 21-22 that the judge who has to determine the issue as to whether the primary limitation period should be disapplied:

> '[21] … may well conclude that it is desirable that such oral evidence as is available should be heard because the strength of the claimant's evidence seems to us to be relevant to the way in which the discretion should be exercised. We entirely agree with the point made at vii) that, where a judge determines the section 33 application along with the substantive issues in the case he or she should take care not to determine the substantive issues, including liability, causation and quantum before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. To do otherwise would, as the court said, be to put the cart before the horse.
>
> [22] That is however simply to emphasise the order in which the judge should determine the issues. When he or she is considering the cogency of the claimant's case, the oral evidence may be extremely valuable because it may throw light both on the prejudice suffered by the defendant and on the extent to which the claimant was reasonably inhibited in commencing proceedings. …'

[62] In *JL v Bowen* [2017] P. I. Q. R. P11 Burnett LJ (as he then was) held:

> '[26] The logical fallacy which Lord Clarke MR was concerned with at [21] of the *Nugent Care Society* case and Auld LJ at [74(vii)] of the *Bryn Alyn* case was proceeding from a finding on the (necessarily partial) evidence heard that the claimant should succeed on the merits to the conclusion that it would be equitable to disapply the limitation period. That would be to overlook the possibility that, had the defendant been in a position to deploy evidence now lost to him, the outcome might have been different. The same logical fallacy is most unlikely to apply in the reverse situation, especially when the case depends upon the reliability of the claimant himself. That may be illustrated by a simple example. A claimant

sues for personal injury ten years after an alleged accident and seeks an order to disapply the limitation period of three years. The defendant has lost its witnesses and records, but advances a defence that the accident did not occur. The judge concludes, without the lost evidence, that indeed the accident did not occur. The burden is on the claimant to prove that it would be equitable to disapply the limitation period having regard to the balance of prejudice. In those circumstances he would not be able to do so. There would be no purpose in extending the limitation period and it would not be equitable to do so. Similarly, a full exploration at trial of, for example, the claimant's reasons for delay may enable the judge to reach firm conclusions which could have been no more than provisional had limitation been resolved as a preliminary issue.

[27] There is clear authority for this approach in the judgment of Thomas LJ (as he then was) in *Raggett v Society of Jesus Trust of 1929* [2010] EWCA Civ 1002. The complaint made by the appellants was that the judge had decided the abuse in question had occurred and had then disapplied the limitation period. They advanced a literal argument based upon the words of Lord Clarke MR that because she structured her judgment by dealing with her findings of fact first and only then considered limitation, she had erred. Unsurprisingly, that argument did not prosper. It is not realistic to shut one's eyes to findings and conclusions reached following a full trial. It is what is done with them in the context of the substance of the reasons for the limitation decision that matters. Thomas LJ, with whom Toulson and Mummery LJ agreed, indicated at [19] that the judge "did not adopt the approach … that she was satisfied that Father Spencer had in fact sexually abused the claimant and therefore there could be no prejudice. He continued:

> '[20] When this court observed that the judge must decide the issue on the

> exercise of the discretion under s.33 before reaching the conclusions on liability, it was enjoining a judge to decide the s.33 question on the basis, not of the finding that the abuse had occurred, but on an overall assessment, including the cogency of the evidence and the potential effect of the delay on it.'
>
> [63] I will therefore proceed on the basis that my first task is to determine the issue of limitation and then, only if the matter is resolved in favour of Mrs Nicholls, go on to consider the question of substantive liability."

[169] I intend to adopt the same approach in this case. First of all, I will determine the issue of limitation which in this case involves considering whether it is appropriate to exercise the court's discretion under Article 50 of the 1989 Order in favour of the plaintiff and each of the other dependants, and then, only if the Article 50 issue is resolved in favour of the plaintiff and/or any of the other dependants, will I go on to consider and adjudicate upon the substantive factual disputes in this case in order to determine whether the shooting of Mr Carberry senior was justified in law.

[170] Turning then to legal principles to be applied in relation to the exercise of the discretion contained in Article 50 of the 1989 Order, Sir Terence Etherton MR in the England and Wales Court of Appeal case of *Carroll v Chief Constable of Greater Manchester Police* [2018] 4 WLR 32 sets out a very helpful summary of the general legal principles and their proper application at para [42] et seq. It should be noted that section 33 of Limitation Act 1980 is the England and Wales equivalent to our Article 50:

> "[42] The general principles may be summarised as follows.
>
> (1) Section 33 is not confined to a "residual class of cases.". It is unfettered and requires the judge to look at the matter broadly: *Donovan v Gwentoys Ltd* [1990] 1 WLR 472 at 477E; *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307, at [9] (approving the Court of Appeal judgments in *Finch v Francis* unrptd 21.7.1977); *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, at [45], [49], [68] and [84]; *Sayers v Lord Chelwood* [2012] EWCA Civ 1715 [2013] 1 WLR 1695, at [55].
>
> (2) The matters specified in section 33(3) are not intended to place a fetter on the discretion given by

section 33(1), as is made plain by the opening words "the court shall have regard to all the circumstances of the case", but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and must be taken into a consideration by the judge: *Donovan* at 477H-478A.

(3) The essence of the proper exercise of the judicial discretion under section 33 is that the test is a balance of prejudice and the burden is on the claimant to show that his or her prejudice would outweigh that to the defendant: *Donovan* at 477E; *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2005] 1 AC 76, at [55], approving observations in *Robinson v St. Helens Metropolitan Borough Council* [2003] PIQR P9 at [32] and [33]; *McGhie v British Telecommunications plc* [2005] EWCA Civ 48, (2005) 149 SJLB 114, at [45]. Refusing to exercise the discretion in favour of a claimant who brings the claim outside the primary limitation period will necessarily prejudice the claimant, who thereby loses the chance of establishing the claim.

(4) The burden on the claimant under section 33 is not necessarily a heavy one. How heavy or easy it is for the claimant to discharge the burden will depend on the facts of the particular case: *Sayers* at [55].

(5) Furthermore, while the ultimate burden is on a claimant to show that it would be inequitable to disapply the statute, the evidential burden of showing that the evidence adduced, or likely to be adduced, by the defendant is, or is likely to be, less cogent because of the delay is on the defendant: *Burgin v Sheffield City Council* [2015] EWCA Civ 482 at [23]. If relevant or potentially relevant documentation has been destroyed or lost by the defendant irresponsibly, that is a factor which may weigh against the defendant: *Hammond v West Lancashire Health Authority* [1998] Lloyd's Rep Med 146.

(6) The prospects of a fair trial are important: *Hoare* at [60]. The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims, especially when any witnesses the defendant might have been able to rely on are not available or have no recollection and there are no documents to assist the

court in deciding what was done or not done and why: *Donovan* at 479A; *Robinson* at [32]; *Adams* at [55]. It is, therefore, particularly relevant whether, and to what extent, the defendant's ability to defend the claim has been prejudiced by the lapse of time because of the absence of relevant witnesses and documents: *Robinson* at [33]; *Adams* at [55]; *Hoare* at [50].

(7) Subject to considerations of proportionality (as outlined in (11) below), the defendant only deserves to have the obligation to pay due damages removed if the passage of time has significantly diminished the opportunity to defend the claim on liability or amount: *Cain v Francis* [2008] EWCA Civ 1451, [2009] QB 754, at [69].

(8) It is the period after the expiry of the limitation period which is referred to in sub-subsections 33(3)(a) and (b) and carries particular weight: *Donovan* at 478G. The court may also, however, have regard to the period of delay from the time at which section 14(2) was satisfied until the claim was first notified: *Donovan* at 478H and 479H-480C; *Cain* at [74]. The disappearance of evidence and the loss of cogency of evidence even before the limitation clock starts to tick is also relevant, although to a lesser degree: *Collins v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 717, [2014] PIQR P19, at [65].

(9) The reason for delay is relevant and may affect the balancing exercise. If it has arisen for an excusable reason, it may be fair and just that the action should proceed despite some unfairness to the defendant due to the delay. If, on the other hand, the reasons for the delay or its length are not good ones, that may tip the balance in the other direction: *Cain* at [73]. I consider that the latter may be better expressed by saying that, if there are no good reasons for the delay or its length, there is nothing to qualify or temper the prejudice which has been caused to the defendant by the effect of the delay on the defendant's ability to defendant the claim.

(10) Delay caused by the conduct of the claimant's advisers rather than by the claimant may be excusable in this context: *Corbin v Penfold Company Limited* [2000] Lloyd's Rep Med 247.

(11) In the context of reasons for delay, it is relevant to consider under sub-section 33(3)(a) whether knowledge or information was reasonably suppressed by the claimant which, if not suppressed, would have led to the proceedings being issued earlier, even though the explanation is irrelevant for meeting the objective standard or test in section 14(2) and (3) and so insufficient to prevent the commencement of the limitation period: *Hoare* at [44]-[45] and [70].

(12) Proportionality is material to the exercise of the discretion: *Robinson* at [32] and [33]; *Adams* at [54] and [55]. In that context, it may be relevant that the claim has only a thin prospect of success (*McGhie* at [48]), that the claim is modest in financial terms so as to give rise to disproportionate legal costs (*Robinson* at [33]; *Adams* at [55]); *McGhie* at [48]), that the claimant would have a clear case against his or her solicitors (*Donovan* at 479F), and, in a personal injury case, the extent and degree of damage to the claimant's health, enjoyment of life and employability (*Robinson* at [33]; *Adams* at [55]).”

[171] I also consider it important to refer to a couple of authorities which emphasise the detrimental impact that the passage of a prolonged period of time can and usually does have upon the ability of a witness to provide cogent and reliable evidence to the court. In the case of *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066, Stewart J made the following observations at para [94] et seq:

“**The approach to evidence**

95. In recent years there have been a number of first instance judgments which have helpfully crystallised and advanced learning in respect of the approach to evidence. Three decisions in particular require citation. These are:

Gestmin SGPS SA v Credit Suisse (UK) Limited - Leggatt J (as he then was);

Lachaux v Lachaux - Mostyn J;

Carmarthenshire County Council v Y - Mostyn J.

96. Rather than cite the relevant paragraphs from these judgments in full, I shall attempt to summarise the most important points:

i) ***Gestmin*:**

We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.

Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), ie memories of experiencing or learning of a particularly shocking or traumatic event.

Events can come to be recalled as memories which did not happen at all or which happened to somebody else.

The process of civil litigation itself subjects the memories of witnesses to powerful biases.

Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.

The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts." This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

ii) ***Lachaux*:**

Mostyn J cited extensively from *Gestmin* and referred to two passages in earlier authorities. I extract from those citations, and from Mostyn J's judgment, the following:

> 'Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance …'

… I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities …

Mostyn J said of the latter quotation, `these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty.'

iii) ***Carmarthenshire County Council*:**

The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.

However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of *Gestmin*, Mostyn J said:

> '… this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.'
>
> 97. Of course, each case must depend on its facts and (a) this is not a commercial case (b) a central question is whether the core allegations happened at all, as well as the manner of the happening of an event and all the other material matters. Nevertheless, they are important as a helpful general guide to evaluating oral evidence and the accuracy/reliability of memory."

[67] McAlinden J noted the detrimental impact that the passage of a prolonged period of time can and usually does have upon the ability of a witness to provide cogent and reliable evidence to a court. There are indications that this may be an issue in respect of Mr Hoy's allegations. In his Historical Abuse Inquiry Report, Sir Anthony Hart said that the Inquiry had examined the various accounts that Mr Hoy had given over the years. At different times he had given different accounts and because he did not give evidence to the Inquiry itself, Sir Anthony was unable to resolve the significant contradictions between these various accounts. Similarly, Mr Kerr has given various accounts of his experiences in Williamson House and Kincora. Sir Anthony considered that his more recent accounts were not to be relied upon and that he could not set aside or ignore the inconsistencies in Mr Kerr's accounts of the abuse he said he suffered.

[68] Nevertheless in an application to strike out an action on the ground of limitation, I do not consider that I should take into account any possible inconsistencies or contradictions in Mr Hoy's or Mr Kerr's evidence and I decline to do so.

[69] Taking into account the legislative provisions and the legal principles set out by McAlinden J in *Carberry v Ministry of Justice*, I have reached the conclusion that I ought not to grant the defendant's application to strike out the plaintiffs' claims on the basis that they are statute barred due to an unanswerable limitation point.

Summary

[70] Given the complexity created by multiple plaintiffs, multiple defendants and multiple applications, I shall finally now summarise the outcomes of the applications made, the reasons for which have all been set out earlier:

(i) The applications by the Department of Health to strike out Mr Kerr's and Mr Hoy's actions against it are dismissed. Those actions against the Department of Health in respect of the abuse alleged by Mr Kerr and Mr Hoy at Kincora and Williamson House will now proceed in the usual way.

(ii) That part of the Department of Health's application seeking Mr Kerr to serve replies to its Notice for Further and better Particulars is adjourned to a date to be fixed by the parties with the Masters' Office.

(iii) The application by Mr Kerr to amend his Statement of Claim in respect of his action against the Chief Constable and the Home Secretary is dismissed.

(iv) Mr Kerr's application to amend his Writ and Statement of Claim against the Department of Health shall stand adjourned to a date to be fixed by the parties with the Masters' Office.

(v) Mr Kerr's application to amend his Statement of Claim against the Northern Ireland Office is granted.

(vi) That element of the application by the Chief Constable and the Home Secretary to strike out the allegations of negligence in Mr Kerr's and Mr Hoy's Statement of Claim on the basis that there is no reasonable cause of action is granted.

(vii) That element of the application by the Chief Constable and the Home Secretary to strike out the allegations of misfeasance in public office in Mr Kerr's and Mr Hoy's Statement of Claim on the basis that there is no reasonable cause of action is granted.

(viii) That element of the application by the Chief Constable and the Home Secretary and the Northern Ireland Office to have Mr Kerr's and Mr Hoy's actions struck out on the ground of limitation is refused.

(ix) The application by the Northern Ireland Office to strike out Mr Kerr's Statement of Claim is dismissed. Mr Kerr's action against the Northern Ireland Office for assault, battery and trespass to the person and for misfeasance in public office therefore continues.

[71] I will hear counsel as to costs at their convenience.