Neutral Citation No: [2023] NIKB 110 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **ROO12239** *ICOS No:* *Delivered:* **18/10/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

MICHAEL MONAGHAN (No.2)

Plaintiff;

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant.

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Mr Brian Fee KC and Ian Skelt KC (instructed by KRW Solicitors) for the Plaintiff
Mr Nicholas Hanna KC and Joseph McEvoy BL (instructed by the Crown Solicitor) for the Defendant

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ROONEY J

[1] The circumstances surrounding the background to the plaintiff's claim have been considered in detail in my judgment *Michael Monaghan (No.1) v Chief Constable of the Police Service of Northern Ireland* [2023] NIKB 49.

[2] At the commencement of the hearing, Counsel for both parties requested the court to defer any determination on an award of exemplary damages until after its decision relating to the merits of the plaintiff's claim founded on the defendant's misfeasance in public office. I agreed to do so.

[3] For the reasons provided in the said judgment, I found in favour of the plaintiff and made a basic award in the sum of £65,000 for personal injuries and an award of £25,000 for aggravated damages.

[4] I now turn to the issue as to whether, in light of my findings, an award of exemplary damages is appropriate. In the analysis that follows, I acknowledge and remain grateful to Counsel for both parties for their succinct and well-reasoned skeleton arguments.

Exemplary damages

[5] A detailed review of the law relating to exemplary damages and the limits within which awards can be made has been conducted recently by McAlinden J in *Quinn v Ministry of Defence* [2018] NIQB 82, paras [55] to [77]. For the purpose of this decision, I do not consider it necessary to repeat the learned judge's comprehensive review of the law, save to state that I have carefully considered the relevant authorities as contained in the said paragraphs of the judgment. I have also taken into consideration the recent decisions of the Court of Appeal in *Rees v Commissioner of Police of the Metropolis* [2021] EWCA Civ 49, which followed an appeal from the decision of Cheema-Grubb J [2019] EWHC 2339.

[6] In relation to the relevant principles pertaining to exemplary damages, in *R (in the application of Lumba) v Secretary of State for the Home Dept; R (in the application of Mighty) v Secretary of State for the Home Dept* [2011] UKSC 12, Lord Dyson stated as follows:

> "The relevant principles are not in doubt. Exemplary damages may be awarded in three categories of case: see per *Lord Devlin in Rookes v Barnard* [1964] AC 1129. The category which is relevant for present purposes is that there has been "an arbitrary and outrageous use of executive power" (p1223) and "oppressive, arbitrary or unconstitutional action by servants of the government" (p1226). In this category of case, the purpose of exemplary damages is to restrain the gross misuse of power: see *AB v South West Water Services Ltd* [1993] QB 507, 529F per Sir Thomas Bingham MR. It must be shown that the "conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more [than compensatory damages] is needed to show that the law will not tolerate such behaviour" as a "remedy of last resort": see per *Lord Nicholls in Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at para 63."

[7] In *Clinton v Chief Constable of the Royal Ulster Constabulary* [1999] NI 215, Carswell LCJ stated:

> "The purpose of retaining the first category of exemplary damages is to vindicate the strength of the law and to compel servants of the government (who for present purposes include the police) to be mindful of their obligation to use their power properly in the service of the public whose servants they also are (ibid at page 1226). The exemplary principle can, as Lord Devlin said (ibid at

> page 1223) serve a valuable purpose in restraining the arbitrary and outrageous use of executive power. The passages which we have quoted give a tolerably clear indication of the type of case in which a court might think it right to award exemplary damages. We agree with the opinion expressed in McGregor on Damages, (16th ed, para 447), that notwithstanding the statement in *Holden v Chief Constable of Lancashire* [1987] QB 380 at 388 that unconstitutional action alone may suffice to ground an award of exemplary damages, that should not suffice without the presence of aggravating features. As the learned author says – 'a central requirement for exemplary damages has always been the presence of outrageous conduct, disclosing malice, fraud, insolence, cruelty and the like.'"

[8] At paras [34]-[67] of my judgment I considered in detail the Ballast report, which was published on 22 January 2007 by Mrs Nuala O'Loan, the then Police Ombudsman for Northern Ireland ('PONI'). I concluded that the Ballast report presented a damming indictment of the unlawful conduct of the defendant police force as an institution, and in particular various police officers, in relation to the management, handling and protection of police informers in the investigation of serious criminality perpetrated by such informers.

[9] Following publication of the Ballast report, Sir Hugh Orde, Chief Constable of the PSNI, specifically stated that:

> "The report makes shocking, disturbing and uncomfortable reading. It does not reflect well on the individuals involved, particularly those responsible for their management and oversight."

[10] The Police Ombudsman's investigation into the murder of Sean McParland and her findings in relation to the defendant's conduct led her to make a finding that the defendant had engaged in collusion. In this regard, reference is made to para 14 of the Ballast report and to the summary at paras [57]-[67] of my judgment. In reaching my decision in this case and on reviewing the analysis at paras [84]-[96] of my judgment, I have no hesitation in coming to a conclusion that the defendant has engaged in conscious wrongdoing which was so outrageous that it amounted to oppressive, arbitrary and unconstitutional action by servants of the government. Accordingly, an award of exemplary damages is warranted in this case.

[11] It is relevant that in its written submissions, the defendant does not dispute the circumstances in which the misfeasance in public office occurred in this case and that this case falls within a category of cases in which, in principle, exemplary damages could be awarded. However, the defendant submits that, if the underlying

purposes of exemplary damages are deterrence, retribution and rehabilitation, then no award of exemplary damages should be made.

[12] The defendant submits that since it is a publicly funded institution an award of exemplary damages would impact on the general public purse at a time when there is severe financial pressure on the funding of public services in Northern Ireland, including the police. I reject this argument. In this case, and indeed in respect of the related claims, the cost to the public purse is likely to be substantial. However, this feature cannot preclude an award of exemplary damages if recognition is required to demonstrate the outrageous wrongdoing by the defendant and the need for public condemnation of the misconduct.

[13] Secondly, the defendant continues to persist with the argument that a determining factor is that police officers did not commit the murder of Sean McParland. The fact that police officers were not active perpetrators in murder or conspiracy to murder may be a relevant factor in other cases. It is not relevant to the facts of this case. In this regard I refer to para [94] of my judgment. The defendant employed Informant 1 as a CHIS. Police officers knew that Informant 1 was a murderer and had previously engaged in attempted murders and serious criminality. Informant 1 had admitted to previous murders. Despite these admissions, police officers continued to protect Informant 1 from investigation and prosecution. Police officers knew that it was probable that Informant 1 would murder or cause serious injury again. Alternatively, they were recklessly indifferent to the probability that Informant 1 would cause harm and injury to the plaintiff or person within a class in which the plaintiff belonged.

[14] With regard to the vicarious liability of government and public institutions, to include the Ministry of Defence and the Chief Constables of Police Forces, I bear in mind paras[74]-[75] of McAlinden J's decision in *Quinn* and the decision of the Court of Appeal in *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773 in which it is stated that, as a matter of policy, awards of exemplary damages can be made against those vicariously liable for the conduct of their servants and agents.

[15] Thirdly, the defendant argues that any award should be moderate relying on the decision of the Court of Appeal in *Thompson v Commissioner of Police of the Metropolis* and *HSU v Commissioner of Police of the Metropolis* [1998] QB 498. Lord Woolf delivering the judgment, said at, page 517C-D:

> "Where exemplary damages are appropriate, they are unlikely to be less than £5,000. Otherwise, the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of punishment for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent."

[16] The *Thompson* and *HSU* cases related to claims for false imprisonment and malicious prosecution, wrongful arrest and assault. Lord Woolf referred specifically to a maximum award in these classes of actions. However, significantly, in *Flynn v Chief Constable of The Police Service of Northern Ireland* [2017] NICA 13, the Northern Ireland Court of Appeal stated as follows in relation to the monetary limits on awards of exemplary damages, at para [27]:

> "… we do not see that the English cases referred to us regarding exemplary damages form a binding code in terms of the level of achievable damages. We consider that there is a valid argument that the subject matter of these proceedings extends beyond those bounds."

[17] Counsel for the plaintiff submits, and I agree, that pursuant to *Flynn*, the said monetary constraints on awards of exemplary damages do not readily apply to claims involving exceptionally serious misfeasance in public office or collusion. In the recent decision of the Court of Appeal in *Rees v Commissioner of Police of the Metropolis* [2021] EWCA Civ 49, a case involving serious misfeasance in public office and malicious prosecution, the Court of Appeal upheld a global figure of £150,000 for exemplary damages which was allocated equally between the three claimants. The Court of Appeal further observed that the resulting individual awards were well within the maximum figure, adjusted for inflation, as proposed in *Thompson.*

[18] Returning to the issue as to whether an award of exemplary damages should be made in this case, it is necessary to consider two matters. Firstly, whether an award of exemplary damages is appropriate where there is a large class of claimants. Secondly, the significance of an apology made by the defendant with regard to the outrageous conduct and the steps taken by the defendant to rectify the systems and the conduct of police officers in connection with the handling of covert human intelligence sources.

[19] In *R (Lumba) v The Secretary of State for the Home Department* [2011] UKSC 12, the Supreme Court agreed with the Court of Appeal that, where there is a large class of claimants, some of whom may not even be before the court, then an award of exemplary damages may not be appropriate. Lord Dyson stated at para 167:

> "The Court of Appeal identified at para 123 of their judgment a further point which militated against awards of exemplary damages to the appellants. Where there is more than one victim of a tortfeasor's conduct, one award of damages should be made which should be shared between the victims, rather than separate awards of exemplary damages for each individual: see *Riches v News Group Newspapers Ltd* [1986] QB 256. This is because the purpose of the award is to punish conduct rather than

> compensate the claimants. In *Riches*, the victims of the tort were a small class who were all before the court. But where (as in the present case) there is potentially a large number of claimants and they are not all before the court, it is not appropriate to make an award of exemplary damages: see *AB v South West Water Services Ltd* [1993] QB 507, 527B-D per Stuart-Smith LJ and p 531D-E per Sir Thomas Bingham MR. Unless all the claims are quantified by the court at the same time, how is the court to fix and apportion that punitive element of the damages? If the assessments are made separately at different times for different claimants, how is the court to know that the overall punishment is appropriate? The Court of Appeal were right to regard this a further reason why it was not appropriate to award exemplary damages in the present case."

[20] As identified by McAlinden J in *Quinn* at para [72], *McGregor on Damages* (20th Edition) at 13-044 is critical of the reasoning adopted by the Court of Appeal in *Lumba:*

> "This result creates an anomaly if the court determines that a defendant's conduct requires deterrence. For why should defendants be able to escape the need for a deterrent award by the "lucky" chance, for them, that they have injured many rather than one or a few? The best approach would seem to be that deterrence should focus upon the particular conduct of a particular defendant. If there are multiple claimants who have been subjected to the same conduct, then the exemplary award should generally be divided amongst them. If the conduct is more serious in relation to some of them, and requires a higher deterrent award, then those claimants should get a greater portion of the award."

[21] The Ballast report reviews the circumstances surrounding specified murders and attempted murders, including the murder of Sean McParland. It is probably correct, as submitted by the defendant, that the number of the victims and potential claimants in relation to each specified incident have not been identified. However, each murder and attempted murder is a standalone incident. Dealing specifically with the circumstances surrounding the murder of Sean McParland, the total number of claimants have been identified, to include the plaintiff.

[22] The plaintiff's claim focused primarily on the misfeasance of the defendant regarding the murder of Sean McParland. The contents of the Ballast report highlighted many factors which, in my judgment, conclusively determined liability

in respect of the plaintiff's claim in misfeasance. The murder of Sean McParland and the circumstances surrounding that murder are distinguishable from the other murders and attempted murders as set out in the Ballast report. For this reason, in my judgment, the plaintiff and the other claimants in this case fall within an identified class, and accordingly an award of exemplary damages can be made and divided equally among the claimants. In coming to this conclusion, I have taken into consideration the decision of the Court of Appeal in *Rees v Commissioner of Police of the Metropolis* [2021] EWCA Civ 49, referred to above, where the court concluded that the trial judge was entitled to reach a global figure for exemplary damages before allocating it equally between the three claimants.

[23] The fundamental question for the court is whether an award of exemplary damages is appropriate to reflect the elements of punishment and deterrence. Following publication of the Ballast report, the then Chief Constable, Sir Hugh Orde, issued a statement which included the following apology:

> "While I appreciate that (the report) cannot redress some of the tragic consequences visited upon the families of those touched by the incidents investigated in this report, I offer a wholehearted apology for anything done or left undone. We have noted and had the opportunity to consider the Ombudsman's recommendations. All those which relate to the Police Service are accepted in full…"

[24] The court notes that in para 33.20-21 of the Ballast report, the Ombudsman stated as follows:

> "33.20. Since 2003 the PSNI has made significant changes and introduced new policies and working practices in relation to its strategic management of Crime Operations Department, which now incorporates Special Branch (now Intelligence Branch) under a single Assistant Chief Constable. A description of those changes is contained in Appendix A of this Report. It is hoped that the further necessary changes consequential upon this Report will combine with the change already made, to ensure that never again, within the PSNI, will there be the circumstances which prevailed for so long in relation to informant handling and intelligence management and which are articulated in this Report.
>
> 33.21. It is evident that the arrangements for ensuring compliance by the PSNI with the Regulation of Investigatory Powers Act were ineffective between 2000 and 2003. Before the Police Ombudsman drew these matters to his attention, the Surveillance Commissioner

> had not been able to identify the misleading documentation which was created by some Special Branch officers. Recent Surveillance Commissioner reports have identified very significant improvements but the most recent report still identifies areas for development. It is essential that in the arrangements for the future strategic management of National Security issues in Northern Ireland, there will be accountability mechanisms which are effective and which are capable of ensuring that what has happened here does not recur."

[25] The Chief Constable's response to the recommendations made by the Ombudsman is set out in chapter 34 of the Ballast report. Accordingly, the defendant submits that the methodology for handling convert human intelligence sources has changed significantly and in a way which seriously reduces the risk of misconduct as identified recurring in the future. In the circumstances, it is submitted that an award of exemplary damages is not necessary since the need for deterrence has not been established.

[26] In my judgment, the apology of the then Chief Constable in response to the Ballast report is a relevant factor to be considered in the court's assessment of an award for exemplary damages. Also, the fact that the then Chief Constable has accepted the recommendations of the Ombudsman and has taken steps to improve the future strategic management of national security issues is another significant factor in the overall assessment. It is my decision that the said apology and the determination to put in place effective accountability mechanisms to prevent recurrence in the future are factors which can reduce, but not dispense with, an award for exemplary damages. The gravity of the arbitrary and outrageous conduct by the defendant's servants and agents must be reflected so as to demonstrate that the law will not tolerate such behaviour.

[27] Counsel for the plaintiff submits that the appropriate award should be substantial. In the absence of the mitigating circumstances highlighted above, I would not disagree with this submission. However, for the reasons stated, I will make an award of £25,000 for exemplary damages which has been significantly reduced to reflect the defendant's apology and the measures taken to ensure that the said outrageous conduct does not reoccur. The award will be divided equally between this plaintiff and the identified plaintiffs who succeed in their claims against the defendant, arising out of these circumstances that led to the death of Sean McParland.