Tort, Truth Recovery and the Northern Ireland Conflict

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Key Words

Northern Ireland Conflict – Truth and Reconciliation – Civil Liability – Disclosure – Limitation Periods – Closed Material Procedures – Human Rights

Abstract

Northern Ireland has no effective process to address the legacy of the human tragedy of decades of conflict. And yet during that conflict, and especially in the years since the Belfast/Good Friday Agreement 1998, people have employed multiple legal mechanisms to gain information about events which affected them and their loved ones. Human rights challenges, public inquiries, freedom of information requests, police investigations and fresh inquests have all contributed to a patchwork of approaches to truth recovery. The UK Government has long viewed these efforts with suspicion; as the primary state actor involved in the conflict its records provide a much richer source of information about historic wrongs than the recollections of members of clandestine paramilitary organisations. Successive Conservative administrations have characterised many of these efforts as "lawfare", intended to persecute veterans long after the events in question and undermine public faith in the UK's Armed Forces. One under-explored element of this complex picture is use of tort in legacy cases. Civil actions, supported by legal aid funding in Northern Ireland, provide a potential avenue for the discovery of information held by public bodies. Even unsuccessful actions can thus contribute new information about the events in question. Many of the harms inflicted during the conflict were torts as well as crimes, and this article assesses the extent to which these civil actions provide an ersatz mechanism for truth recovery, and challenges efforts to curtail such actions as a "witch-hunt".

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Introduction

Legal challenges against the activities of the United Kingdom's (UK) Armed Forces gained increasing prominence within public policy debates in the aftermath of the campaigns in Iraq and Afghanistan. Further legal challenges emerged out of historic colonial struggles in Malaya, Kenya and Cyprus. These challenges have prompted pressure for restrictions upon the historic liability of serving and retired members of the UK Armed Forces, culminating in the Overseas Operations (Service Personnel and Veterans) Bill. The legacy of the Northern Ireland conflict has, however, been kept distinct from these proposals. The management of the security situation during the conflict may have been directly compared to that of 'colonial jurisdictions',[1] but in the face of intense controversy Boris Johnson's Government has baulked at extending these restrictions to cover activity which took place in part of the UK. The Northern Ireland cases, whatever UK Government ministers might have said, are not simply manifestations of 'lawfare'.[2] Instead, the absence of any formalised process for dealing with the legacy of the Northern Ireland conflict has led to various legal avenues being explored as 'informal truth recovery mechanism(s)'.[3] The criminal investigations into the events of Bloody Sunday, the Ballymurphy inquest and the pressure for a public inquiry into the murder of Pat Finucane have been amongst the most prominent of these efforts. The use of civil actions has, however, received little attention, in keeping with general tendencies to downplay tort where it overlaps with criminal law.[4]

This article suggests that tort actions could help to unlock some of the detailed documentary evidence on contested episodes in the Northern Ireland conflict which is held by UK public bodies. Where individuals have directly suffered personal injury or trauma as a result of

[1] B. O'Leary, *A Treatise on Northern Ireland: Volume 3 Consociation and Confederation*, (Oxford: Oxford University Press, 2019), p. 70.
[2] G. Davies and D. Nicholls, "Penny Mordaunt leads backlash over failure to include Northern Ireland veterans in 'presumption of innocence' scheme", (15 May 2019), *The Telegraph*, https://www.telegraph.co.uk/news/2019/05/15/axing-northern-ireland-plans-protect-troops-historic-allegations/ [Accessed 20 March 2020].
[3] H. Quirk, "Don't Mention the War: The Court of Appeal, the Criminal Cases Review Commission and Dealing with the Past in Northern Ireland", (2013) 76 *Modern Law Review* 949, 951
[4] See M. Dyson, "The Timing of Tortious and Criminal Actions for the Same Wrong", (2012) 70 *Cambridge Law Journal* 86, 86.

another's action or inaction, multiple causes of action in tort are available to them (which remain supported by legal aid funding in Northern Ireland). But before compensation can be contemplated, courts hearing tort actions are engaged in an exercise in fact finding, meaning that even unsuccessful actions can provide a window onto the events in question. Thus, the attractiveness of such tort actions, we will suggest, does not depend upon claimants standing victorious outside a courthouse. They are about discovery, not compensation; truth recovery, rather than a quest for justice. In the absence of a holistic approach to transitional justice, we contend that civil actions will play an increasingly significant role.

Our exploration of this shift towards tort unfolds in four sections. The first examines truth amidst transition, mapping the emergence of the right to truth in international law and the relationship between truth, justice and reconciliation. It also recognises the difficulties associated with truth recovery, particularly when treated as apportioning blame (vilifying one group involved in a conflict while vindicating another). Northern Ireland has seen continued equivocation over the place of truth in its transition from conflict to peace. To this end, the second section examines the panoply of (often unsuccessful) truth recovery efforts employed in Northern Ireland. We identify a range of obstacles – both legal and political – that have consistently stymied initiatives to address the legacy of conflict. Legal efforts have been scuppered by delays in disclosing relevant documentation and the lack of independence of the established mechanisms. Politically, a growing body of opposition is challenging what is perceived to be a one-sided approach to dealing with the past. Against this backdrop, the third section of our account introduces tort into the efforts towards truth recovery. Although significant obstacles exist to tort's use for addressing historical wrongs – aptly demonstrated by the fate of civil claims made against colonial oppression – its use in the Northern Ireland context must be distinguished from these efforts. For one, Northern Ireland cases address more recent events, with more documentation potentially available than in the end-of-empire cases. They are funded also differently, utilising legal aid rather than a no-win no fee model. The final section, therefore, considers several civil cases pertaining to the Northern Ireland conflict. We seek to demonstrate the potential for civil actions to deliver truth to victims. Our intention is not to advance tort as a silver bullet for addressing the past. Rather, we suggest that as systematic and holistic transitional justice efforts in Northern Ireland remain stalled, tort offers a possible route to truth recovery, one thus far under-utilised.

Truth amidst Transition

The right to truth has its origins in international humanitarian law, the body of public international law that governs armed conflict.[5] Additional Protocol I to the Geneva Conventions, for instance, refers to the 'right of families to know the fate of their relatives',[6] with regard to both missing persons[7] and the remains of the deceased.[8] The right has nonetheless primarily evolved within international human rights law.[9] The International Convention for the Protection of All Persons from Enforced Disappearance provides that:

> Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.[10]

Regional human rights mechanisms have affirmed and expanded the right. The Inter-American Court on Human Rights has asserted that states are obliged to provide victims' families with the truth about circumstances surrounding crimes.[11] It has also ruled that society has the right to know the truth regarding crimes to prevent future occurrences,[12] and that amnesty laws which impede the investigation of the facts about gross human rights violations and the establishment of responsibility breach international human rights law.[13] In Europe, the European Court of Human Rights' Grand Chamber acknowledged the importance of truth in *El-Masri*.[14] The Court highlighted the negative impact of inadequate investigation

[5] For an overview of the development of the right to truth see A. Panepinto, "The right to the truth in international law: The significance of Strasbourg's contributions", (2017) 37 *Legal Studies* 739; D. Groome, "The Right to Truth in the Fight against Impunity", (2011) 29 *Berkeley Journal of International Law* 175.
[6] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (8 June 1977), Art 32.
[7] *Ibid.,* Art 33.
[8] *Ibid*., Art 34.
[9] Although some also examine the right to truth in the context of international criminal law. See B. McGonigle Leyh, "The Right to Truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law", (2018) 41 *Fordham International Law Journal* 697.
[10] International Convention for the Protection of All Persons from Enforced Disappearance 2006, Art 24(2).
[11] *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).
[12] *Bámaca Velásquez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 91 (2002).
[13] *Barrios Altos Case*, Inter-Am.Ct.H.R. (Ser. C) No. 75 (2001). See L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, (Oxford: Hart, 2008) p. 211.
[14] *El-Masri v The Former Yugoslav Republic of Macedonia* (2013) 57 E.H.R.R. 25.

on the rights of the applicant – a victim of rendition (including enforced disappearance) – and his family.[15] It concluded that 'the summary investigation that has been carried out in this case cannot be regarded as an effective one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth'.[16] This does not amount to a free-standing right to truth, but an element of states' investigation obligations under Articles 2 and 3 ECHR.[17]

In addition, a number of soft-law United Nations (UN) initiatives have further strengthened claims that a right to truth exists under international law.[18] Treaty bodies have developed the right to truth through their jurisprudence. As early as 1981, for example, the Human Rights Committee asserted in *Almeida de Quinteros* that it 'understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts'.[19] It continued that '[t]he author has the right to know what has happened to her daughter.'[20] The UN Human Rights Commission, its successor the Human Rights Council and the General Assembly, have all adopted resolutions stressing the importance of the right to truth in countering impunity and promoting human rights.[21] In 2006, a study on the right to truth by the Office of the UN High Commissioner for Human Rights explained that it 'implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them'.[22] The Basic

[15] *Ibid.,* para. 191.
[16] *Ibid.,* para. 193.
[17] See, however, *Abu Zubaydah v Lithuania* [2018] E.C.H.R. 446, para. 610; 'where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened'. See also J. Larkin, "The ECHR and the Future of Northern Ireland's Past", (Policy Exchange, 2020) p. 13.
[18] On soft law, see J. Cerone, S. Lagoutte and T. Gammeltoft-Hansen (eds), *Tracing the Roles of Soft Law in Human Rights*, (Oxford: Oxford University Press, 2016).
[19] *Almeida de Quinteros et al v Uruguay*, Human Rights Committee Communication 107/1981, UN Doc CCPR/C/19/D/107/1981 (1983), para. 14.
[20] *Ibid.,* para. 14. For a discussion on human rights treaty bodies and the right to truth see J. Sweeney, "The Elusive Right to Truth in Transitional Human Rights Jurisprudence", (2018) 67 *International and Comparative Law Quarterly* 353, 354.
[21] Human Rights Commission Resolution 2005/66, (20 April 2005) UN Doc. E/CN.4/RES/2005/66; Human Rights Council Resolution 12/12, (12 October 2009) UN Doc A/HRC/RES/12/12; UNGA Resolution 68/165, (18 December 2013) UN Doc A/RES/68/165.
[22] Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, (2006) UN Doc. E/CN.4/2006/91, para. 59.

Principles on the Right to a Remedy further provide that 'victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimisation and to learn the truth in regard to these functions'.[23] Similarly, the UN Principles to Combat Impunity explicitly assert an inalienable right to the truth:

> Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.[24]

Perhaps the pinnacle of this institutional embrace of the concept is demonstrated in the UN Human Rights Council's decision to appoint a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in 2011.[25] The continuing development of the right to truth through various legal and quasi-legal fora has even prompted discussion of its status as customary international law.[26]

As the above examples demonstrate, under international human rights law, victims and their families have the right to know, amongst other things, about the circumstances of a loved one's death. This right assumes particular salience in contexts of transitions from conflict to peace, with the right to truth constituting one of the foundational tenets of transitional justice.[27] The UN has defined transitional justice as 'the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale

[23] Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations of humanitarian law, CHR Res. 2005/35, (19 April 2005); ECOSOC Res. 2005/35, (25 July 2005), Principle 24.
[24] Human Rights Commission, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 2.
[25] Human Rights Council Resolution 18/7, (13 October 2011) UN Doc A/HRC/RES/18/7.
[26] See S. Szoke-Burke, "Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies", (2015) 33 *Berkeley Journal of International Law* 526, Y. Naqvi, "The Right to Truth in International Law, Fact or Fiction?", (2006) 88 *International Review of the Red Cross* 245 and T. Antkowiak, "Truth as Right and Remedy in International Human Rights Experience", (2001-2) 23 *Michigan Journal of International Law* 977.
[27] On transitional justice's development, see C. Bell, *Transitional Justice* (Abingdon: Routledge, 2017), R. Teitel, "Transitional Justice Genealogy", (2003) 16 *Harvard Human Rights Journal* 69 and P. Arthur, "How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice", (2009) 31 *Human Rights Quarterly* 321.

past abuses, in order to ensure accountability, serve justice and achieve reconciliation.'[28] Developing out of the pursuit of retributive justice through courts during Latin American transitions from autocracies to democracy, the field now encompasses a wider toolkit of mechanisms to help societies address their past.[29] This toolkit includes not only criminal prosecutions, but also truth commissions; reparations; institutional reform; vetting and lustration. Truth seeking plays a part of many of these efforts. For example, truth is both a product of the criminal investigation and the basis for subsequent convictions. The pursuit of truth is the primary function of truth commissions, while truth also serves as the basis for reparations, which can be both material and non-material in nature.

Aside from its significance for a transition from conflict, truth is also inherently linked to the telos of sustaining peace in the long run. Peace must arguably be accompanied by justice, and by extension, some form of truth recovery; understanding how a conflict developed is a prerequisite for preventing its re-emergence.[30] Truth helps to guide efforts like institution building and constitutional reform. It is also key to reconciling a conflict's protagonists and divided sections of society. As Daniel Bar-Tal notes, groups in conflict tend to form selective 'collective memories' of violence, ones that 'focus mainly on the other side's responsibility for the outbreak and continuation of the conflict and its misdeeds, violence, and atrocities' while at the same time 'concentrat[ing] on their own self-justification, self-righteousness, glorification, and victimization.' [31] '[L]eft unaddressed', Nevin Aiken frets that 'these antagonistic belief systems can pose obstacles to the development of more cooperative relationships and risk recidivist violence.' [32] Truth recovery tackles these societal divisions, paving the way for reconciliation.[33]

[28] UN Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies", (23 August 2004) UN Doc S/2004/616, para. 8.
[29] See L. Barria and S. Roper, "Mechanisms of Transitional Justice", in L. Barria and S. Roper (eds), *The Development of Institutions of Human Rights: A Comparative Study*, (New York: Palgrave MacMillan, 2010).
[30] See Sweeney, *supra note* 20, 354 and J. Herman, O. Martin-Ortega and C. Lekha Sriram, "Beyond Justice versus Peace: Transitional Justice and Peacebuilding Strategies", in K. Aggestam and A Björkdahl (eds), *Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans*, (London: Routledge, 2012) p. 58.
[31] D. Bar-Tal, "Collective Memory of Physical Violence: Its Contribution to the Culture of Violence", in E. Cairns and M. Roe (ed), *The Role of Memory in Ethnic Conflict*, (New York: Palgrave MacMillan, 2003), p. 78.
[32] N. Aiken, "Learning to Live Together: Transitional Justice and Intergroup Reconciliation in Northern Ireland", (2010) 4 *The International Journal of Transitional Justice* 166, 171.
[33] See T. Borer, *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, (Notre Dame: University of Notre Dame Press, 2006).

Truth is also central to victims' and survivors' efforts to come to terms with the past.[34] It can help them find closure, by revealing the details of the events they suffered, the fate of forcibly disappeared loved ones or explaining why certain people were targeted. Knowing the truth about past events enables mourning practices, which facilitate personal and communal healing and reconciliation. Through truth, victims and survivors can attempt to challenge prevailing versions of history and compel authorities to investigate contested events.[35] Truth recovery is also, according to the Inter-American Commission on Human Rights, a fundamental factor in restoring citizens' confidence in a state's institutions.[36] Truth therefore exists within a larger context of transitional justice and peacebuilding. Truth is viewed as both a right in and of itself and as conducive to peace, contributing to national catharsis, facilitating the demands and rights of victims, and helping to provide closure. Truth-finding mechanisms thus often form prominent parts of broader transitional justice packages.

The pursuit of truth in these settings is not, however, uncontroversial. Attempts to address the past can be destabilising, at least in the short term.[37] Where no clear winner emerged from a conflict, probing underlying societal fissures or disputes over justifications for the conflict can ignite fresh contest.[38] Agreement over a definition of truth, and the processes necessary for truth recovery, thus requires an accommodation of different narratives about the conflict. Truth, however, ordinarily entails apportioning blame to human rights violators. As the primary duty-bearer under international human rights law, the responsibility for pursuing and facilitating truth recovery often falls to the state. Because states are often implicated in human rights violations prior to and during conflict, they can also become a source of barriers to truth recovery. These tensions and trade-offs have together impeded an overarching approach to addressing Northern Ireland's past.

[34] See K. McEvoy and K. McConnachie, "Victims and Transitional Justice: Voice, Agency and Blame", (2013) 22 *Social & Legal Studies* 489 and S. Robins, "Failing Victims? The Limits of Transitional Justice in Addressing the Needs of Victims of Violations", (2017) 11 *Human Rights & International Legal Discourse* 41.
[35] See C. Lawther, "Denial, Silence and the Politics of the Past: Unpicking the Opposition to Truth Recovery in Northern Ireland", (2012) 7 *International Journal of Transitional Justice* 157.
[36] Inter-American Commission on Human Rights, *The Right to Truth in the Americas*, (2014) OEA/Ser.L/V/II.152.
[37] See, for example, Anonymous, "Human Rights in Peace Negotiations", (1996) 18 *Human Rights Quarterly* 249.
[38] C. Bell, C. Campbell and F. Ní Aoláin, "Justice Discourses in Transition", (2004) 13 *Social & Legal Studies* 305, 316.

(The lack of) Truth Recovery in Northern Ireland

All but one of the major political parties in Northern Ireland, together with the UK and Irish Governments, concluded the Belfast/Good Friday Agreement 1998.[39] It was subsequently accepted by referendum in both Ireland and Northern Ireland. The Agreement aimed at ending 30 years of political violence in Northern Ireland in which over 3,700 individuals were killed, and at least 40,000 injured. It contained a number of provisions connected to transitional justice – including policing reform, criminal justice reform, victims' rights, human rights and the release of paramilitary prisoners.[40] However, the settlement was largely forward-looking, and neither established a strategy for dealing with Northern Ireland's past, nor proposed any structured mechanism for truth recovery or reconciliation.[41] The reasons for this omission are diverse and contested.[42] It suffices to note for present purposes that in Northern Ireland the nature of the conflict, who was to blame and where accountability should ultimately lie, all remain contested. A holistic peace-versus-justice debate was bypassed by efforts to kick discussions on the past 'into the long grass'.[43]

In the absence of an overarching approach to truth-recovery, a patchwork of piecemeal approaches has nonetheless emerged.[44] Truth recovery in Northern Ireland has thus been described as emerging 'over time, without a planned approach on how to best meet the needs of the people using it'.[45] The resulting assemblage of mechanisms has been described as a 'quagmire',[46] and a multitude of causes, symptoms and proposed remedies have been suggested to facilitate truth-seeking in Northern Ireland. Christine Bell has warned that this

[39] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes), (10 April 1998), 2114 U.N.T.S. 473.
[40] See C. Campbell, F. Ní Aoláin and C. Harvey, "The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland", (2003) 66 *Modern Law Review* 317, 338.
[41] See Northern Ireland Human Rights Commission (NIHRC), *Dealing with Northern Ireland's Past Towards a Transitional Justice Approach*, (2013), p. 3.
[42] See, for example, J. Dingley, "Constructive Ambiguity and the Peace Process in Northern Ireland", (2005) 13 *Low Intensity Conflict & Law Enforcement* 1.
[43] C. Bell, "Contending with the Past: Transitional Justice and Political Settlement Processes", in R. Duthie and P. Seils (ed) *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, (New York: International Center for Transitional Justice, 2017), p. 91.
[44] For a useful overview of existing approaches, see K. McEvoy and B. Gormally, *Dealing with the Past in Northern Ireland 'From Below'* (Belfast: Community Foundation for Northern Ireland, 2009).
[45] Northern Ireland Office, *Consultation Paper: Addressing the Legacy of Northern Ireland's Past*, (2018), p. 16
[46] P. Shirlow, "Truth Friction in Northern Ireland: Caught between Apologia and Humiliation", (2018) 71 *Parliamentary Affairs* 417, 419.

patchwork of truth-recovery mechanisms could well be undermining some specific past-focused initiatives in Northern Ireland and even the peace process itself.[47] We will thus provide a synopsis of the legal and political impediments to existing truth-seeking mechanisms, before exploring how these inadequacies have contributed to recent attempts to pursue truth through tort.

(i) Impediments to Truth Recovery within the Legal System

From the conflict's beginnings a range of legal impediments stymied truth recovery. As Andrew Mumford identifies, 'a mutual psychology of suspicion' has long permeated relations between the UK Armed Forces and Northern Ireland's Nationalists.[48] The military thus invested little effort in building up confidence amongst what was seen as a hostile community. Successive UK Governments have since regarded allegations of human rights violations against security personnel as a manifestation of a 'sophisticated [Republican] propaganda approach',[49] intended to discredit it and thereby legitimate paramilitary activity. The instrumentalisation of human rights to serve ethno-nationalist ends carries deep irony, given the scale of human rights violations caused by paramilitary violence.[50] Its legacy is nonetheless pervasive; legal challenges came to be viewed by officials and ministers through the prism of conflict management and the need to supress sources of embarrassment.

This tendency towards attempting to draw a line under the "dark times" of the conflict is encapsulated in David Cameron's reported comments that forces within Whitehall would never permit a public inquiry into the circumstances of the murder of Belfast solicitor Pat Finucane in 1989.[51] At the time of writing, the UK Government has yet to respond to the UK Supreme Court's finding that there has not, as yet, been an inquiry into Finucane's murder

[47] C. Bell, "Dealing with the Past in Northern Ireland", (2002) 26 *Fordham International Law Journal* 1095, 1099-1100.
[48] A. Mumford, *The Counter-Insurgency Myth: The British Experience of Irregular Warfare* (London: Routledge, 2012), p. 96.
[49] W.R. Matchett, "Security: Missing from the Northern Ireland Model" (2015) 11 *Democracy and Security* 1, 12.
[50] See B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland*, (Oxford: Oxford University Press, 2010), p. 22.
[51] David Cameron is quoted as saying that 'the previous administration could not deliver a public inquiry and neither can we. There are people in buildings all around here who won't let it happen'; see I. Cobain, *The History Thieves: Secrets, Lies and the Shaping of a Modern Nation* (London: Portobello Books, 2016), p. 203.

which meets the requirements of Article 2 ECHR.[52] The same impetus is driving proposals, under the Overseas Operations (Service Personnel and Veterans) Bill, to amend human rights legislation in order to shield serving and former service personnel from investigation. This Bill's proposed restrictions on civil claims are, however, not a novel concept.[53] The prospect of indemnity for military personnel was mooted in the early years of the Northern Ireland conflict in the context of liability arising from interrogations of internees.[54] And although these proposals do not cover the Northern Ireland conflict, the Government has prevaricated for years over the introduction of the Northern Ireland (Stormont House Agreement) Bill, with its proposed mechanisms for information retrieval.[55] In March 2020 the Northern Ireland Secretary announced a rethink of some of this Draft Bill's terms, with the aim of restricting the scope for criminal prosecutions of military veterans.[56] This official push-back is yet to stifle demand for truth recovery. Public bodies continue to hold much information about the conflict which is not in the public domain and, in the absence of any dedicated truth-recovery process, those affected by the violence continue to seek new avenues by which to access information relating to their personal trauma.

This struggle for information release has been long running, and extends across Northern Ireland's divisions. Ian Paisley Senior's sensationalised release of a leaked Royal Ulster Constabulary (RUC) dossier on the Kingsmills massacre under parliamentary privilege in 1999 exemplifies the lengths to which some Unionist politicians have been willing to go to be seen to respond to the pressure from victims for information.[57] The UK Government has, nonetheless, become increasingly vehement in its efforts to protect information regarding

[52] *Re Finucane's Application for Judicial Review* [2019] UKSC 7, [152]-[153] (Lord Kerr). This delayed response is subject to a further judicial review challenge; see C. McCurry, "Government to respond to Supreme Court ruling over Pat Finucane death 'in weeks'", (21 February 2020), *Belfast Telegraph*, https://www.belfasttelegraph.co.uk/news/northern-ireland/government-to-respond-to-supreme-court-ruling-over-pat-finucane-death-in-weeks-38978993.html [Accessed 20 March 2020].

[53] Overseas Operations (Service Personnel and Veterans) Bill 2020, cl.8-10, exclude the court's discretion to waive the standard time limits upon civil actions in England and Wales, Scotland and Northern Ireland where overseas military operations are at issue.

[54] Lord Parker, *Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism* (1972) Cmnd 4901, para. 38.

[55] Draft Northern Ireland (Stormont House Agreement) Bill 2018, cl.40-50.

[56] See Brandon Lewis, MP, HC Deb., vol. 673, HCWS168 (18 March 2018).

[57] Ian Paisley Snr, MP, HC Deb., vol. 324, col. 380-381 (27 January 1999). The contents of the dossier in question were subsequently dismissed as inaccurate by the PSNI Historical Enquiries Team, and Seamus Mallon vividly attests to the impact upon those falsely connected to the massacre in Parliament; S. Mallon with A. Pollak, *A Shared Home Place* (West Meath: The Lilliput Press Ltd., 2019), p. 145.

the security forces. Freedom of information requests regarding security policy during the conflict continue to be blocked, and efforts to secure public inquiries or fresh inquests into notorious episodes in the conflict resisted. This section explores these shifts in official resistance to legal challenges to the actions of security agencies.

Inadequate investigation of certain deaths at the hands of security personnel has long been a prominent basis for human rights claims relating to the Northern Ireland conflict, as demonstrated in a series of 'ground-breaking' European Court of Human Rights' judgments against the UK in 2001.[58] Three of these cases involved deaths at the hands of state agents (both police and the SAS)[59] and the fourth in circumstances that suggested collusion between Loyalist paramilitaries and the RUC.[60] The European Court of Human Rights found that the UK had failed to comply with the procedural component of the right to life under Article 2 ECHR in that they had not established independent and effective investigations of these killings within a reasonable period. In 2013 the Strasbourg Court again considered delayed investigations. In *McCaughey*, concerning the killing of suspected Irish Republican Army (IRA) members by the police, the Court criticised a series of lengthy intervals in the investigative process. These included the RUC not forwarding material to the Coroner until four years after the deaths, two more years until the Coroner informed families of its receipt of information, and a further four years until the Coroner requested police statements. In total, there was a 21-year delay between the killings and the inquest.[61]

Delays in obtaining justice are a recurrent theme in Northern Ireland's legacy cases. In some cases, these delays have eroded any semblance of trust between the various stakeholders. For instance, in 2016 the Criminal Justice Inspectorate published a report which was critical of the Police Service of Northern Ireland's (PSNI) disclosure process to Coroners' inquests, with the Chief Inspector Brendan McGuigan noting that 'processes leading to disclosure are unwieldy and risk averse and trust among the various parties is in short supply'.[62] In other

[58] Dickson, *supra note* 50, p. 270.
[59] *McKerr v United Kingdom* (2002) 34 E.H.R.R. 20; *Kelly and others v United Kingdom* (App. No. 30054/96) and *Jordan v United Kingdom* (2003) 37 E.H.R.R. 2.
[60] *Shanaghan v United Kingdom* (App. No. 37715/97). See also *Brecknell v United Kingdom* (2008) 46 E.H.R.R. 42.
[61] *McCaughey and others v United Kingdom* (2014) 58 E.H.R.R. 13, para. 131.
[62] Criminal Justice Inspectorate Northern Ireland, *Coronial Processes: An Inspection of the Arrangements in Place in the Police Service of Northern Ireland to manage and disclose information in support of the Coronial Process*

cases, these issues have led to the circumstances of an incident being wholly obscured. When the inquest into the death of Pearse Jordan, an IRA member killed by police in West Belfast in 1992, was delivered in 2016, the Coroner's report found that:

> It is now impossible with the passage of time to say with any certainty what happened on that fateful afternoon. At the remove of a quarter of a century I am simply unable to reach a concluded view which is fair and just as to whether the use of lethal force was justified or not.[63]

The *McCaughey* case raised this issue of disclosure of evidence before the Strasbourg Court. This complaint was rejected on the grounds that it was contemporaneously being considered in domestic proceedings.[64] The lack of co-operation – often bordering on obstruction – further undermines truth recovery within the legal system. This impediment is perhaps most compelling demonstrated across Sir John Stevens' three investigations on collusion between loyalist paramilitaries and the security forces. Stevens, the Commissioner for the Metropolitan Police, found that there had been a 'wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence' in respect of his investigations.[65] He further noted that throughout his investigations he had faced a culture of obstruction from elements in the Armed Forces and the RUC/PSNI.[66]

Widespread concerns also persist about the consistency of ongoing criminal investigations into conflict-related killings. In 2005, then-Chief Constable for Northern Ireland, Sir Hugh Orde, established a Historical Enquiries Team (HET) to re-examine such killings between 1969 and 1998. Seven years later the then-Justice Minister, David Ford MLA, instructed a review into whether the HET's investigations conformed the correct policing standards, were consistent and Article 2 compliant. The report presented a damning indictment on the HET,

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in Northern Ireland, (December 2016), http://www.cjini.org/CJNI/files/45/45098860-9917-48bc-93ac-ffec70960e84.pdf, p. 5 [Accessed 20 March 2020].

[63] Law Society of Northern Ireland, "Pearse Jordan Inquest Findings Delivered", (7 November 2016), https://www.lawsoc-ni.org/pearse-jordan-inquest-findings-delivered [Accessed 20 March 2020].

[64] *McCaughey and others v United Kingdom* (2014) 58 EHRR 13, para. 121.

[65] Sir John Stevens, *Stevens Enquiry: Overview and Recommendations* (2003), https://cain.ulster.ac.uk/issues/collusion/stevens3/stevens3summary.pdf, 4.7 [Accessed 20 March 2020].

[66] *Ibid.,* 3.1.

expressing concerns that deaths 'are examined less rigorously' where there were allegations of state involvement.[67] Further concerns were raised with regards to the independence of HET investigations, with the involvement of former RUC and PSNI officers giving the impression that 'the process lacks independence'.[68] Following the report, a re-examination was ordered in 32 of the cases the HET had completed. The HET was ultimately wound-up in 2014 and replaced with a Legacy Investigation Branch.

This theme of imbalance extends beyond investigative processes, being reflected in the findings of specific inquiries. One stark comparison is between the initial inquiry into Bloody Sunday, the Widgery Report, and the Saville Report of nearly four decades later. The former concluded that UK Armed Forces had returned fire in response to shots fired by IRA members,[69] that some amongst the protestors had been carrying weapons, or were closely associated with those who were,[70] and that there had been no breakdown in discipline of the soldiers involved in the events.[71] The Chair of the Report, Lord Widgery, had been advised by then Prime Minister Edward Heath, that the conflict with the IRA was 'not only a military war but a propaganda war'.[72] The long-awaited Saville Report of 2010 refuted the contents of the earlier report, establishing that soldiers that had fired first,[73] after losing their 'self-control',[74] and that during the Inquiry many of the soldiers 'knowingly put forward false accounts in order to seek to justify their firing'.[75] This report prompted renewed police investigations.

Although the ordinary process of public records release under the Public Records Act's 30- (and latterly 20-) year rule[76] now covers much of the Northern Ireland conflict, many related records have been sealed for longer periods. This legislation, moreover, excludes police

[67] Her Majesty's Inspectorate of Constabulary (HMIC), *Inspection of the Police Service of Northern Ireland Historical Enquiries Team* (2013), p. 16.
[68] *Ibid.*, p. 25.
[69] Lord Widgery, *Widgery Report, Summary of Conclusions* (1972), p. 7.
[70] *Ibid*., p. 10.
[71] *Ibid*., p. 11.
[72] Anonymous, "Heath denies influencing Widgery Report", (15 January 2003), *Irish Times*, https://www.irishtimes.com/news/heath-denies-influencing-widgery-report-1.456535 [Accessed 20 March 2020].
[73] See Lord Saville of Newdigate, *Independent Report: Report of the Bloody Sunday Inquiry* (Saville Report) (2010), para. 3.76.
[74] *Ibid.,* para. 5.4.
[75] *Ibid.,* para. 3.82.
[76] Public Records Act 1958, s. 3(4).

records,[77] channelling efforts to secure such material into the Freedom of Information requests.[78] For all that the UK Government proclaims its commitment to 'providing as much information as possible to families about what happened to their loved ones',[79] such requests have been vigorously resisted by public bodies. Requests can be refused on a number of grounds, including sensitivity, which can cover anything from security concerns to protection of personal information. In 2017, for example, academics sought the release of the 1973 Morton Report into the organisation of the RUC's Special Branch.[80] The PSNI refused the release on the basis that the Report was supplied to it by the Security Service (MI5); Jack Morton was a serving MI5 officer who had been tasked to prepare his Report by MI5's Director General. Such material is covered by a blanket exemption from the operation of the UK's Freedom of Information Act; decisions over release are hence not subject to any public interest considerations, such as the completeness of the historical record.[81] As soon as the UK's Information Commissioner was satisfied that the report had been supplied by MI5, she dismissed a challenge against the PSNI's refusal.[82]

It is possible to have some sympathy for the Information Commissioner; once the conditions applicable to the security exemption have been fulfilled, she has no basis for balancing the interests at stake in the application. Instead, it is the authorities' eagerness to restrict access to historic documents with such blanket exemptions which distorts the historical record. The limited records which have entered the public domain thus risk producing a selective narrative about the conflict, one which could require revision in light of future releases.[83]

(ii) Political Impediments to Truth Recovery

[77] *Ibid*., sch. 1, para. 2.
[78] See the Freedom of Information Act 2000, ss. 63-66.
[79] Brandon Lewis, MP, HC Deb., vol. 673, HCWS168 (18 March 2018).
[80] Although there is currently no record of the 1973 Morton Report within the UK National Archives' or Public Record Office of Northern Ireland's holdings, Morton's earlier reports into colonial security in Swaziland (Eswatini), Bechuanaland (Botswana) and Basutoland (Lesotho) were released in May 2019, suggesting that they had been sealed for 50 years. See UK National Archives Files CO 1035/339, CO 1035/340 and CO 1035/341.
[81] Freedom of Information Act 2000, s. 23(1).
[82] Information Commissioner's Office Decision FS50705592 (2019), para. 15.
[83] See R.C. Thurlow, "The Historiography and Source Materials in the Study of Internal Security in Modern Britain (1885–1956)", (2008) 6 *History Compass* 147.

Political difficulties often underpin these legal impediments to truth recovery. As Cheryl Lawther recounts, 'a truth process would investigate human rights violations the state's legal architecture should have rendered impossible', a fact which many Unionists find 'paradoxical and uncomfortable'.[84] The question of whether such mechanisms will lead to criminal prosecutions has become increasingly fraught, amid accusations of an imbalance in attention to the activities of state agents over those of paramilitaries, and an imbalance in potential criminal penalty. In January 2017 the then-Secretary of State for Northern Ireland, James Brokenshire, declared the system for investigating conflict-related murders was not working, because it placed a 'disproportionate' focus on soldiers.[85] The Democratic Unionist Party entered into an agreement to support the Conservative Government six months later on the basis that legacy bodies should 'operate in ways that are fair, balanced and proportionate and which do not unfairly focus on former members of the armed forces or police'.[86]

In May 2019 the then-Defence Secretary Penny Mordaunt doubled-down on this position, declaring that she wanted to include veterans of the conflict in Northern Ireland in controversial plans to prevent prosecution of offences over ten years old.[87] A BBC report challenged this account, finding that investigations into killings by the Armed Forces represented only 30% of all legacy investigations.[88] Moreover, because the UK as a liberal democracy draws legitimacy from its adherence to human rights standards it, and its agents, must to some extent be treated differently from paramilitary actors; 'the ways of its enemies are not always open before it'.[89] The narrative that truth recovery is selective, and only benefits those seeking to hold the state to account, has nonetheless persisted.

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[84] Lawther, *supra note* 35, p. 164.

[85] R. Mendick, "British soldiers are being failed by Troubles inquiry, Northern Ireland Secretary concedes", (28 January 2017), *The Telegraph*, https://www.telegraph.co.uk/news/2017/01/28/soldiers-failed-troubles-inquiry/ [Accessed 20 March 2020].

[86] See UK Government, "UK Government financial support for Northern Ireland", (22 March 2019), https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/uk-government-financial-support-for-northern-ireland [Accessed 20 March 2020].

[87] L. Buchan, "Defence secretary Penny Mordaunt sparks backlash over veterans pledge", (15 May 2019), *The Independent*, https://www.independent.co.uk/news/uk/politics/penny-mordaunt-uk-human-rights-defence-secretary-amnesty-a8914456.html [Accessed 20 March 2020].

[88] V. Kearney, "Troubles legacy cases bias disputed by figures", (2 February 2017), *BBC*, https://www.bbc.co.uk/news/uk-northern-ireland-38844453 [Accessed 20 March 2020].

[89] Case HCJ 5100/94, *Public Committee Against Torture v The State of Israel* (1999) 7 BHRC 31, [39] (President Aharon Barak).

In 2015, the five main political parties completed the Stormont House Agreement (SHA), proposing the creation of a series of truth recovery mechanisms. These would include an Independent Commission on Information Retrieval, Historic Investigations Unit and an Implementation and Reconciliation Group. While not welcomed by all commentators, there was some hope that this political compromise could bring to an end decades of intransigence and lead to a more comprehensive process.[90] The collapse of the Stormont Institutions in January 2017, however, stalled this progress.[91] While the UK Government had earmarked £150 million to fund these initiatives, funds would not be released until there was political consensus on dealing with the past.[92] Renewed hope for a lasting settlement was injected in January 2020 with the New Decade New Approach agreement.[93] Along with the restoration of the Stormont Assembly, this deal committed the UK Government to the introducing legislation based on the Stormont House Agreement within 100 days.[94] The UK Government has, however, latterly set upon redrafting the existing legislative proposals, and this timeframe might well be affected by the exigencies of the Covid-19 crisis. [95]

The lethargy with which Northern Ireland's political institutions engaged with legacy issues resulted in the judiciary moving to fill the vacuum in truth recovery. In March 2016 the Lord Chief Justice of Northern Ireland, Sir Declan Morgan, introduced a plan for completing the remaining legacy inquests within five years. This plan was blocked, however, when the First Minister Arlene Foster refused to approve it, because legacy inquests required a 'political judgment'.[96] This decision was deemed unlawful in a judicial review hearing in 2018.[97] In

[90] Shirlow, *supra note* 46, 422.
[91] In a related problem, the Information Commissioner noted in 2018 that without a minister in post to consider requests, freedom of information processes would be halted; see N. McCracken, "Stormont departments 'may not release government information'" (23 November 2018), *BBC*, https://www.bbc.co.uk/news/uk-northern-ireland-46318065 [Accessed 20 March 2020].
[92] Anonymous, "Legacy Inquest Unit being set up by Department of Justice", (28 February 2019), *BBC*, https://www.bbc.co.uk/news/uk-northern-ireland-47405979 [Accessed 20 March 2020].
[93] New Decade, New Approach, (9 January 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf [Accessed 20 March 2020].
[94] *Ibid*., Annex A, para. 16.
[95] The Northern Ireland Secretary has pledged to introduce legislation 'in line with our commitments'; Brandon Lewis, MP, HC Deb., vol. 673, HCWS168 (18 March 2018). The extended 2020 Easter recess in response to Covid-19, however, makes the introduction of legislation into Parliament within 100 days unrealisable.
[96] *Hughes's Application for Judicial Review* [2018] NIQB 30, [35].
[97] *Ibid.*, [55].

February 2019, the Department of Justice committed to establishing a Legacy Inquest Unit in the Coroners Service under the Lord Chief Justice's supervision. The unit has since been designated £55 million to address the remaining 52 legacy inquest cases. Yet, as these inquests proceed, the problems encountered in the legal domain over delays, state cooperation and the disclosure of relevant information, have re-emerged.

While they are to be welcomed, the New Decade New Approach commitments have received a cautious reception from those engaged in truth recovery in Northern Ireland. Despite being on the political agenda for decades, truth-recovery efforts have often been blocked by political wrangling and, the more intractable these disputes become, the less likely that any formal mechanism will emerge. For victims and their families, there is an awareness that the longer delays persist, the more practical challenges will emerge. As the son of one victim, shot dead by UK Armed Forces in 1971, has asserted, '[o]ur loved ones are dying, witnesses are dying year on year'.[98] There is thus an increasing urgency behind efforts to explore all legal avenues in order to gain information amongst the conflict's remaining survivors.

Tort and the Legacy of the Northern Ireland Conflict

Given these blockages, hundreds of claimants have instituted "legacy" tort actions in recent years. Tort has played a prominent, and not always uncontroversial role, in addressing large-scale human rights violations.[99] The United States' Alien Tort Claims Act has gained increasing prominence as a mechanism for pursuing abuses perpetrated by multi-national companies in countries such as Myanmar, Nigeria and South Africa.[100] The use of tort in the context of the Northern Ireland conflict is not novel.[101] From the earliest days of the conflict, the police and

[98] Unknown Author, "Legacy of the past: Victims campaigners protest at Stormont", (4 July 2017), *Belfast Telegraph*, https://www.belfasttelegraph.co.uk/news/northern-ireland/legacy-of-the-past-victims-campaigners-protest-at-stormont-35894510.html [Accessed 20 March 2020].

[99] See, for example, Case 17/04567 *Mothers of Srebrenica v The State of the Netherlands* (19 July 2019) (Supreme Court of the Netherlands). On the issues with using tort to address certain human rights abuses, see D. Hovell, "The Gulf Between Tortious and Torturous", (2013) 11 *Journal of International Criminal Justice* 223.

[100] See M. Sterio, "Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act'", (2018) 50 *Case Western Reserve Journal of International Law* 127.

[101] This liability was noted prominently in the Parker Report into internee interrogation, *supra note* 54, para. 2. In the subsequent "hooded men" case, the Strasbourg Court noted the settlement of some connected civil claims; *Ireland v United Kingdom* (1978) 2 E.H.R.R. 25, para. 107. See S. Newbery, *Interrogation, Intelligence and Security: Controversial British Techniques*, (Manchester: Manchester University Press, 2015) p.122.

military were subject to personal injury and unlawful detention claims.[102] Regular compensation awards against the security forces during the conflict illustrated how tort provided more effective outlet for challenging such activity than the operation of statutory bodies, like the Independent Commission for Police Complaints.[103] In one of the leading Article 2 cases emerging out of the Northern Ireland conflict, moreover, Strasbourg recounted some of civil proceedings' advantages for claimants; they 'provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages'.[104] Tort's continued use should therefore come as little surprise. A negligence action, for example, has been instituted against the former senior military officer Sir Frank Kitson, named as defendant alongside the Ministry of Defence, with regard to alleged military collusion in a paramilitary murder in the 1970s.[105] Civil action was also engaged against alleged paramilitary members, notably in the context of the Omagh bombing[106] and the Hyde Park bombing,[107] alongside attempts to sue the Libyan Government for Libya's role in supplying the IRA with Semtex.[108] This section considers whether tort claims can possibly circumvent many of the limitations to truth recovery discussed above.

Tort, of course, is far from a bespoke truth-recovery mechanism. Indeed, if it has long been accepted that criminal proceedings are not an idealised quest for truth,[109] tort might appear no better as vehicle for truth recovery, especially when the courts maintain that 'the principal aim of an award of compensatory damages is to compensate the claimants for loss

[102] Prominent cases included *Doherty v Ministry of Defence* [1979] 6 N.I.J.B. 6 and *Farrell v Ministry of Defence* [1980] 1 All ER 166. See D. Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland*, (New York: Palgrave MacMillan, 2000), p. 181.
[103] S. McNulty, "Building trust in Northern Ireland: The Role of Civilian Review of the Police", (2001) 12 *Indiana International & Comparative Law Review* 219, 227-228.
[104] *Jordan v United Kingdom* (2003) 37 E.H.R.R. 2, para. 141.
[105] See O. Bowcott, "Former General sued over death of Catholic minibus driver during Troubles", (17 April 2015), *The Guardian*, https://www.theguardian.com/uk-news/2015/apr/27/northern-ireland-general-sued-death-catholic-troubles-heenan-kitson [Accessed 20 March 2020].
[106] *Breslin v McKevitt* [2011] NICA 33.
[107] *Young v Downey* [2019] EWHC 3508 (QB).
[108] O. Boycott, "Fresh attempt to sue Libya for supplying IRA with Semtex explosive", (9 January 2020), *The Guardian*, https://www.theguardian.com/uk-news/2020/jan/09/fresh-attempt-to-sue-libya-for-supplying-ira-with-semtex-explosive-bombings-northern-ireland [Accessed 20 March 2020]. See also Northern Ireland Affairs Committee, *HM Government support for UK victims of IRA attacks that used Gaddafi-supplied Semtex and weapons: Follow-up*, (2019) HC 1723.
[109] J. Jackson, "Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach", (1988-89) 10 *Cardozo Law Review* 475.

suffered'.[110] Before compensation can be contemplated, however, tort actions involve an exercise in fact finding. Where individuals have directly suffered personal injury or trauma as a result of another's action, or inaction, multiple causes of action in tort are available to them. The most prominent of these is negligence, where the basis of the action is the breach of the duty of care generally owed by members of society to each other. Such actions can be employed in relation to personal injuries sustained as a result of terrorist attacks, just as easily as it can be applied to abuses of power by security personnel.[111] There is, however, something of an absurdity in 'the importation of a common law duty of care to terrorists in the conduct of a bombing campaign'.[112]

Cases like the Omagh bombing civil action have thus instead used trespass to the person, which encompasses the infliction of assault, battery or the unlawful deprivation of liberty. This tort can be more difficult to establish than negligence, as intention is a prerequisite to the tort's commission. Claimants must therefore generally establish that the defendants' intention was to perform the act or omission which caused the injury in question. Where a battery is at issue, however, the claimant only has to establish that the unlawful contact was intentional,[113] not intention to inflict particular harms, with jurisprudence suggesting that the tortfeasor's subjective recklessness with regard to the consequences will suffice.[114] The perception that a greater level of wrongfulness is inherent where a trespass to the person is established, by comparison to negligence, increases its attractiveness to claimants seeking to emphasise the defendant's blameworthiness. Independent of the cause of action, legacy tort actions will inevitably be initiated on the basis of personal injury to the claimant, because it is only in the context of personal injury or death that the courts have the discretion to waive the three-year time limit which ordinarily applies to such claims.[115]

Tort has yet to be employed to its full potential, with the limitation period's strictures, in particular, resulting in civil actions being overlooked. Given the significance of this barrier,

[110] *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962; [2008] UKHL 25, [22] (Lord Scott).
[111] See *Young v Downey* [2019] EWHC 3508 (QB), [8] (Yip J).
[112] *Breslin v McKevitt* [2011] NICA 33, [14].
[113] *Collins v Wilcock* [1984] 1 WLR 1172, 1177 (Goff LJ).
[114] *Wilson v Pringle* [1987] 1 QB 237; *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312.
[115] Limitation (Northern Ireland) Order 1989 (S.I. 1989/1339), s. 50.

Young v Downey marks an important development. This was a civil action against one of the alleged perpetrators of the Hyde Park bombing, a Provisional IRA attack in 1982 which killed four soldiers and injured 31 others. Yip J found that on a balance of probabilities 'the defendant was knowingly involved in the concerted plan to detonate the bomb in Hyde Park specifically targeted at the passing Guard', and was therefore liable in tort for his part in the attack.[116] On her way to this conclusion, the judge adopted a particularly flexible approach to the limitation period, taking specific note of the limited information available to the claimant (who had been a child at the time of the attack) and her vulnerable state.[117] The most important factor, however, was the breakdown of a criminal prosecution of the defendant, which provided a fresh impetus for initiating a civil action:

> [A]s a matter of public policy, it would be highly undesirable to actively encourage civil claims for damages to be brought while the prospect of prosecution remains. The sensible course in a case of this nature is to give priority to action in the criminal jurisdiction. The claimant has made it clear that monetary compensation is not her primary motive for bringing this claim. Rather, she seeks justice for her father's death. The need for her to do so through the civil jurisdiction only arose in 2014 when it was determined that the defendant's criminal prosecution could not proceed.[118]

Notwithstanding these developments, if the purpose behind a tort action is truth recovery, as opposed to gaining compensation, then claimants do not ultimately have to persuade the court to set aside the limitation period. They must instead have sufficiently plausible claims to avoid the limitation period being used to strike out the action at its earliest stages. Coulson J's judgment in a challenge regarding pollution and environmental damage allegedly caused by a copper mine in Zambia illustrates how the courts approach efforts by defendants, in this case revolving around a lack of jurisdiction, to prevent substantive hearings:

[116] *Ibid*., [87](x).
[117] *Ibid*., [28]. In this case, the limitation period was found in the Limitation Act 1980, s.33.
[118] *Ibid*., [37].

> I have expressed the view that the claim is arguable and not fanciful; that it may be something of an uphill task but that there is already material to support it; and that these views are in any event subject to disclosure and the evidence at trial.[119]

In other words, only the most unarguable claims will be struck out by the courts before the process of discovery.[120] Discovery obliges one party to a case to disclose 'every document … which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party (seeking discovery) either to advance his own case or to damage the case of his adversary'.[121] Its potential as a tool for truth recovery is further enhanced by Article 2 ECHR's positive obligations under, which oblige the state to act with 'exemplary diligence and promptness' in cases which engage the right to life.[122]

It took challenges against the conduct of the Kenya Emergency (1953-1961) to showcase the potential effectiveness the disclosure element of tort actions as a standalone truth-recovery mechanism. In *Mutua*,[123] the UK Government was unsuccessful in its efforts to have the first of these claims time barred in its preliminary stages.[124] The Foreign and Commonwealth Office was thus obliged to release documents detailing the use of torture and mass internment of many tens of thousands of Kikuyu, Embu and Meru in unsanitary camps by the colonies' authorities as part of counter-insurgency efforts led by the UK's Armed Forces.[125] Such was the impact of these disclosures, not least for the UK's relationship with Kenya, that the UK Government opted to settle a first tranche of claims through a £19.9 million payout.[126] Subsequent claims for compensation arising from both the Kenya Emergency and the Cyprus

[119] *Lungowe* v *Vedanta Resources PLC* [2016] EWHC 975 (TCC), [128]. See E. Aristova, "Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction", (2018) 14 *Utrecht Law Review* 6, 13-14.
[120] In England and Wales, discovery is covered by the Civil Procedure Rules, Rule 24. A court may issue a summary judgment given against a claimant if it is 'clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based'; *Three Rivers v Bank of England (No 3)* [2001] UKHL 16; [2003] 2 AC 1, [95] (Lord Hope of Craighead).
[121] *Compagne Financiere du Pacifique v Peruvian Guano Company* [1882] 11 QBD 55, 62-63 (Brett LJ).
[122] *Öneryildiz v Turkey* (2005) 41 E.H.R.R. 22, para. 94.
[123] *Mutua and Others v Foreign and Commonwealth Office* [2011] EWHC 1913 (QB).
[124] *Ibid*., [32] (McCombe J).
[125] See *Mutua and Others v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB), [55]. The documents also indicated the degree to which these activities were directed by the UK Government, [48].
[126] William Hague, MP, HC Deb., vol. 563, col. 1692 (6 June 2013).

Emergency have been unsuccessful,[127] because the claimants were unable to identify evidence connecting the UK Government or its agents to their specific allegations.[128]

More recent overseas activities involving the UK Government's agents began to attract similar tort actions. The case of *CF v Ministry of Defence*[129] was initiated in trespass to the person, amongst other claims, with regard to the alleged involvement of the UK authorities in the claimant's detention in Somaliland. Given that the claimant was no longer detained, meaning that issues surrounding their liberty were not active in the proceedings, Irwin J took a restrictive approach to the defendants' disclosure obligations; 'there is no irreducible minimum of disclosure, or necessary minimum revelation by summary or gist of the Defendants' case, obligatory despite the consequences for national security'.[130] The Court was prepared to curtail disclosure to prevent a scenario in which the UK Government considered itself compelled to settle a case in order to block a release of materials that it believed compromised national security. This case was followed by *Alseran v Ministry of Defence*,[131] which concerned tort and Human Rights Act claims arising out of activity by the UK Armed Forces in Iraq after the 2003 invasion. The Court again circumscribed the reach of tort law, applying the Foreign Limitation Periods Act 1984 to the effect that time limits on actions in the law of Iraq barred these elements of the claims.[132]

These setbacks have not dampened interest in this approach in the Northern-Ireland context for two reasons. First, cases relating to the conflict in Northern Ireland are more recent than the cases related to the counter insurgencies in Kenya and Cyprus.[133] They are also likely, given that the conflict took place within the UK, to be better documented in official files. This

[127] See *Sophocleous v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 19 (QB), *Kimathi and Others v Foreign & Commonwealth Office* [2018] EWHC 2066 (QB) and *Kimathi and Others v Foreign & Commonwealth Office* [2018] EWHC 3144 (QB).
[128] See, for example, *Kimathi and Others v Foreign & Commonwealth Office* [2018] EWHC 3144 (QB), [317] (Stewart J). See C. Murray, "Back to the Future: Tort's Capacity to Remedy Historic Human Rights Abuses", (2019) 30 *King's Law Journal* 426.
[129] *CF v Ministry of Defence* [2014] EWHC 3171 (QB).
[130] *Ibid*., [23].
[131] *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB); [2018] 3 WLR 95.
[132] *Ibid*., [724] (Leggatt J). See U. Grusic, "Civil Claims Against the Crown in the Wake of the Iraq War: Crown Acts of State, Limitation under Foreign Law and Litigation Funding in *Alseran v Ministry of Defence*", (2018) 37 *Civil Justice Quarterly* 428.
[133] In Northern Ireland, discovery is covered by The Rules of the Court of Judicature (Northern Ireland) 1980, Order 24, rule 7.

means that any mechanism for accessing these files is likely to be valuable for specific individuals seeking to understand what happened to them, rather than providing more generalised information about the conflict (as was the case of the Mau Mau group actions). Thus, if a public body can plausibly be connected to the wrongdoing, in a claim that has better than 'a "fanciful" prospect of success', discovery processes could enable access to these documents.[134] In carrying out this assessment the courts will not engage in a mini trial of the merits at the interlocutory stage; a truly "fanciful" claim will be evident to the court on consideration of little more than the statement of claim.[135] Provided that a claimant does not 'simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure', then disclosure processes will commence.[136]

The second reason why the collapse of many of the end-of-empire claims has not dampened interest in the use of tort for truth recovery purposes in Northern Ireland is that funding for personal injury cases is different in Northern Ireland's justice system. The Mau Mau claims before the courts of England and Wales were funded through conditional-fee arrangements. Under such arrangements, law firms only take on clients if they offered a reasonable prospect of success, for they bear the costs of an unsuccessful action. After the settlement of *Mutua* the successor cases were instituted on a similar basis on the expectation of similar outcomes. But the no-win, no-fee business model saw the use of standardised claim forms and a lack of individual attention to each one of thousands of linked claims.[137] The collapse of these cases does not mark the end of the usefulness of tort in the context of cases of historic rights abuses, but demonstrates the limitations inherent in this approach to litigation. In Northern Ireland, by contrast, legal aid remains available in personal injury cases.[138] The comparatively 'generous' provision of state support in such cases means that it is much easier for claimants to secure representation to conduct such a civil action in Northern Ireland.[139] When other avenues of truth recovery have been closed off, tort therefore provides an opportunity for

[134] *Gulati v MGN Limited* [2013] EWHC 3392 (Ch), [6] (Mann J). Under the wording of Order 24, a Northern Ireland court can step in if it decides that 'discovery is not necessary either for disposing fairly of the cause'; The Rules of the Court of Judicature (Northern Ireland) 1980, Order 24, rule 9.
[135] See *Sabbagh v Khoury* [2014] EWHC 3233 (Comm), [100] (Carr J).
[136] *Vedanta Resources PLC v Lungowe* [2019] UKSC 20, [45] (Lord Briggs).
[137] For judicial complaints about this approach, see *Kimathi and Others v Foreign & Commonwealth Office* [2018] EWHC 2066 (QB), [76] (Stewart J).
[138] Access to Justice (Northern Ireland) Order 2003 (SI 2003/435), Art. 10(3).
[139] B. Dickson, *Law in Northern Ireland*, (3rd ed) (Oxford: Hart Publishing, 2018), pp. 390-391.

those affected by the conflict with few associated costs. The attractiveness of such tort actions does not depend upon claimants standing victorious outside a courthouse. These cases often primarily seek disclosure, not compensation; they are thus better conceived as efforts towards truth recovery, rather than as quests for justice.

Legacy Litigation in Tort

Tort thus provides a potential means for bringing information about the Northern Ireland conflict into the public domain. *Flynn v Chief Constable of Northern Ireland*[140] is the pathfinder case for this litigation. John Flynn alleges that a loyalist paramilitary, identified as Informant 1, twice attempted to murder him, in 1992 and 1997. In 2007 the Police Ombudsman for Northern Ireland published a report which concluded that RUC officers had colluded in Informant 1's activities.[141] Keegan J summarised the report as concluding that Informant 1's 'criminal conduct, including paramilitary activity and involvement in serious crime including murder, was allowed to continue during the relevant period'.[142] On the basis of this evidence of a connection between Informant 1's actions and the RUC, Flynn instituted his action against the Chief Constable of Northern Ireland. His action encompasses multiple torts; negligence, trespass to the person, conspiracy to injure and misfeasance in public office. The torts in question have, however, become almost incidental; in 2014 the Chief Constable accepted liability to pay both compensatory and exemplary damages.

In spite of this admission, issues surrounding disclosure have continued to dominate proceedings. This somewhat strange state of affairs should not be surprising. John Flynn was always more interested in the discovery process than in any remedy relating to the harms he had suffered. The admission of liability, as with official apologies in other cases, attempts to fulfil the public body's 'overarching need to avoid accountability and to placate victims'.[143] In short, discovery is being used (and resisted) in *Flynn* because of its potential as a mechanism

[140] *Flynn v Chief Constable of Northern Ireland* [2017] NICA 13 and [2018] NICA 3.
[141] Police Ombudsman for Northern Ireland, *Operation Ballast: Investigation into the circumstances surrounding the murder of Raymond McCord Jr*, (2007), pp. 132-137.
[142] *Flynn v Chief Constable of Northern Ireland* [2017] NICA 13, [5].
[143] P. Lundy and B. Rolston, "Redress for past harms? Official apologies in Northern Ireland", (2016) 20 *International Journal of Human Rights* 104, 116.

for truth recovery. Keegan J concluded that the PSNI's efforts could not head off discovery in this case as some discovery process was necessary to assess the appropriate level of damages to be awarded following the Chief Constable's admission of liability.[144] The PSNI's behaviour comes across as ill thought through and even crass; with regard to the Chief Constable's efforts to present the interlocutory order mandating discovery as a 'windfall' for Flynn, Keegan J responded that such a 'description is not an appropriate reflection of the subject matter of this case'.[145] Much as these efforts to resist discovery appear ham-fisted, they would turn out to be only the first line of defence available to public bodies.

A further example of the turn towards tort in Northern Ireland's legacy cases comes in *Morley v Ministry of Defence*, which involves allegations that a member of the Provisional IRA responsible for murdering the claimant's son was, at the time of the murder, acting as an informant for the UK Armed Forces.[146] This case showcases some of the mechanisms available to public bodies to blunt the use of tort as a tool for information gathering. UK ministers have long been able to issue Public Interest Immunity (PII) certificates to prevent discovery where they consider national security to be at issue.[147] The operation of these certificates is subject to a public interest assessment by the courts, but historically this process involved 'proceedings from which the claimants were excluded, with secret defences they could not see, secret evidence they could not challenge, and secret judgments withheld from them and from the public for all time'.[148] This posed serious issues for the application of the right to a fair hearing under Article 6 ECHR.[149] The PII mechanism, however, remained part of the PSNI's efforts to restrict discovery in *Flynn*. Even after the Northern Ireland Court of Appeal's 2017 ruling, the PSNI continued to raise concerns about discovery, including the potential cost of a PII exercise and the possibility that the release of information through discovery could endanger lives and ongoing investigations. The Northern Ireland Court of Appeal was, by now,

[144] *Flynn v Chief Constable of Northern Ireland* [2017] NICA 13, [28].
[145] *Ibid*., [31].
[146] *Morley v Ministry of Defence and Others* [2017] NIQB 8.
[147] Crown Proceedings Act 1947, s. 28(2). See L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy*, (Oxford: Oxford University Press, 1994) and P. Scott, "An inherent jurisdiction to protect the Public Interest: From PII to 'Secret Trials'", (2016) 27 *King's Law Journal* 259.
[148] *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531, [83] (Lord Brown).
[149] In *Al Rawi* a majority of the UK Supreme Court ruled that Parliament would have to legislate to address the shortcomings in the PII regime; see C. Murray, "Out of the Shadows: The Courts and the United Kingdom's Malfunctioning International Counter-Terrorism Partnerships", (2013) 18 *Journal of Conflict & Security Law* 193, 222-230.

increasingly impatient with such arguments, concluding that '[s]ince the documents are in the custody, power or possession of the applicant the onus to ensure a proportionate approach to disclosure rests primarily with those representing the Chief Constable'.[150]

As a result of the shortcomings of historic PII processes, however, new processes were introduced in the Justice and Security Act 2013 which affect discovery in cases which touch upon national security.[151] In *Morley*, the Ministry of Defence sought a declaration under the 2013 Act that the case covers 'sensitive material',[152] defined as 'material the disclosure of which would be damaging to the interests of national security'.[153] Such a declaration allows a court involved in civil proceedings to institute a closed material procedure, 'under which the court receives sensitive material in private and without disclosure to the other party or parties, whose interests are to some extent protected by special advocates appointed on their behalf to whom disclosure is also made'.[154] The court then determines, at the conclusion of this process, the extent of the information which the claimants can access, which is more likely to involve the gist of the information held by the public body than a direct release of documents.[155] This process can be laborious, with judges in the England and Wales High Court bemoaning 'the increasingly familiar "three dimensional" problems associated with the proper management of litigation which incorporates a closed process'.[156] In other words, the Court becomes a hub for managing three-way interactions between a claimant's chosen legal representatives, the appointed special advocates and the defendant public body. This becomes particularly complex once the special advocates have seen the closed material, as they are not able to consult with the claimants after this point out of concern to protect the secrecy surrounding the closed material.[157]

[150] *Flynn v Chief Constable of Northern Ireland* [2018] NICA 3, [33] (Morgan LCJ).
[151] See P. Scott, "Hybrid Institutions in the National Security Constitution: The Case of the Commissioners", (2019) 39 *Legal Studies* 432, 436.
[152] Justice and Security Act 2013, s. 6(4).
[153] *Ibid*., s. 6(11).
[154] *Belhaj v Straw* [2017] EWHC 1861 (QB), [15] (Popplewell J).
[155] See C. Walker, "Living with national security disputes in Court Processes", in G. Martin, R. Scott Bray, and M. Kumar (eds), *England and Wales in Secrecy, Law and Society*, (London: Routledge, 2015), p. 23.
[156] *Belhaj v Straw* [2018] EWHC 977 (Admin), [14] (Irwin LJ and Green J).
[157] See A. Kavanagh, "Special Advocates, Control Orders and the Right to a Fair Trial", (2010) 73 *Modern Law Review* 836, 856.

A further element of complexity in these cases surrounds the status of informants, with the public bodies in most cases adopting a "neither confirm nor deny" policy for the protection of both the alleged informant and others who might be suspected of providing information to the authorities.[158] In *Morley*, the claimant challenged this position on the basis that the identity, status and handling of the man she alleged was an informant was already in the public domain.[159] Stephen J recognised that in some cases it might be appropriate to reach a determination of such issues before evaluating whether a closed material procedure declaration should be made. In most cases, however, he preferred to address the public bodies' arguments under the closed material procedure;[160] '[i]t is at that stage when the court is fully sighted with full consideration of all the material for which protection is sought that a decision can be taken as to how much could or should be put into open or dealt with in private and how best to achieve a fair trial of the substantive claim'.[161]

The main action in *Morley* has thereafter been stuck in a closed material procedure. Months turn to years and any potential releases of documentation into the public domain has become, at best, the gist of such records. The claimant in *Morley* has not, however, passively accepted this state of affairs. With the main case mired in the closed material procedure, Eilish Morley made a separate application under section 32 of the Administration of Justice Act 1970 with regard to documents held by the Office of the Police Ombudsman for Northern Ireland. This provision allows for discovery of materials held by a third-party which are relevant to a tort action. Following a theft of documents from the Police Ombudsman, the claimant was aware that it also held material relevant to her claim. This application, however, took Master Bell into territory in which he felt no court should tread:

> [T]he applicant … is asking the court to adapt a piece of legislation which was designed to be used for litigation dealing with such matters as road traffic accidents, accidents in the workplace, and medical negligence cases and use it in legacy litigation which

[158] *Re Scappaticci's application for Judicial Review* [2003] NIQB 56, [15] (Carswell LCJ) and *McGartland v Secretary of State for the Home Department* [2015] EWCA Civ 686, [25]-[26] (Richards LJ).
[159] This claim would subsequently be reinforced by information stolen from the Police Ombudsman regarding the case; see *Morley v Ministry of Defence* [2019] NIMaster 1, [7]-[11] (Master Bell).
[160] Justice and Security Act 2013, s. 8(1).
[161] *Morley v Ministry of Defence and Others* [2017] NIQB 8, [19] (Stephen J).

involves national security issues. That is not a judicial function. It is a parliamentary function.[162]

This adaptation might alternately be thought of as part and parcel of the reshaping of tort to fit the purposes of 'legacy litigation'. In any event, Master Bell considered that inviting the Special Advocate in the main litigation to seek a *Khanna* subpoena regarding the relevant documents would provide a better outlet for the claimant in this case (thereby manoeuvring these materials within the closed material procedure).[163]

Such offshoot litigation demonstrates how, from the beginnings of the *Flynn* case, claimants are becoming more ambitious regarding discovery. Further innovations are almost inevitable. So widespread are allegations of collusion with paramilitary groups against the RUC and UK Armed Forces during the conflict that they open up the possibility of *Norwich Pharmacal*[164] actions against public bodies. *Norwich Pharmacal* relief fits directly with the disclosure aims of the legacy litigation; it enables the victim of a tort to access information held by a third party, in this case, UK public bodies, which are in some way involved in the wrongdoing. If the putting of questions to Guantánamo detainees was sufficient to involve the UK in their maltreatment in *Binyan Mohamed*,[165] then claimants can potentially rely on general evidence of collusion between public bodies and paramilitary groups, rather than having to establish the direct involvement of an informant in their particular case.

This legacy litigation, using tort as a means to achieve disclosures of information, evidences a steep learning curve for all parties. For some claimants, disclosure of new information through tort actions has brought a substantial measure of truth recovery. In cases such as *Arthurs*,[166] relating to the ambush of a Provisional IRA unit involved in an attack on Loughgall police station in 1987, the release of information by the PSNI about the surveillance of the IRA unit in the weeks leading up to the attack enabled the claimant's legal team to assert that

[162] *Morley v Ministry of Defence* [2019] NIMaster 1, [47].
[163] *Ibid*., [82]. See *Khanna v Lovell White Durrant* [1995] 1 WLR 121.
[164] *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.
[165] *R (Binyan Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC (Admin) 2048, [2009] WLR 2579, [147] (Thomas LJ).
[166] *Arthurs v Ministry of Defence* [2016] NIMaster 1.

'the security services not only could have prevented the ambush but that the MOD have not been up-front in relation to their disclosure obligations in this case'.[167] As a result of such successes, and with new tort actions being initiated,[168] proposed restrictions upon the courts' flexibility with regard to tort's limitation periods could be extended to cover the Northern Ireland conflict.[169] But public authorities' approaches to these cases have also evolved. In *Flynn*, the PSNI contemplated applying for a closed material procedure as a last resort. Indeed, it did so too late, for the Court of Appeal asserted that there had been too much prevarication and insisted that the 2013 Act 'should be avoided if at all possible'.[170] By the time this decision had been handed down, seeking a closed material procedure had become the Ministry of Defence's first line of response to discovery efforts in *Morley*. Legacy litigation is thus becoming more protracted, and its ability to deliver truth recovery less certain.

Conclusion

The UK's Conservative Government is eager to characterise much of the litigation arising from the conflict in Northern Ireland as part of an effort on the part of Republican groups to continue the conflict 'by other means'.[171] Such assertions provide a convenient façade for ministers to hide behind, and a narrative that supportive sections of the press have sustained. These cases, however, cannot simply be dismissed as lawfare. They are the product of deep frustrations at the lack of a truth-recovery process and evasions of Freedom of Information requests. That many of the high-profile cases concern direct action by state agents or allegations of collusion is also unsurprising; disclosure under tort law only operates against parties other than the tortfeasor in limited circumstances. Because of these strictures, tort will remain an outlet which is more useful to some victims of the conflict than others as a means of gaining information about the events which affected them.

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[167] A. Erwin, "IRA men shot dead at Loughgall had been under surveillance for weeks, court told", (11 May 2018), *Belfast Telegraph* (quoting the claimant's solicitor Claire McKeegan), https://www.belfasttelegraph.co.uk/news/northern-ireland/ira-men-shot-dead-at-loughgall-had-been-under-surveillance-for-weeks-court-told-36897577.html [Accessed 20 March 2020].

[168] See, for example, *Sullivan v Chief Constable of The Police Service of Northern Ireland* [2018] NIMaster 5.

[169] See the Overseas Operations (Service Personnel and Veterans) Bill 2020, cl.8-10. See also J. Duke-Evans, R. Ekins, J. Marionneau and T. Tugendhat, *The Collapse of the Kenyan Emergency Group Litigation: Causes and Consequences*, (Policy Exchange, 2018), p. 5.

[170] *Flynn v Chief Constable of Northern Ireland* [2018] NICA 3, [35] (Morgan LCJ).

[171] J. Curtis, *Human Rights as War by Other Means: Peace Politics in Northern Ireland*, (Pennsylvania: University of Pennsylvania Press, 2014), p. 8.

The UK Government's approach is thus driving the current 'piecemeal approach … focused on the state actors'.[172] The resultant problems make efforts to deal with the legacy of the conflict more holistically, including the long-delayed Northern Ireland (Stormont House Agreement) Bill, all the more significant. For as long as those efforts remain stalled, tort continues to provide an outlet for Northern Ireland's survivors (one showcased by high-profile cases and facilitated by the availability of legal aid). Much as accusations of lawfare have become predictable, they are also irrelevant to the process; judges have long denied that they take any account of 'the motives of the parties in bringing or resisting what is, on the face of it, a well-recognised claim in tort'.[173] Such complaints also ignore tort's use, in *Young v Downey*, by the families of UK Armed Forces personnel unlawfully killed or injured in paramilitary attacks. The testing, in *Morley*, of the boundaries of what it means for the state to be bound up in a tortious wrong could extend tort's usefulness to a broader range of claimants.

Even partial truth recovery can nonetheless be valuable; any new information reframes understandings of the conflict, and thereby challenges narratives established by 'still powerful actors keen to conceal their past actions and inactions'.[174] The more cases which result in significant disclosures for claimants, moreover, the greater the pressure for a systematised approach to truth recovery regarding the conflict. Even perceptions that the current crop of legacy cases focuses disproportionately upon the UK Government and its agents highlights the failure to address the conflict's legacy in a holistic manner. If such pressure has an effect, then these claimants' successes could benefit the conflict's victims more generally.

[172] Northern Ireland Affairs Committee, "Oral Evidence: Consultation on implementation of the Stormont House Agreement", (4 September 2019) HC 1095, Q30 (Kieran McEvoy).
[173] *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962; [2008] UKHL 25, [4] (Lord Bingham).
[174] Lawther, *supra note* 35, 158.