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Judgment: approved by the Court for handing down | *Delivered:* **26/06/2014**
(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Between

CR19

Plaintiff/Appellant

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant/Respondent

_____

Before: Girvan LJ, Coghlin LJ and O'Hara J

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COGHLIN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal by CR19 ("the appellant") from a judgment of Horner J as a consequence of which the appellant was awarded the sum of £20,000 as compensation for damages for personal injuries, loss and damage, sustained by the appellant by reason of the negligence and breach of statutory duty of the Chief Constable of the Police Service of Northern Ireland ("the PSNI") together with interest at 2% over a period of some 6 years producing, in total, a final sum of £22,400. The appellant presented his appeal in this court personally without legal representation while Mr Hanna QC and Mr David Dunlop appeared on behalf of the respondent. We are grateful for the assistance that the court derived from all of their carefully prepared and eloquently delivered written and oral submissions.

[2] The appellant made an initial application to this court for a direction that the appeal should be conducted as a 'closed' hearing from which the public should be excluded. It appears that no such application at been made at first instance. Bearing in mind that the appellant is to be referred to only as CR19 and that the court was unable to discern any basis for altering the fundamental commitment of these courts to a system of open justice the application was refused.

Background Facts

[3] The appellant was employed as a police officer in Northern Ireland for more than 30 years and, as a result of being exposed to a number of horrifying terrorist atrocities, it is accepted by the respondent that he developed the condition of Post-Traumatic Stress Disorder ("PTSD") during that service. It also appears to be accepted by both parties that during the course of his service the appellant developed a habit of excessive alcohol consumption no doubt associated, to some degree, with his PTSD condition.

[4] The appellant left the Royal Ulster Constabulary ("RUC") in 2001 after more than 30 years' service at the conclusion of which his Certificate of Service described his conduct as "exemplary". From approximately 1976 until his retirement the appellant was employed in the Special Branch Department of the RUC. Personal data and information relating to the appellant and his service were stored at the respondent's premises at Castlereagh Police Station in accordance with, and subject to, the provisions of the Data Protection Act 1998.

[5] On or about 17 March 2002 the respondent's premises at Castlereagh Police Station were the subject of a burglary, presumed to have been carried out on behalf of a terrorist organisation, and data and records relating to a large number of officers, including the appellant, were stolen.

[6] The appellant's case was that the knowledge that his personal data and records had fallen into the hands of terrorists caused him to sustain an exacerbation of both his PTSD condition and his alcohol dependence. He also alleged that, as a result of the deterioration in his condition he was unable to take up an offer of employment and suffered loss of earnings over the period 2002 to 2008. The respondent admitted liability and the only issue to be determined in the first instance proceedings was that of quantum of damages.

The hearing at first instance

[7] The learned trial judge had the benefit of expert oral evidence from three psychiatrists. Dr Chada and Professor Fahy were called on behalf of the respondent, although Dr Chada had originally been retained by and provided a report to the appellant's solicitors, while Dr Stephen Best gave evidence on behalf of the appellant. Dr Chada had not been able to obtain access to the appellant's GP notes and records before writing her report but those documents had been available to both Dr Best and Professor Fahy. The GP records and the records of the Police Occupational Health Unit were also available during the hearing and were the subject of both examination and cross-examination of the medical witnesses. The trial judge also heard evidence from Mr Jenkins with regard to the appellant's potential employment with the Lagan Group. The appellant himself gave evidence to support his claim that his house had been devalued as a result of threats to the property and the package of security measures that had been implemented for protection.

[8] In addition to their oral evidence the trial judge had the assistance of a written memorandum which was helpfully agreed by Dr Best and Professor Fahy. That document read as follows:

> "1. We agree that CR19 suffered PTSD prior to leaving the police. This was attributable to his stressful experiences in the police.
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> 2. We agree that CR19 drank excessively prior to leaving the police.
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> 3. Dr Best classifies the level of alcohol intake as Harmful Use.
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> 4. In Professor Fahy's opinion the true severity of CR19's alcohol misuse prior to 2002 depends on the weight given to his challenge to the content of Dr Best's first report. In Professor Fahy's opinion it is possible that CR19 was alcohol dependant prior to leaving the police.
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> 5. We agree the Castlereagh incident was a significant source of stress, leading to security concerns coinciding with his retirement from the police.
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> 6. We agree that there had been three additional security related incidents since 2002 that also caused stress.
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> 7. We agree that post-Castlereagh, CR19's PTSD symptoms increased in severity.
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> 8. In Dr Best's opinion, CR19's alcohol problems escalated post-Castlereagh and could be classified as Alcohol Dependence. In Professor Fahy's opinion it is possible that he was already Alcohol Dependent before 2002.
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> 9. We agree that any escalation of symptoms was limited to 2008. Dr Best attributes 50% of CR19's symptoms during this period to the effects of Castlereagh, although other security concerns may also have had a detrimental effect. Professor Fahy attributes a maximum of 25% of symptoms to the

index event, and the remainder of symptoms to CR19's experience within the police and the post-2002 security threats.

10. We agree that CR19 was not fit for regular sustained employment during the period of alcohol dependency after leaving the police. The escalation in his anxiety symptoms would also have an effect on his ability to work.

11. We agree that CR19 has been relatively well since 2008. Although he describes some residual anxiety symptoms, he should be fit (from a psychiatric view point) for some type of work eg office work where he is not exposed to confrontation or threat.

12. We identify no ongoing treatment needs arising from the index event."

The judgment at first instance

[9] It is clear that the trial judge subjected the witnesses and the evidence that they gave to careful and conscientious consideration and analysis. He assessed the appellant as being "essentially a decent man" who had been exposed to many horrific events during the course of his police service and he took into account the difficulties that he faced in presenting his case without the assistance of legal representation. However, for a number of reasons, the trial judge found the appellant's testimony to be unreliable in relation to certain key issues and, in particular, he found that he had put Dr Best under pressure to change his evidence as to the note made during the course of the examination of the appellant some six months after the Castlereagh break-in. At the heart of the debate between the medical witnesses was the extent to which the appellant's alcohol consumption/dependency had been exacerbated by the Castlereagh break-in and whether, as a result of that incident, his PTSD symptoms had been increased by 50% or 25%. The trial judge found both Dr Chada and Professor Fahy to be impressive witnesses upon whom he could repose considerable trust but he expressed greater caution with regard to the evidence of Dr Best. He did not consider that the appellant had adequately tested the evidence of Dr Best and he was not satisfied as to how Dr Best had arrived at a figure of 50% in his attribution of psychiatric symptoms to the break-in for a period of 6 years. With regard to that aspect of Dr Best's evidence the trial judge said:

> "When I asked him how he had assessed the break-in as being responsible for 50% of the plaintiff's psychiatric symptoms for that limited period, his answers were unconvincing. All in all I consider that at least

> sub-consciously Dr Best allowed his professional view to be coloured by his sympathy for the plaintiff."

After a careful analysis of the relevant contemporary medical records the trial judge was satisfied that the appellant had been drinking very heavily in the police for many years before he left the service and that the claim that he had developed an "Alcohol Dependence Syndrome" as a consequence of the break-in was, at the very best, not established on the balance of probabilities.

[10] The trial judge recorded that the offer of employment upon which the appellant relied in support of his claim for loss of earnings would have required him to conduct business with paramilitaries who were intent on extorting money from the Lagan group of companies. In the circumstances, the trial judge rejected the proposition that he would have been able to carry out such a demanding job given the history of PTSD and continuing excessive consumption of alcohol, a conclusion which he noted had been shared by both Dr Best and Professor Fahy.

[11] The trial judge also rejected the appellant's claim based upon an alleged diminution in the open market value of his house noting that he was disappointed that the appellant appeared to have been "less than frank" in the presentation of this part of his claim.

[12] Ultimately, the trial judge concluded that the damage established by the appellant fell into the range of moderate psychiatric damage and awarded a sum of £20,000 by way of compensation.

The Relevant Authorities

[13] The approach to be taken by this court when reviewing the judgment of a judge sitting alone has long been well established. The principles were identified by Lowry LCJ in Northern Ireland Railways Company Ltd v Tweed [1982] 15 NIJB, at page 10, when he summarised them as follows:

> "[1] The Trial judge's finding on primary facts can rarely be disturbed if there is evidence to support it. This principle applies strongly to assessments of credibility, accuracy, powers of observation, memory and general reliability of the witnesses.
>
> [2] The appellate court is in as good a position as the Trial judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusions.
>
> [3] The Trial judge can be more readily reversed if he has misdirected himself in law or if he has misunderstood

> or misused the facts and may therefore have reached a wrong conclusion. For this purpose his judgment may be analysed in a way which is not possible with a jury's verdict. The appellate court should not resort to conjecture or its own estimate of the probabilities of a balanced situation as a means of rejecting the trial judge's conclusion."

[14] The relevant principles have been reviewed subsequently and confirmed by this court in a serious of cases including Murray v Royal County Down Golf Club [2005] NICA 52, Stewart v Wright [2006] NICA 25 and McDaid v Snodgrass [2009] NICA 18.

[15] In order to properly assess quantum in this case the fundamental task faced by the trial judge was to resolve the apparent conflicts of credibility between the witnesses in a fair and balanced manner and, having done so, to attribute an appropriate degree of weight to the evidence which they gave. After giving careful consideration to the terms of his judgment and the contents of the transcripts with which we have been provided, we are not persuaded that his decision with regard to compensation for personal injuries can be validly challenged in any material respect.

The claim under the Data Protection Act 1998

[16] In addition to negligence, the appellant's Statement of Claim also alleged a breach of Section 4 of the Data Protection Act 1998 ("the Data Protection Act"). At paragraph 11 of the defence the respondent admitted that, in the event that any personal data had been unlawfully removed from Castlereagh and probably came into possession of terrorists, there had been a failure to take appropriate technical and organisational measures against accident loss of such personal data, contrary to Section 4 of the Data Protection Act. Neither the alleged breach of the Data Protection Act nor the amount of any consequent compensation was raised by the appellant with the trial judge. It seems likely that the omission was due to the fact that the appellant was doing his best to conduct his own case on the basis of a Statement of Claim that had been earlier drafted by counsel and that he did not appreciate the relevance/significance of the claim.

[17] Section 13 of the Data Protection Act provides as follows:

> "13 - Compensation for failure to comply with certain requirements.
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> (1) An individual who suffers damages by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.

(2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if –

(a) the individual also suffers damage by reason of the contravention; or

(b) the contravention relates to the processing of personal data for the special purposes.

(3) In proceedings brought against a person by virtue of this Section it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned."

[18] Section 13 of the Data Protection Act was considered by the Court of Appeal in England and Wales in the case of Halliday v Creation Consumer Finance Ltd [2013] EWCA Civ 333, a case in which the claimant claimed damages for damage to his reputation and stress caused as a result of the defendant, between March and October 2008, processing and transferring data to a third party falsely asserting that the claimant owed the defendant £15,000 and was thereby in excess of his credit limit. That allegation was not disputed. In delivering the judgment of the court Lady Justice Arden said at paragraphs 33-35:

> "[33] Coming to my conclusion, it is undoubtedly correct that there was wrongful processing of Mr Halliday's data, but the object of the award to be made by the court under Section 32 is to compensate, neither more nor less. The breach was, as I see it, of a limited nature. It did not lead to loss or credit or reputation. There may well be other cases where there is a loss of some housing benefit or opportunity or credit facilities and so on. That was not this sort of case. Likewise there is no proof of any fraudulent or malicious intent on the part of CCF.
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> [34] As I have explained, I have also taken into account that this breach was, as I see it, a single episode case. There was one error. It has been explained how it occurred. It does not to my mind matter greatly how it occurred, but it seems to be more of a mechanical than technical error than anything else.
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> [35] There is, in addition, no contemporary evidence of any manifestation of injury to feelings and distress apart

> from what one would normally expect from frustration at these prolonged and protracted events. I bear in mind the authority produced by Mr Halliday from the Court of Justice, that it is important to mark violations of this kind where there has been frustration with some kind of remedy. He referred us to Franchet and Daniel DYK v The Commissioner of the European Communities (Case T-48/05) paragraph 400, where it was held that the fact that the complainants had been unable to defend themselves had necessarily produced feelings of injustice and frustration. I would accept as a general principle that, where an important European instrument such as data protection has not been complied with, there ought to be an award, and it is to be expected that the complainant will be frustrated by non-compliance."

Bearing all of those points in mind, Lady Justice Arden confirmed her judgment that any sum to be awarded in respect of distress should be of a relatively modest nature since "… it is not the intention of the legislation to produce some kind of substantial award". In the circumstances, the court awarded £750. She had earlier awarded nominal damage of £1.00 for the purposes of Directive 95/46/EC and section13 (2) of the Data Protection Act.

Discussion

[19] Litigation of its nature is a complex process and litigants in person often find themselves at a real disadvantage due to their lack of experience in conducting litigation and their lack of expertise in the field of substantive and procedural law. Undoubtedly they will find themselves in a situation which for them will often be bewildering and also, potentially, intimidating. Such litigation has the potential to produce a degree of frustration and/or irritation on the part of legal professionals trying to deal with unrepresented opponents. Lord Woolf observed in *"Access to Justice, Interim Report"* June 1995:

> "All too often a litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists. "

Experience shows that, within the body of those who seek to represent themselves, there are a number of vexatious personal litigants who persist in presenting unmeritorious claims with the consequence that they take up a disproportionate amount of court time and cost so far as other litigants are concerned. In such circumstances the conduct of litigation by a personal litigant may represent a real challenge to the judge who has a duty to remain both impartial and independent in adjudicating in such cases and must seek to maintain a fair balance between the particular needs of the personal litigant and the rights of represented parties

consistent with the just conduct of the litigation in accordance with the overriding objective defined in Order 1 Rule 1A of the Rules of the Court of Judicature (NI) 1980.

[20] We should at this point emphasise that no criticism is to be made of CR19 who has conducted his litigation in an impressively effective and courteous manner. However, we are satisfied that, as a personal litigant, he simply would not have appreciated the significance of the pleaded and formally admitted breach of Section 4 of the Data Protection Act. On balance, we consider that, in the unusual circumstances of this case and bearing in mind that the breach was admitted, it would have been preferable if the learned trial judge had raised the matter in court with the parties and invited submissions from both parties on the section and the legal consequences of the breach.

[21] The question arises as to whether this court should remit the case back to the trial judge in order for him to reach a first instance decision on whether additional compensation should be awarded for distress suffered by CR19 as a consequence of the breach of Section 4 of the Data Protection Act. We note that the events giving rise to the breach of Section 4 occurred more than 12 years ago and more than 2 years have elapsed since the initiation of the proceedings.

[22] In Halliday Lady Justice Arden expressed the view that it was not the intention of the legislation to produce some kind of substantial award. That may well be so in respect of the types of breach of Section 4 generally encountered such as the communication of inaccurate credit information. We bear in mind that the height of the evidence of distress suffered by Mr Halliday, as recorded in his own words at paragraph 21 of Lady Justice Arden's judgment, was as follows:

> "I find [CCF's] continued disregard of District Judge Temple's order highly distressing especially when coupled with the courts seeming inability to protect its process from abuse."

In that case the court found the breach to be of a limited nature constituted by a mechanical rather than technical error which did not lead to any financial loss or damage to credit or reputation. By contrast, as CR19 observed before this court "a breach of national security is not the same as a break-in at the local corner shop!"

[23] In AB v Ministry of Justice [2014] EWHC 1847 (QB) Baker J. awarded £2,250.00 compensation for distress, in addition to £1.00 nominal damages, to a prominent member of the legal profession who had been subjected to significant delays in obtaining sensitive information in connection with the death of his wife. In that case, as in Halliday, there was no medical evidence, the claimant did not seek to quantify his time and expense and the compensation was restricted to the claim under the Data Protection Act. Such cases may be contrasted with Douglas and others v Hello! Ltd (No3) [2003] 3 All ER 996 and Weller and others v Associated Newspapers Ltd [2014] EWHC 1163 QB. In the former there was a primary substantial claim for

damages for breach of confidence while in the latter individual claimants were awarded £5000 and £2500 for misuse of private information. In both cases the claimants had included claims for compensation for breach of the Data Protection Act but in both the court felt such claims did not add anything of significance to the primary claims for damages.

[24] In this case we have earlier recorded that three eminent psychiatrists gave professional evidence as to the distress sustained by CR19 as a consequence of the break-in. While accepting that the breach and its consequences in this case are of a different order to the matters considered in Halliday or AB, we conclude that the damages for distress arising from the breach of the Data Protection Act must be considered to be subsumed into the judge's award which, while rejected as too low by the appellant, was by no means an insignificant award. The assessment took account of the distress engendered by the breach of data protection. We cannot conceive of any additional evidence that might be relevant to any additional damages for distress in respect of breach of section 4. Accordingly, we affirm the award of compensation made by the learned trial judge. However, in view of Arden LJ's reasoning in Halliday, we conclude that the appellant must in addition be entitled to nominal damages of £1.00 to reflect the fact that there was an admitted breach of Section 4 of the Data Protection Act.

[25] We will hear counsel on the question of costs.