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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**03.03.2015**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

THOMAS CROSSEY

Plaintiff/Appellant;

-and-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant/Respondent.

Before: Morgan LCJ, Girvan LJ and Weir J

WEIR J (delivering the judgment of the court

The nature of the appeal

[1] This is an appeal from a decision of Gillen J dismissing that part of the appellant's claim that related to allegations of wrongful arrest, false imprisonment, unlawful detention, assault, battery, trespass to the person and negligence of the defendant, his servants and agents at the appellant's apartment at 64 Henderson Avenue, Belfast ("the apartment"). The learned judge allowed that part of the appellant's claim that related to the unlawful entry by police to the apartment in respect of which he awarded £1,250 damages together with County Court costs. The appellant does not challenge the quantum of that award but contends that High Court costs ought to have been awarded thereon.

The factual background

[2] The evidence of the appellant and of police and medical witnesses is very fully set out in the judgment of the trial judge at [2014] NIQB 54 and is therefore merely summarised here. On 20 September 2006 in the early hours of the morning police were called to the apartment where the appellant lived with his girlfriend and her young daughter. There had been a domestic dispute and when the police arrived the girlfriend was out on the street while the appellant and the child were within the apartment. The appellant then brought out the child and handed it to police alleging that his girlfriend was an unfit carer for the child as she had been drinking and taking drugs.

[3] Having resolved that initial issue two of the police officers decided to go inside the apartment to see whether there were drugs there. They either said or believed that they were acting under Section 23 of the Misuse of Drugs Act 1971 but the appellant objected that they would require a warrant in order to enter and declined to admit them voluntarily. The police insisted on entering, asserting that they did not require a warrant. As the judge subsequently found, the police were wrong and the appellant was right, a warrant was required and none was in existence. That was the basis of the award of damages for what the learned judge held was in those circumstances an unlawful entry.

[4] The disagreement about the right of the police to enter the apartment uninvited resulted in the police forcing their way in. The appellant went to a bedroom to put on some clothes and at this point the first of a number of factual disputes was generated. The two male police officers followed the appellant into the bedroom where the appellant says that for no reason he was sprayed in the face with CS spray. The only thing that had happened prior to this, according to him, was that he had knocked over some door saddles that had been stacked so that they fell to the ground with a crack. The police on the other hand contended that while they were standing by the bedroom door the appellant verbally threatened them, lifted a large plank of wood similar in size to a cricket bat and, raising it above his right shoulder, walked towards the police. The police said that they believed that they were being subjected to an immediate threat of assault and that in response one shouted "CS spray" and both sprayed the appellant with the gas. One officer said in evidence that he believed his baton was not as big as the plank and in the circumstances he had no option but to use the spray, there being no time to retreat from the room or give a more explicit warning.

[5] The appellant was then handcuffed and according to him was punched, slapped and kicked about his torso, legs and head by a number of police including others who had arrived and also was twice struck on the head with a door saddle. He was then removed into a police landrover in which he was roughly treated and kicked in the stomach, punched in the right eye and had his ankles twisted by a police woman. While he lay on his stomach in the vehicle he was further struck on his torso, back and head notwithstanding that he was not struggling. On arrival at

the police station and while waiting to be brought into the custody office he said that he was threatened with being shot if he "made a move". The police version of this phase of events was that after the appellant had been handcuffed he was resistant and struggling, swinging his head, shaking his upper body and kicking out with his legs as he was removed to the police vehicle and it had taken about four officers to bring him there during which there was a struggle. It was denied that any blow with a door saddle had been struck by police. At the landrover the appellant had resisted efforts to place him in it, shaking his head and kicking out with a foot and attempting head-butting. A policeman had therefore pushed the appellant into the vehicle causing him to fall in on his back between the two benches. Thereafter he had struggled and kicked out at officers while shouting at and threatening them. A female officer said that she did grab the appellant's feet to stop him kicking as there were no leg restraints available. She denied twisting his ankles.

[6] The judge was thus faced with a complete conflict of evidence between the appellant and the police. He looked for independent evidence to assist him in determining where the truth lay. A forensic medical officer, Dr O'Kane, gave evidence of having examined the appellant at 8.38 am on the morning in question. She found a number of bruises, abrasions and lesions to the right side of the appellant's back, right hand, left hand, lower back, upper back, left flank, abdomen, right knee, right and left shins, left calf, right nose and left upper arm. He had tenderness to his right thumb. His abdomen was soft with no tenderness. A number of points arose from the doctor's evidence which potentially bore upon the conflict of evidence between police and appellant. The judge recorded those in the following terms:

> "(1) She did not document a black eye and would have recorded this if she had observed one. There was an injury below on the lateral side of his nose but it was not consistent with a punch to the eye. If he had been punched about the face she would have expected to see deeper bruising or swelling.
>
> (2) The injury to his nose and eye could have been consistent with a police officer blocking an attempted headbutt by him with his hand pulled up to protect himself. The injury was consistent with either a blocking blow or a punch.
>
> (3) Of the allegation that the plaintiff claimed to have been kicked in the ribs and stomach, there was some redness on his abdomen but there was no tenderness which she would have expected to have found if it had been the case he was kicked.

(4) There were signs on his wrist of having been handcuffed but not excessively tight as there were no abrasions.

(5) There was no particular definite pattern to his injuries necessarily consistent with him being manhandled down stairs or kicked.

(6) Of the allegation that he had been struck on the head with a saddle board, she would have expected some erythema or bruising or tenderness, none of which she found on his head.

(7) If he had been kicked with any force, she would have expected deeper bruising to be found on the various areas where abrasion/bruising were found.

(8) There were no toe-cap marks which would have brought about some deeper bruising if they had occurred as a result of kicking.

(9) There was no allegation made to her of ankle twisting and no gripping marks on the ankles suggestive of someone gripping his ankle and twisting it.

(10) The multiple areas of abrasion could have been caused by contact with stairs or being in a landrover. They could have been caused by coming into contact with walls/stairs or the side of a landrover.

(12) [sic] Her conclusions were that she would have expected more bruising to be found in light of his allegations and to have elicited more tenderness. If he was kicked in the ribs she would have expected for example to have found tenderness there. She would have definitely palpated his abdomen and he gave no complaint whatsoever of pain there or tenderness.

Dr O'Kane said she had been doing this job for eight years and had observed injuries caused by struggling and contact with walls/floors/solid objects. The plaintiff's injuries were consistent with someone struggling for example in a landrover although some

> could also have been consistent with a punch or a kick although there was no pattern."

[7] In the cross-examination of the appellant a number of points emerged which the judge regarded as significant in the assessment of his veracity and reliability. These are summarised as follows:

(1) The appellant did not tell Dr Mangan, a consultant psychiatrist who had been retained by his solicitors, that he had a long history of drug abuse, a psychiatric history that was not related solely to a bereavement but included paranoia, hallucinations, sleeplessness and anger management problems.

(2) He denied knowledge of the cut straws bearing cocaine traces that had been found by police in his apartment on the night of this incident.

(3) He had made no mention of a conviction for making threats to kill.

(4) He denied having lifted the door saddle above his head or threatening the police in the bedroom.

(5) He denied struggling violently as police sought to take him from his apartment or resisting being placed in the landrover.

(6) On being asked why he had told the Police Ombudsman that he did not believe any female officer was involved in his assault "unless they did it silently" whereas his evidence had been of an assault by a female officer while in the landrover, his explanation was that he must have indicated this because the female police officer's behaviour was not very much compared to the behaviour of the males.

(7) He agreed that he had not told the Ombudsman about the threat described in his evidence that he would be shot in the chest and explained this by saying that it was not unusual for him to be threatened by police. Nor had he mentioned it to Dr Mangan although he had to Dr Fleming, consultant psychiatrist, who examined him at the request of the respondent in 2013.

The trial judge's conclusions on the evidence

[8] The judge began by observing that "the credibility of the witnesses was a crucial factor". In relation to the appellant he concluded:

> "I find the plaintiff to be a completely unreliable and disingenuous witness who clearly found difficulty distinguishing between fact and fiction. The grim

> truth is that his evidence was regularly punctuated with implausible assertions and self-evident lies."

The judge explained that conclusion by reference to the following specific matters which he described as "some of the more obvious examples of this which have fuelled my conclusions":

> "(1) He concealed from Dr Mangan, his own consultant psychiatrist, his previous abuse of illicit drugs including cocaine and his psychiatric history. His records revealed a history of paranoia, anxiety, hallucinations, adverse reaction to death threats etc. all of which he obviously intentionally withheld from Dr Mangan.
>
> (2) In evidence before me he deliberately attempted to minimise his previous history of drug abuse notwithstanding that his medical records set out with compelling clarity a longstanding problem back to the mid-1990s.
>
> (3) His version of events contained wholly implausible internal contradictions in circumstances where objective evidence often existed to challenge his account. Why would he have told the Ombudsman in 2006 that he did not believe any female had been involved in the assault if it was true, as he told me in evidence, that a female police officer had on a number of occasions twisted his ankles?
>
> (4) It is also significant in this regard that Dr O'Kane found absolutely no mark on his ankles indicating any serious gripping by a police officer.
>
> (5) Why did Dr O'Kane not find a blackened eye when she examined him shortly after his arrest if, as he emphatically told me, a police officer had lifted his head and punched him in the eye?
>
> (6) Why did he not tell the Ombudsman about the threat by a police officer to shoot him in the chest if, as he told me, this clearly happened outside Antrim Police Station?
>
> (7) Why, if he was struck on the head on two occasions by a wooden saddle board, did Dr O'Kane

find no mark or tenderness on his head when she examined him at 8.30 am on the morning of the alleged assault. It is inconceivable that if he had been hit in this manner there would not have been such a mark or tenderness.

(8) Why would he not have told his GP when attending on 3 October 2006 (when attending with various psychiatric problems) about the impact of this incident? It is inconceivable that if he had told the doctor about the sequelae of this incident, that it would not have been recorded. These are all instances where one would have expected to have found some objective and independent evidence to back up his allegations. The absence of such evidence is indicative of where the truth lies.

(9) Dr O'Kane found no signs of tenderness in various areas where he alleged he had been kicked e.g. the abdomen. I have no doubt that if he had been beaten in the manner he described that such tenderness would have been obvious to Dr O'Kane.

(10) Why in his Police Ombudsman statement did he make no reference whatsoever to the twisting of his ankles by a female police officer and indeed specifically deny any assault by a female police officer?

(11) On the issue of credibility, a number of allegations he made were inherently implausible and highly unlikely to have occurred. A prime example of this is his assertion that for absolutely no reason two police officers simultaneously produced their CS spray canisters and sprayed him with CS spray. For this to be true, the two officers must have simultaneously decided to do this without the slightest provocation on his part and that at a time when he was innocently putting his shoes on and some saddle boards fell over. The contrasting story of the police namely that he attempted to assault them with a saddle board is all the more likely. I watched him carefully when he was giving this evidence and his demeanour betrayed the evident mendacity in which he was engaging.

> I consider the evidence of Dr O'Kane very important in this case. She was a forthright and informative witness. I find no basis for the suggestion by the counsel on behalf of the plaintiff that she evinced bias against the plaintiff. Her findings of 23 injury sites, including some crescentric bruising in the middle of the abdomen, were in her view consistent with contact with surface edges or corners was both credible and plausible. The absence of tenderness on various occasions was of significance in the face of allegations by the plaintiff of being kicked and punched. I accept her assertion that the injuries which she found on the plaintiff were equally consistent with a struggle of the type described by the police officers before me. I believe this suggestion rhymes with evidence that he was struggling violently on a number of occasions including coming down the stairs from his flat, outside the police landrover and indeed inside the police landrover. There was ample opportunity for him during such violent behaviour to sustain a number of injuries by coming into contact with hard surfaces. This was a plaintiff with a past record of criminal violence and I have no doubt that he exhibited his tendencies on the night in question."

[9] Turning then to the evidence of the police officers, the judge concluded that, with the exception of one officer, they had been "impressive, forthcoming and candid". He said that he had carefully considered the alleged points of inconsistency in the police evidence highlighted by the appellant's counsel in his closing submissions but concluded:

> "I find none of them to be sustained in light of the overwhelming lack of credibility in the plaintiff's evidence and my careful assessment of these officers when giving evidence before me."

[10] The officer whose evidence was not the subject of a positive appraisal by the judge and which was left out of account by him was dealt with by him as follows:

> "A number of flaws emerged in this police officer's evidence during the course of cross-examination. First, her notebook recorded that 'it looked as if (Crossey) was going to headbutt' the police officer. I regard this as significantly different from her evidence to me that she had seen Crossey attempting

> to headbutt the police officer. Secondly, she claimed before me that she heard the CS gas warning being given. That was not contained in her notebook and was not contained in the statement she made to the Ombudsman. Thirdly, she told me that she was standing above Crossey when he was taken downstairs by the police. In her statement to the Ombudsman she said she was waiting below the men bringing Crossey down. I consider that these inaccuracies may well have been caused by the passage of time because my impression of the constable was that she was fundamentally an honest person doing her best to recall an incident that occurred so long ago. However such were the flaws that I paid no attention to her evidence."

The use of CS spray against the appellant

[11] On this question the judge first noted the concession by counsel for the respondent that the use of CS spray on an individual prima facie constitutes a trespass to the person which must be justified according to the general principles of self-defence and reasonable force which he set out. He referred to the PSNI General Order then governing the use of such spray indicating in what circumstances, with what warning and in what manner the spray should be used and noting that the Order emphasised that police officers must be prepared to justify not only the use of the spray but also the decision to use it in the circumstances. The judge expressed his conclusions on the justification for the use of the spray in the particular circumstances of this case as follows:

> "I consider that the police officers in this case were entirely justified in invoking the use of CS spray albeit that the warning given was not as comprehensive as should be given in normal circumstances. I have no doubt that these officers were confronted by Crossey with a raised saddle board and that they were justified in concluding that they were in danger of being struck and injured. The decision as to how to handle this dangerous situation had to be made in seconds or indeed fractions of seconds. I consider that the decision not to retreat from the bedroom into a narrow hallway was justified and that Constable A gave the only warning that was available to him to issue in the limited time he had to consider the situation. The fact that both officers used the spray almost simultaneously is indicative of the grave danger that both felt that they were in. I do not

> believe that the level of violence which was being offered by Crossey at this stage could have been dealt with by a lower level of violence on the part of the police and that had they failed to induce immediate incapacitation then the risks of severe injury to either or both of them were all too real. In substance I consider that the use of CS spray in this case was not only appropriate but proportionate given the circumstances."

Late application to amend the statement of claim to alleged breaches of Articles 3 and 8 of the ECHR

[12] After the hearing of the evidence and the lodging of written submissions, senior counsel for the appellant applied to the judge for leave to amend the statement of claim to seek declarations under the Human Rights Act 1998 ("the Act") in respect of claimed breaches of the Convention under Articles 3 and 8 arising from the same wrongful acts as were alleged by the appellant in the action.

In order to succeed this application required not merely an exercise of discretion in accordance with the general principles upon which amendments to pleadings may be allowed but an extension of the short statutory limitation period for the bringing of such proceedings provided for by Section 7(5) of the Act:

> "Proceedings under sub-section (1)(a) must be brought before the end of:
>
> (a) the period of one year beginning with the date on which the act took place; or
>
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances …."

Plainly the limitation period at (a) had long since expired and the appellant's counsel was therefore obliged to rely upon a submission under (b) that to allow the claims would be equitable in all the circumstances. The judge did not agree and refused the application on four grounds:

(1) That no good reason had been advanced as to why the claims could not have been included in the pleadings or applications made in respect of them at the outset of or during the course of the trial.

(2) That any damages to which the appellant might be found to be entitled at common law would not be augmented by the inclusion of these claims.

(3) That if a finding were to have been made in favour of the appellant on his claims at common law such would have sufficiently vindicated his rights and therefore declarations under either Article 3 or Article 8 would not have been of benefit.

(4) That in any event on the facts as he had found them there had been no breach of Article 3. Insofar as there had been a breach of the appellant's right to respect for his home under Article 8 by reason of the unlawful entry to it, damages were a sufficient remedy and the appellant's rights would not be further vindicated in any material way by the making of the declaration sought.

The grounds of appeal to this court

[13] (1) The learned judge erred in finding that in the circumstances the use of CS spray on the plaintiff in his flat by two police officers, or either of them, did not constitute unlawful trespass to his person entitling the appellant to damages for consequential personal injuries sustained therefrom.

(2) In relation to that incident and to subsequent events, the learned judge erred in finding the evidence of the police officers concerned with the exception of one, to be "impressive, forthcoming and candid".

(3) The learned judge erred in finding none of the inconsistencies of police evidence, highlighted in cross-examination and in submissions to the court, to have been sustained.

(4) The learned judge erred in considering that inaccuracies in the evidence of one police officer may well have been caused by the passage of time rather than deliberately untruthful evidence as submitted on behalf of the plaintiff.

(5) The learned judge erred when he decided and stated that on account of flaws in that officer's evidence he decided to pay no attention to her evidence.

(6) Having rejected the plaintiff's submission that her evidence was deliberately untruthful but decided to pay no attention to that officer's evidence, the learned judge erred in failing to take any or proper account of the key role which this flawed witness played in the subsequent investigation, including the taking of statements from other police witness colleagues who had been involved as she was in the events in question.

(7) The learned judge erred in failing to find that any of the multiple injuries sustained by the plaintiff, 23 injury sites recorded at hospital by Dr O'Kane who gave evidence to the court, were the fault of police officers dealing with the appellant rather than of the appellant himself and his violent struggling, and further erred in finding that no injuries resulted from unlawful assault and trespass to the person of the plaintiff by police officers. As but one example, crescentric bruising on the plaintiff's abdomen evidenced by Dr O'Kane to be consistent with boot contact is cited herein, the plaintiff having evidenced that he was kicked on the abdomen by a police officer.

(8) The learned judge failed to take any or adequate account of:

(a) Expert evidence to the court regarding the likely effects upon the plaintiff in the immediate aftermath of the close range use of CS spray on him, including that he would feel starved of air, fear and fright, feelings of suffocating and of being cornered;

(b) A submitted duty upon police officers then to professionally manage the plaintiff in the condition to which he had been reduced by the CS spray and to take him safely and without injury to Antrim Road Police Station, a duty submitted as breached.

(9) The learned judge erred in:

(a) Finding no equitable or other reason to extend the limitation period to permit the plaintiff to invoke his Article 3 and 8 Convention rights pursuant to Section 7(1)(a) of the Act.

(b) Declining to make declarations that there had been breaches of these Convention rights.

(c) Finding that there had not been breaches of the plaintiff's said Convention rights.

(10) The learned judge erred in finding that in the circumstances of the said award of damages in his favour the plaintiff was not entitled to High Court costs.

[14] These ten grounds divide into six broad themes:

1. That the judge was wrong to find that almost all the police witnesses were candid and that the one whose evidence he disregarded had not been deliberately untruthful rather than as he found inaccurate and inconsistent possibly due to the passage of time.

2. That the judge had erred in finding that none of the multiplicity of injuries noted by Dr O'Kane was due to unlawful assault by police officers rather than caused by the actions of the appellant.

3. That the judge had erred in finding that the use of CS spray by the two officers was justified and not unlawful.

4. That the judge had erred in not having regard to the expert evidence of the likely physical effects of the CS spray upon the appellant the need for his careful management thereafter.

5. That the judge had erred in not extending the time for the making of claims under Article 3 and Article 8.

6. That High Court and not County Court costs ought to have been awarded in all the circumstances of this complex case.

[15] It is noteworthy that the appellant's grounds of appeal do not include any challenge to the judge's adverse findings in relation to the appellant's own evidence as set out at [8] above or his conclusion that the appellant was "a completely unreliable and disingenuous witness" and, at [9] above, his finding of the "overwhelming lack of credibility" in his evidence.

Consideration

[16] A considerable hurdle is faced by a plaintiff/appellant who, shouldering the obligation to affirmatively establish his case on the balance of probabilities, finds himself the subject of a conclusion by the trial judge that he was a "completely unreliable and disingenuous witness" whose evidence evinced an "overwhelming lack of credibility". As earlier noted, no challenge is offered to those findings, nor to the detailed basis for them set out at length by the judge. Mr Brian Kennedy QC for the appellant contended that an examination of the transcript of the evidence of the police officers and of Dr O'Kane would lead this court to take a less favourable view of their candour than did the judge and thereby lead to a different conclusion as to where the truth lay. We do not agree. In the first place there is ample authority for the proposition that, especially where, as here, an assessment of the credibility of witnesses is indispensable because of fundamental factual conflict between them, the trial judge is in the best position to reach a conclusion having not merely having heard the evidence but also seen it given. For example, as Lowry LCJ, having extensively reviewed the House of Lords authorities, put it in Northern Ireland Railways v Tweed [1982] 15 NIJB:

> "… while the jurisdiction of the Court of Appeal is unrestricted when hearing appeals from the decision of a judge sitting without a jury, the trial judge was in

> a better position to assess the credibility of the witnesses and his decision should not be disturbed if there was evidence to support it."

There is much other subsequent authority in this jurisdiction all to the same effect and which therefore need not to be restated here.

[17] In the second place Mr Kennedy has not demonstrated any factual error or omission on the part of the judge in his detailed review of the evidence for both parties that might enable this court to conclude that he had wrongly preferred the police evidence to that of the appellant. Mr Kennedy did submit that the judge had not had sufficient regard to the evidence of Dr Sinnott who gave evidence on behalf of the appellant as to the likely disabling effects of being sprayed with CS spray but, as the judge noted, Dr Sinnott agreed that his information as to its actual effect upon the appellant in this case came solely from the appellant himself and that he had not seen the statements of the police officers. We do not consider that this theoretical evidence was such as ought to have caused the judge to reach different conclusions as to the credibility of the defence witnesses. We accordingly reject strands one to four of the appellant's appeal.

[18] In the fifth strand complaint is made that time was not extended for the claiming of declarations under Articles 3 and 8. As has been noted above the time for such a claim is one year, a relatively short period of limitation. The application to extend time in this case came years after the events complained of, years after the commencement of proceedings and at the very last moment before, having heard all the evidence and received written submissions, the judge was about to decide the action. The one-year limitation can only be extended where the court considers that course to be equitable having regard to all the circumstances. The judge carefully considered the application and concluded that no good reason for the long delay had been advanced as indeed none was before us. He further concluded that even if the appellant had succeeded in full and the Article 3 and Article 8 claims had been admitted and been upheld they would have added nothing to the damages otherwise recoverable at common law nor would they have vindicated the appellant's rights in any additional way. Further, that would have been so even had he allowed a late claim under Article 8 in respect of the unlawful entry to the appellant's apartment, that being the only aspect of the appellant's claim that had succeeded. We do not consider that the judge's reasoning or conclusion on this very late application to extend time are susceptible of criticism.

[19] The sixth and final strand of the appeal relates to the decision to award County Court and not High Court costs on the judgment amount of £1,250 awarded for the unlawful entry. Mr Kennedy pointed to the fact the trial had occupied several days and was, in his submission, a matter of some complexity. Further, the action had been the subject of an unsuccessful remittal application by the defendant. The starting point for a consideration of this issue is Order 62 Rule 17(4) of the Rules of the Court of Judicature which, so far as is material, provides:

> "… if damages or other relief awarded could have been obtained and proceedings commenced in the County Court, the plaintiff shall not, except for special cause shown and mentioned in the judgment making the award, recover more costs than would have been recoverable had the same relief been awarded by the County Court."

[20] It is important to keep in mind that the appellant failed to establish any cause of action apart from the unlawful entry to his apartment. His other claims for damages and aggravated or exemplary damages were in the event rejected. The unlawful entry claim could readily have been heard in the County Court. This court sees no reason to alter the decision of the judge that County Court costs were the appropriate measure.

[21] Accordingly, the appellant's appeal is dismissed.